IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 861

FREDERICK T. ZUBER, ET AL.,
Petitioners,

v.

RUSSELL ALLEN, ET AL.,
Respondents.

No. 1076

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE,
Petitioner,

v.

RUSSELL ALLEN, ET AL.,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Relevant Docket Entries

1. *District Court* (Dkt No. 3379-66)

December 27, 1966—"Complaint to Enjoin Enforcement of Secretary of Agriculture of the United States and for Declaratory Relief" and "Motion for Preliminary Injunction" filed by Plaintiffs.

January 5, 1967—"Motion of New England Milk Producers' Association, et al., for Leave to Intervene as Defendants" filed.

January 11, 1967—"Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction" and "Defendant's Motion for Order Consolidating Hearing on Plaintiffs' Motion for Preliminary Injunction with Hearing on Motion(s) for Summary Judgment, and Fixing Expedited 'Timetable' Schedule for Consolidated Hearing" filed.

January 13, 1967—Hearing on Motion for Preliminary Injunction and Motion for Leave to Intervene

January 16, 1967—"Preliminary Injunction" and "Order Denying Applicants' Motion for Intervention" entered.

January 23, 1967—"Motion for Order Authorizing Maintenance of Suit as Class Action Under Rule 23(c)" filed by Plaintiffs.

January 30, 1967—"Motion of Plaintiffs To Add Parties Plaintiff"

January 31, 1967—Hearing on Class Action Motion

February 1, 1967—"Order" authorizing maintenance of suit as class action entered and "Order" denying defendant's motion for extension of time entered.

February 15, 1967—"Order" granting motion to add 163 additional plaintiffs.

February 24, 1967—"Motion for Leave to Intervene as Defendants" filed by Zuber, et al.

February 24, 1967—"Plaintiffs' Motion for Summary Judgment" filed.

February 27, 1967—"Answer" filed by Defendant.

March 3, 1967–Hearing on Motion to Intervene.

March 6, 1967—"Defendant's Motion for Extension of Time Within which to Respond to Plaintiffs' Motion for Summary Judgment" and "Defendant's Motion for Order Directing further Proceedings in Litigation be Held in Abeyance Pending Exhaustion of Administrative Remedies" filed.

March 13, 1967—"Opposition of Plaintiff to Motion for Order Directing Action To Be Held in Abeyance, and to Motion for Extension of Time."

March 13, 1967—"Order Denying Motion to Hold Proceedings in Abeyance" and "Order Extending Time" entered.

March 17, 1967—"Consent" of plaintiffs to filing of brief *amicus curiae* by Frederick T. Zuber, et al.;"Designation of Parts of Admin. Record."

March 17, 1967—"Modification of Preliminary Injunction" by consent order entered.

March 20, 1967—"Opposition to Plaintiffs' Motion for Summary Judgment" filed by Defendant.

March 20, 1967–Excerpts from Administrative Records filed by Government with Court

March 21, 1967—"Order Denying Applicants' Motion for Intervention" (Zuber, et al.) entered.

April 20, 1967—"Summary of 1963 Promulgation Hearing Record for Mass.-R.I. Order."

May 2, 1967—"Order" denying motion of Dairymen's League Cooperative Assoc., Inc., to file a brief amicus curiae.

May 10, 1967—"Copy of Letter", dated May 8, 1967 from Charles Patrick Ryan to Lawrence D. Hollman, Esq.

May 10, 1967—"Copy of Letter", dated April 20, 1967, from Charles Patrick Ryan to Irwin Goldbloom, Esq.

May 15, 1967—"Summary of Hearing Record in Promulgation of 1936 Greater Boston Milk Order."

May 15, 1967—"Summary of Hearing Record Amending and Reinstating Boston Order, 1937."

May 15, 1967—"Summary of Hearing Records for Worcester, Mass., Springfield, Mass., and Southeastern New England."

May 15, 1967—"Motion for Leave to File Brief as Amicus Curiae" filed by Commonwealth of Massachusetts.

May 16, 1967—"Consent to Motion for Filing of Brief Amicus by Commonwealth of Massachusetts and Plaintiffs' Memorandum of Points and Authorities in Opposition to Such Brief" filed.

May 16, 1967—Hearing on Motion for Summary Judgment

May 22, 1967—"Order Granting the Commonwealth of Massachusetts Leave to File Its Brief as Amicus Curiae" entered.

May 22, 1967—"Affidavit" of Charles P. Ryan (exhibit)

May 24, 1967—"Memorandum" by the Court granting summary judgment and directing Plaintiffs' counsel to submit a proposed order.

May 31, 1967—Plaintiffs' proposed "Order Granting Motion for Summary Judgment and Judgment for Declaratory and Injunctive Relief" filed.

June 15, 1967—"Defendant's Opposition to Plaintiffs' Proposed Order Granting Motion for Summary Judgment and Judgment for Declaratory and Injunctive Relief" filed.

June 15, 1967—"Reply of Plaintiffs to Opposition to Proposed Orde-"; "Supplemental Reply of Plaintiffs."

June 15, 1967—"Order Granting Motion for Summary Judgment and Judgment for Declaratory and Injunctive Relief" (Plaintiffs' proposed order) entered.

July 6, 1967—"Order" of USCA denying motion for stay of District Ct. order and granting leave to Zuber, et al., to intervene to appeal.

July 7, 1967—"Order Granting Intervention" (Zuber, et al.) and "Order" temporarily preserving status quo (by consent)

July 10, 1967—"Notice of Appeal" by Zuber, et al. filed.

July 14, 1967—"Motion for Order Preserving Effectiveness of Judgment and For Defendant and Others To Show Cause Concerning Noncompliance Therewith" filed by Plaintiffs

July 24, 1967—"Defendant's Opposition To Plaintiffs' Motion for Order Preserving Effectiveness of Judgment and For Defendant and Others to Show Cause Concerning Noncompliance Therewith" filed by Defendant

July 31, 1967—"Reply to Defendant's Opposition To Plaintiffs' Motion for Order Preserving The Effectiveness of Judgment, and For Defendants and Others To Show Cause Concerning Noncompliance Therewith" filed by Plaintiffs

August 11, 1967—"Motion for Preservation of Status Quo Pending Appeal of Order of Summary Judgment dated June 15, 1967 and For Other Relief" filed by Zuber et al. with Supporting Memorandum

August 14, 1967—"Notice of Appeal" by Defendant

August 18, 1967—"Opposition to Motion Entitled 'Motion for Preservation of Status Quo Pending Appeal of Order of Summary Judgment Dated 6/15/67 and for Other Relief' filed herein by Defendant Intervenors" filed by Plaintiffs

August 24, 1967—"Motion by Commonwealth of Massachusetts for Leave to File Memorandum as Amicus Curiae In Support of Motion of Intervenors for Preservation of Status Quo" filed by Massachusetts with Memorandum

August 24, 1967—"Motion of State of Connecticut for Leave to File Memorandum as Amicus Curiae in Support of Intervening Defendants' Motion for Preservation of the Status Quo" filed by Connecticut with Memoranda

August 25, 1967—"Supplemental Memorandum of Points and Authorities In Support of Motion for Preservation of Status Quo" filed by Zuber et al.

August 29, 1967—"Memorandum" granting Motions of Massachusetts and Connecticut to file memorandum as amicus curiae

September 1, 1967—"Plaintiffs' Points and Authorities in Opposition To Memorandum Amicus Curiae filed by the State of Connecticut" filed by Plaintiffs

September 1, 1967—"Motion by State of Vermont for Leave to File Brief Amicus Curiae in Support of Plaintiffs' Motion to Preserve Effectiveness of Judgment and in Opposition To Defendant Intervenors' Motion for Stay" filed by Vermont

September 1, 1967—"Plaintiffs' Supplemental Points and Authorities in Support of Motion to Preserve The Effectiveness of Judgment & In Opposition to Motion for Stay" filed by Plaintiffs

September 1, 1967—"Affidavit" of Stewart Johnson filed by Zuber et al.

September 4, 1967—"Notice to Produce" filed by Plaintiffs.

September 5, 1967—Hearing before Judge McGarraghy on pending Motions

September 8, 1967—Proposed Order filed by Zuber et al.

September 8, 1967—Plaintiffs Proposed Order re its Motion to Preserve Effectiveness of Judgment

September 11, 1967—"Plaintiffs' Objections To Proposed Order Preserving The Status Quo" filed by Plaintiffs with a proposed Order

September 12, 1967—"Defendant's Objections to Plaintiffs' Proposed Order Regarding Denial of Plaintiffs' Motion For Preservation of the Effectiveness of the Judgment" filed by Defendant

September 12, 1967—"Intervenors' Reply To Plaintiffs' Objections To Proposed Order Preserving The Status Quo" filed by Zuber et al.

September 15, 1967—"Counter Reply of Plaintiffs Concerning Proposed Order" filed by Plaintiffs

September 15, 1967–"Order" entered by Judge McGarraghy preserving the status quo pending appeal

September 15, 1967–"Order" entered by Judge McGarraghy denying Plaintiffs' Motion for Preservation of the Effectiveness of Judgment

2. *Court of Appeals* (Dkt. No. 21,141)

Relevant Docket Entries

July 18, 1967–Certified original record (3 vols.) and Clerk's copy of transcript also (3 vols.) and 1 vol of duplicate transcript and 1 package of exhibits containing 2 vols. (2-n)

July 26, 1967–appellees' motion to hold proceedings in abeyance, for consolidation, and for other relief (m-26)

July 28, 1967–appellant's statement of points (m-28)

July 28, 1967–appellant's statement as to joint appendix (m-28)

August 1, 1967–appellants' opposition to motion to hold proceedings in abeyance etc. (m-1)

August 2, 1967–appellees' reply to opposition to motion to hold proceedings in abeyance etc. (m-2)

August 7, 1967–Per Curiam order denying appellees' motion to hold proceedings in abeyance; for consolidation of cases, and for other relief; appellants' brief shall be filed on August 15th, appellees' brief shall be filed on August 29th and appellants' reply brief on September 5th; if Secretary of Agriculture determines to prosecute appeal from the order of the District Court on appeal herein, the court will entertain a motion for consolidation. Danager, McGowan and Robinson. Circuit Judge McGowan did not participate in the foregoing order.

August 7, 1967–appellees' motion for leave to file supplemental joint appendix (3 copies of exhibits) in lieu of printing in joint appendix (p-7)

August 7, 1967—appellees' counter-designation of record for joint appendix (p-7)

August 8, 1967—appellants' motion for permission to file brief in excess of 50 pages (p-8)

August 9, 1967—appellees' opposition to motion for leave to file brief in excess of 50 pages (m-9)

August 9, 1967—appellants' opposition to motion for leave to file supplemental joint appendix (p-9)

August 10, 1967—Order denying appellees' motion for leave to file supplemental joint appendix [illegible] of reprinting parts in a joint appendix, directing [illegible]' attention to rule 16(j). Burger, CJ

August 10, 1967—Order granting appellant's motion for permission to file a brief in excess of 50 pages, but not to exceed 60 pages. Burger, CJ.

August 10, 1967—appellants' motion to extend time to file the joint appendix to August 21st (p-10)

August 10, 1967—appellees' response to motion to extend time to file joint appendix and counter motion to include parts of record designated by appellees in the joint appendix (m-10)

August 14, 1967—Order granting appellants' motion to extend time to file joint appendix until August 21st. Burger, CJ.

August 14, 1967—appellees' motion to withdraw counter-motion for order directing appellants to include appellees' designation in joint appendix (m-14)

August 14, 1967—appellees' motion for leave to file brief in excess of 50 pages (m-14)

August 15, 1967—appellants' brief

August 22, 1967—appellants' motion to extend time to file joint appendix to August 30, 1967 (m-22)

August 24, 1967—appellants' brief and service

August 29, 1967—Order granting appellants' motion to extend time to file joint appendix until August 30th. Wright, CJ.

August 29, 1967—appellees' motion to lodge brief of appellee pending ruling of appellees' motion for leave to file brief in excess of 50 pages (p-29)

August 29, 1967—motion of State of Vermont for leave to file brief as amicus curiae (p-29) (c)

August 29, 1967—motion of State of Connecticut for leave to file brief as amicus curiae (c)

August 29, 1967—motion of Commonwealth of Massachusetts for leave to file brief as amicus curiae (c)

August 29, 1967—Order authorizing appellees to file a brief not to exceed 60 pages without prejudice to a renewal thereof upon a showing that an additional 10 pages are required to reply to amicus curiae briefs.

August 29, 1967—Order granting appellees' motion to withdraw counter-motion for order directing appellants to include appellees' designation in joint appendix.

August 29, 1967—appellee's brief.

August 30, 1967—joint appendix and service

August 31, 1967—appellants' consent to the filing of brief as amicus curiae by State of Vermont

September 5, 1967—appellees' opposition to motion of Commonwealth of Massachusetts for leave to file brief as amicus curiae (m-5)

September 5, 1967—appellees' opposition to motion of State of Connecticut for leave to file brief as amicus curiae (m-5)

September 5, 1967—Appellants' reply brief

September 7, 1967—appellees' motion to withdraw motion to lodge brief in excess of 50 pages pending ruling of court as to the same (m-7)

September 12, 1967—appellants' motion for consolidation of this appeal with the appeal noted by the Secretary of Agriculture below and for an expedited hearing (p-12)

September 13, 1967—appellants' reply brief and service

September 15, 1967—appellees' motion for summary affirmance or dismissal of appeal (p-15)

September 19, 1967—appellees' opposition to motion to consolidate and for an extension of time for argument in the event of consolidation (m-19)

September 20, 1967—appellants' opposition to appellees' motion for summary affirmance or dismissal of appeal (m-20)

September 21, 1967—appellees' reply to opposition to motion for summary affirmance or dismissal (m-21)

September 26, 1967—Order consolidating with 21308 for all purposes; appellant's, Secretary of Agriculture, brief due October 9th, appellees' October 25th, Secretary's reply brief due October 31st; directing clerk to schedule appeals for argument as soon after October 31st as business of court will permit; denying appellants' motion for additional time to argue without prejudice to filing of new motion for relief, before October 25th; any similar request on behalf of parties shall be submitted on said date to permit clerk to transmit matters to assigned division; directing clerk to hold in abeyance appellees' motion for summary affirmance of District Court's judgment or dismissal of appeal and to transmit same to division which will be assigned to hear argument on merits. Danaher, CJ.

October 5, 1967—Per Curiam order granting motion of State of Vermont, Commonwealth of Massachusetts, and State of Connecticut leave to file brief amicus curiae and directing clerk to file lodged briefs. Danaher, Leventhal and Robinson, CJ.

October 5, 1967—brief amicus curiae of the State of Vermont and service

October 5, 1967—brief amicus curiae of the Commonwealth of Massachusetts and service

October 5, 1967—brief amicus curiae of the State of Connecticut and service

October 19, 1967—Certified original supplemental record including transcript of proceedings (p. 1-25) (N-5)

October 19, 1967—appellants' motion for additional time for oral argument (m-19)

October 26, 1967—appellees' opposition to motion for additional time for argument (m-26)

November 7, 1967—Per Curiam order granting appellants' motion for additional time for oral argument; each side allotted 45 minutes for presentation of oral argument; total allotted time is 90 minutes Burger, Wright, McGowan, CJ's

November 7, 1967—Argued before Burger, Wright, McGowan, CJ's

January 4, 1968—motion of appellees for leave to file supplemental memorandum (m-4)

January 4, 1968—motion of appellees to require appellants to file additional bond (m-4)

January 11, 1968—appellants' opposition to motion for leave to file supplemental memorandum (m-11)

January 11, 1968—appellants' opposition to motion to require filing of an additional bond by Zuber et al (m-11)

January 12, 1968—appellees' reply to opposition to motion for leave to file supplemental memorandum (m-12)

January 12, 1968—appellees' reply to opposition to motion to require filing of additional bond by appellants' Zuber, et al (m-12)

February 5, 1968–Per Curiam order denying appellees' motion to require the filing of additional bond by appellants; appellees' motion for leave to file a supplemental memorandum is granted; Clerk is directed to file appellees' lodged memorandum Burger, Wright, McGowan, CJ's

February 5, 1968–appellees' supplemental memorandum

August 7, 1968–appellants' motion for leave to file supplemental memorandum

August 14, 1968–Appellees' opposition to motion for leave to file supplemental memorandum (m-14)

August 20, 1968–Appellants' reply to opposition to motion for leave to file a supplemental memorandum (m-20)

September 11, 1968–Appellees' motion for leave to file supplemental memorandum (m-11)

September 16, 1968–Appellants' opposition to motion to file supplemental memorandum (m-16)

September 23, 1968–Opinion per Circuit Judge McGowan

September 23, 1968–Judgment affirming judgment of the District Court and remanding case to District Court for further proceedings consistent with the opinion of this Court

October 7, 1968–Appellee's printing bill (p-7)

October 8, 1968–Appellants' motion for stay of mandate pending application for certiorari (p-8)

October 11, 1968–Appellees' opposition to motion to stay mandate and to continue escrow arrangement (m-11)

October 11, 1968–Appellants' response to appellees' bill of costs (m-11)

October 14, 1968–Appellees' motion to require bond or other security and for other relief (m-14)

October 15, 1968–Appellees' response to appellants' opposition to bill of costs (m-15)

October 15, 1968–Appellants' reply to opposition to motion to stay mandate and to continue escrow arrangement (p-15)

October 18, 1968–Appellants' opposition to motion to require bond or other security and for other relief (m-18)

November 1, 1968–Appellants' motion to transmit original record to Supreme Court (m-1)

November 5, 1968–Appellees' motion consenting to motion to transmit original record to Supreme Court (m-4)

November 15, 1968–Order directing clerk to transmit original record to Supreme Court

November 19, 1968–Appellant's designation of record for use in Supreme Court (m-19)

November 20, 1968–Certified record prepared

November 20, 1968–Certified original record transmitted to Supreme Court

November 20, 1968–Receipt from Clerk, Supreme Court for original record, supplemental record and 2 volumes of exhibits

December 2, 1968–Per Curiam order denying motion to require posting of bond Burger, Wright and McGowan, CJ's

December 2, 1968–Per Curiam order approving appellees' bills of costs Burger, Wright and McGowan, CJ's

December 2, 1968–Per Curiam order directing clerk to stay transmittal of opinion and judgment for time permitted by law for filing of petition for certiorari; and granting appellants motions to continue the escrow arrangements Burger, Wright and McGowan, CJ's

December 20, 1968–Appellees' designation of record (m-20)

December 20, 1968–Certified record prepared

December 23, 1968–Certified notice from Clerk, Supreme Court, of filing of petition for writ of certiorari on December 20th SC 861 OT 68

April 11, 1969–Certified copy of order of the Supreme Court allowing certiorari on April 7th

3. *Court of Appeals* (Dkt. No. 21,308)

Relevant Docket Entries

September 22, 1967–Certified original record (no transcript) (n-2)

September 26, 1967–Order (in case 21141) consolidating with 21141 for all purposes; appellant's, Secretary of Agriculture, brief due October 9th, appellees' October 25th Secretary reply brief due October 31st; directing clerk to schedule appeals for argument as soon after October 31st as business of court will permit; denying appellants' motion for additional time to argue without prejudice to filing of new motion for relief, before October 25th; any similar request on behalf of parties shall be submitted on said date to permit clerk to transmit matters to assigned division; directing clerk to hold in abeyance appellees' motion for summary affirmance of District Court's judgment or dismissal of appeal and to transmit same to division which will be assigned to hear argument on merits. Danaher, CJ.

October 2, 1967–appellants' motion to dispense with printing of joint appendix (m-2)

October 2, 1967–appellant's statement of points (m-2)

October 9, 1967–brief for appellant

October 13, 1967–Order granting appellant's motion to dispense with printing of joint appendix Burger, CJ

October 16, 1967–brief and service for appellant

October 19, 1967–appellants' motion for additional time for oral argument (m-19)

October 25, 1967—appellees' brief

October 26, 1967—appellees' opposition to motion for additional time for argument (m-26)

October 27, 1967—appellees' motion for summary affirmance of District Court judgment or dismissal of appeal (p-27)

October 31, 1967—appellant's reply brief

October 31, 1967—appellees' brief and service

October 31, 1967—appellees' opposition to motion for summary affirmance or dismissal of appeal (m-30)

November 2, 1967—appellees' reply to opposition to motion for summary affirmance or for dismissal (m-1)

November 3, 1967—appellant's reply brief and service

November 7, 1967—Per Curiam order granting appellants' motion for additional time for oral argument; each side allotted 45 minutes for presentation of oral argument, total allotted time is 90 minutes Burger, Wright, McGowan, CJ's

November 7, 1967—Argued before Burger, Wright, McGowan, CJ's

January 4, 1968—motion of appellees for leave to file supplemental memorandum (m-4)

January 10, 1968—appellants' opposition to motion of appellees for leave to file supplemental memorandum (m-10)

January 16, 1968—appellees' reply to opposition to motion for leave to file supplemental memorandum (m-12)

February 5, 1968—Per Curiam order denying appellees' motion to require the filing of additional bond by appellants; appellees' motion for leave to file a supplemental memorandum is granted; Clerk is directed to file appellees' lodged memorandum Burger, Wright, McGowan, CJ's

February 5, 1968—4-appellees' supplemental memorandum

August 6, 1968–appellants' motion for leave to file decision rendered subsequent to argument (m-6)

August 16, 1968–Appellees' opposition to motion for leave to file supplemental memorandum and court decision (m-16)

August 19, 1968–Appellees' motion for leave to amend or correct opposition to appellant's motion for leave to file memorandum (m-17)

August 26, 1968–Appellants' reply to opposition to motion for leave to file supplemental memorandum and court decision (m-26)

September 11, 1968–Appellees' motion for leave to file a supplemental memorandum (m-11)

September 16, 1968–Appellant's opposition to motion to file supplemental memorandum (m-16)

September 23, 1968–Opinion per Circuit Judge McGowan

September 23, 1968–Judgment affirming judgment of the District Court and remanding case to District Court for further proceedings consistent with the opinion of this Court

October 7, 1968–Appellees' bill of costs (p-7)

October 8, 1968–Appellants' motion to stay mandate to December 23rd and to continue escrow arrangement (m-8) (CM 10/21)

October 11, 1968–Appellees' opposition to motion to stay mandate and to continue escrow arrangement (m-11)

October 14, 1968–Appellants' response to bill of costs (m-14)

October 14, 1968–Appellees' motion to require bond or other security and for other relief (m-18)

October 15, 1968–Appellees' reply to appellant's response to bill of costs (m-15)

October 18, 1968–Appellants' opposition to motion to require bond or other security (m-18)

December 2, 1968–Per Curiam order denying motion to require posting of bond Burger, Wright and McGowan, CJ's

December 2, 1968–Per Curiam order approving appellees' bills of costs Burger, Wright and McGowan, CJ's

December 2, 1968–Per Cuiam order directing clerk to stay transmittal of opinion and judgment for time permitted by law for filing of petition for certiorari; and granting appellants' motions to continue the escrow arrangments Burger, Wright and McGowan, CJ's

December 20, 1968–2-Appellees' designation of record (m-20)

December 20, 1968–Certified record prepared

February 24, 1969–Notice of filing of petition for certiorari from Clerk, Supreme Court, on February 20th (SC 1076 OT 68)

April 11, 1969–Certified copy of order of Supreme Court allowing certiorari on April 7th

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

[Filed December 27, 1966]

Civil Action No. 3379-'66

1. RUSSELL ALLEN, New Haven, Vermont
2. JAMES O. PHILLIPS, R. D. No. 2, Middlebury, Vermont
3. DWIGHT BURNHAM, R. D. 2, Vergennes, Vermont
4. DWIGHT BESSETTE, R. D. 2, Vergennes, Vermont
5. HENRY LA FLAM, Bristol, Vermont, *Plaintiffs,*

v.

ORVILLE FREEMAN, Secretary of Agriculture
of the United States, *Defendant*

Complaint to Enjoin Enforcement of Order of Secretary of Agriculture of the United States and for Declaratory Relief

1. This court has jurisdiction of this action under the Agricultural Marketing Agreement Act of 1937, as amended, 50 Stat. 246, 7 U.S.C. 601 et seq.; Title 11, Sec. 521, D.C. Code, 1961 Ed., Supp. V, 1966; 28 U.S.C. 2201-2 (Declaratory Judgment Act); Art. III of U.S. Constitution; 5 U.S.C. 1001 et seq. (Administrative Procedure Act); and under 28 U.S.C. 1331-7, giving the Court jurisdiction over any Act of Congress regulating commerce.

2. The plaintiffs are dairy farmers who produce and sell milk under the federal order regulating the handling of milk in the Massachusetts-Rhode Island Marketing Area, 7 C.F.R. 1001, hereinafter called the "Order". The said Order purports to have been issued by the defendant under the Agricultural Marketing Agreement Act of 1937, as amended, hereinafter called the "Act", effective on October 1, 1964. The plaintiffs are producers as defined in said Order and they sell their milk to handlers regulated under the Order. The plaintiffs bring this Action for them-

selves, individually, and also for the benefit of all other persons in their class who are similarly situated. This is an action to establish the rights of the plaintiffs in their own behalf and also for the many producers similarly situated in the states of Vermont, Maine, Massachusetts, New Hampshire, and other states whose milk is sold to handlers regulated under the Order.

3. The defendant is Orville L. Freeman, Secretary of Agriculture of the United States, whose official residence is Washington, D. C.

4. The said Order is in effect at the present time. The Order, in general, provides for the classification of milk in accordance with the use made thereof by the handler to whom it is sold or the form in which it was disposed of by him, and the order fixes minimum prices to be paid by the handler for each use classification.

The Order provides for the marketwide pooling of all milk sold to regulated handlers and for the equalization of payments to producers through the operation of a Producer Settlement Fund, subject to certain specified adjustments.

The Act authorizes the foregoing terms and conditions in the milk orders promulgated by defendant to provide "for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;". The Act authorizes certain adjustments to the uniform or "blended" price to be received by producers but it specifically states that the "blended" or uniform price is subject only to the enumerated adjustments or differentials. (7 U.S.C. 608c(5)(B)(ii)). In conformity with the Act, the Order also provides a method of adjusting the payments by regulated handlers to the end that the total sums paid by each handler shall equal the value

of the milk purchased by him at the prices fixed for the various use classifications under the Order. Those handlers who dispose of their milk primarily in the higher use classification and whose value of fluid milk products is therefore higher than the blended or uniform price are required to pay the difference into the Producer Settlement Fund for payment over to the handlers whose value of fluid milk products is less than the uniform or blended price, and this enables all producers to receive such uniform price irrespective of the use that is made of his milk by the handler to whom it has been delivered.

5. Section 1001.32 of the Order requires the defendant's agent, the Market Administrator for the Massachusetts-Rhode Island milk order, to publicly announce (1) by the 25th day of the month the Class I price for the following month, as computed under the Order; (2) by the 5th day of the month, the Class II price for the preceding month, as computed under the Order, and (3) by the 12th day of the month, the blended or uniform price, as computed under Sec. 1001.64 of the Order.

The Class I price referred to above concerns the classification of milk used for fluid purposes, which is assigned a higher value and price under the Order than Class II milk, which is used primarily for manufacturing purposes.

Under the Order, the handlers, on or before the 5th day of the month, pay each producer for the approximate value of milk received from him during the first 15 days of the previous month, which payment is at a rate not less than the Class II price for the month.

On or before the 20th day of the month, each handler makes final payment to each producer for the total value of milk received from him during the previous month at not less than the basic blended or uniform price per hundredweight, adjusted by the zone, butterfat, and farm location differentials applicable under Sections 1001.62,

1001.71, and 1001.72, minus the amount of the payment previously made to the producer on the 5th day of the month. The Order also requires each handler to submit reports to the Market Administrator concerning the receipts of milk from producers each month and the amounts sold in each use classification, as well as other detailed information, by the 8th day of the month for the previous month, in order that the Market Administrator may compute the value of fluid milk products for each handler and advise him by the 15th of the month of the amount of his debit or credit to the Producer Settlement Fund. Any debit in the account of a handler owed to the Fund must be paid by him on or before the 18th of the month to assure the payment of the uniform or blended price to producers by the 20th of the month.

6. The zone differential referred to as an adjustment to the basic uniform or blended price is covered under Sec. 1001.62 of the Order. It provides for a schedule of mileage zones from the plant at which the handler receives the producer milk to the primary consumption center of Boston. The center zone is 201-210 miles from Boston, and deliver to plants located closer to Boston require (sic) the addition of a price differential which varies in accordance with the mileage from Boston. As the distance from Boston increases by zones over the 201-210 center zone, a price differential is applied against the uniform or blended price in successively larger amounts for each zone progressively away from Boston and the center zone. There is no quarrel with this differential, for it reflects primarily a transportation cost of milk removed from the consumption center. The milk must be transported by the handler from the plant where it is received, and such an adjustment is authorized under the Act as an adjustment for "the locations at which delivery of such milk is made". Such higher payment to the producer located near the market consumption center in the form

of this zone differential is warranted on the basis of a saving to the handler in transportation costs. The amount of the differential also embraces a specified portion thereof for an additional saving to the handler by virtue of direct delivery to a city or nearby zone plant or handler. This eliminates the necessity of double handling, etc., which occurs when milk is delivered to a country plant and is subsequently transferred to the city or nearby zone plant. The plaintiffs do not challenge either of such consolidated differential payments or adjustment in this action, nor do they contest the butterfat differential referred to previously, since it is obvious that milk with a certain butterfat content should command an appropriate differential and the handler is warranted in making a price differential payment based thereon.

7. The previously referred to "Farm Location" differential of Sec. 1001.72 of the Order is challenged herein, however, as illegal and unauthorized under the Act under which the Secretary purports to have promulgated the same. Such Order provision sets up two payment areas, one in which the differential payment is 46 cents per hundredweight and the other 23 cents per hundredweight. The Order provision sets forth the names of certain cities, townships, counties and States in the two respective differential areas, and provides that farms located within any of the specified places are entitled to the appropriate differential payment in addition to the uniform or blended price. These payments of the farm location differential are analogous to the "special nearby location" differential of the New York-New Jersey milk order, 7 C.F.R. 1002.71(b), and are also paid out of the marketwide pool or Producers Settlement Fund, thus reducing pro tanto the amount of the uniform or blended price and the amount that the plaintiffs and others in their class would otherwise receive for their milk. The differential effects a partial exemption from the marketwide pooling required

under the Act and under which the Order operates. The Order provision provides, both in respect to the 46 and 23 cents payments, that such additions to the uniform price for the favored few shall cease when said amounts or any part thereof equals the Class I or fluid milk price. The entire 46 or 23 cents is not paid when a lesser sum will equal the Class I or fluid milk price, a feature similar to the utilization percentage schedule of the New York-New Jersey milk order which provided that the "nearby" differential payments to producers located within 120 miles of New York City should cease when Class I or fluid milk utilization in the market reached 80% of the total milk marketed. In both instances the Class I price is reserved and assured to the producer whose farm is located in the "nearby" area, thus violating the Act's command that each producer shall receive a uniform price for his milk irrespective of the uses made of such milk. Such differential payment geared to Class I or fluid use is clearly violative of the Act. If all of the milk marketed under the Order was for Class I or fluid use, no "nearby" or "farm location differential would be paid, thus further indicating that the differential is an illegal utilization differential. It is not a differential based upon the locations at which delivery of milk is made, as contemplated by the Act, such as the transportation and direct delivery differentials received by such "nearby" producers.

8. The nearby farm location differential is not only unauthorized under the Act, but it is not even one of the specified adjustments allowed thereunder. Payment from the pool or Producer Settlement Fund is not authorized under the Act, and this constitutes the removal of monies from one producer and the discriminatory and arbitrary payment of the same over to the "nearby" producer without any compensation and without due process of law.

9. The said differential also constitutes a trade barrier and interferes with the free flow of commerce between

states as effectively as a customs duty levied upon such milk equal in degree to such differential, thereby reserving the Class I or fluid milk market to a favored group of producers in violation of the Act and contrary to good and decent milk marketing.

10. The defendant promulgated said differential provision on October 1, 1964, without making any basic finding supported by evidence that would support such Order differential and his action was arbitrary and irrational, in that he based the promulgation of such differential provision on the ground that the differential had been paid under prior orders and upon the ground that they had previously been "adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets". 29 F.R. 5590. His findings relate only to the alleged fact that "it was not established that the farm location differential provisions are resulting in unstable or disruptive marketing conditions which warrant their deletion from the orders at this time.", whereas under the Act he is required to find that all of the terms and conditions of the Order will tend to effectuate the declared policy of the Act, a totally different thing. His referral to a previous finding in another order that "It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed" is not supported by any evidence of a valid nature, refers to proceedings under a prior order, and is an illegal criterion under the Act, for the Act prohibits any variance from the uniform price to certain producers based upon the use of their milk—whether such use refers to past historical use, present use or future use of a producer's, or group of producers', milk.

11. The nearby farm differential is also violative of Sec. 608c(7)(D) of the Act which requires that any terms

and conditions in such Order be incidental to, and not inconsistent with, the terms and conditions specified in Sec. 608c(5)-(7) of the Act and that they be necessary to effectuate the other provisions of the Order. In addition to a violation of Sections 608c(A) and (B) of the Act pertaining to uniform prices, it is also violative of Sec. 608c(5)(G) relating to the prohibition or limitation of the marketing of milk in any marketing area of milk or any product thereof produced in any production area of the United States. It is also violative of Sec. 608c(5)(D) of the Act, which provides that the only limitation that may be provided for in respect to the marketing of a producer's milk is that in respect to a producer just entering the market, in that he may be awarded a Class II price for the first two months in supplying the market.

12. Upon information and belief, the plaintiffs and their class have never been located so as to be eligible for farm location differential payments. During the years 1964, 1965 and 1966, the defendant throught (sic) his Market Administrator effected the transfer of substantial monies from plaintiffs and their class in the approximate amount of $300,000.00 per year, said differential being a charge on all milk delivered by plaintiffs, amounting to 3,000 to 4,000 lbs. of milk per day for each individual plaintiff and approximately 5.9 per hundredweight. The unlawful deduction effected by defendant in the computation of the uniform price and the corresponding loss to plaintiffs and their class will continue to occur in like amount in the future under said Order provision despite the ilegality (sic) thereof unless the relief requested herein is granted.

13. Under Sec. 1001.32(j) of said Order, the Market Administrator is required to announce not later than the 12th day of January, 1967, the uniform or "blended" price payable to producers for milk delivered during the month of December, 1966. Unless the relief sought herein is granted, the defendant through his Market Administrator

will then announce such price, computed under Sec. 1001.64 of said Order, thereby deducting said differential payments from the pool belonging in equity to all producers and reducing the amount which plaintiffs and their class are entitled to receive and illegally transferring funds of one producer to another. Such monies belonging to thousands of producers will be unlawfully diverted by defendant's action, giving rise to undue hardship, lack of practical recovery thereof, multiplicity of actions of doubtful nature, and infringement of the right to receive payments for their milk at a price computed without deduction of the nearby farm differential.

14. Plaintiffs and their class are not afforded a method of administrative relief in the Act or otherwise. Upon information and belief, they are without an adequate remedy at law.

15. The plaintiffs and their class are threatened with definite, immediate and irreparable injury, loss and damage.

16. A copy of the Act, the Order and the defendant's recommended and final decision in promulgating said Order are attached hereto and made a part hereof as if fully set forth herein.

WHEREFORE, the plaintiffs pray:

1. That a temporary restraining order be issued enjoining the defendant through his Market Administrator from computing and announcing the uniform or blended price under the Order in such manner as to subtract monies for payment to nearby farm producers from the uniform or blended prices to be paid to producers, and requiring defendant to compute, announce and cause to be paid to producers a uniform or blended price without consideration for or deduction, diversion or transfer of the payments unlawfully contained in the Farm Location Differential

provision of said Order; or, in the alternative, requiring such computation and announcement to provide that any subtraction of moneys from producers for the benefit of other producers whose farms are located in such "nearby" areas is contingent upon further order of this court, and requiring the collection, deposit and retention of such monies in an escrow fund or the registry of this court until further order thereof or for the pendency of this cause.

2. That a preliminary injunction be issued during the pendency of this action enjoining the defendant through his market administrator as provided in the foregoing prayer and requiring the defendant to compute, announce and cause to be paid to producers the uniform or blended price as aforesaid; or, in the alternative, to require the aforesaid action and escrowing of said monies until further order of this court or for the pendency of this cause.

3. That a preliminary injunction be issued during the pendency of this action and perpetually thereafter enjoining the defendant throught his (sic) Market Administrator from enforcing the Farm Location Differential provision of said Order, 7 C.F.R. 1001. 72, and requiring the payment of the uniform or blended price to producers without deduction of said differential.

4. That the said Order provision be declared to be unauthorized by law, illegal and void.

5. That the aforesaid restraining orders and injunctions be made binding upon the defendant, his Market Administrator for said Order, and their respective agents, attorneys and employees.

6. That the court grant such other and further relief as to it may seem just and proper, including costs, ~~interest~~ and attorney fees.

JAMES O. PHILLIPS
James O. Phillips

Dr. Ray Collins

RUSSELL ALLEN
Russell Allen

DWIGHT BURNHAM
Dwight Burnham

DWIGHT BESSETTE
Dwight Bessette

HENRY LA FLAM
Henry La Flam,
Plaintiffs.

State of Vermont
County of Addison, ss:

James O. Phillips, being first duly sworn, deposes and says that he has read the foregoing Complaint by him subscribed, that he knows the contents thereof, that the allegations and things stated therein are true to his own knowledge, except such as stated upon information and belief, and as to such matters and statements he verily believes them to be true; and that unless the relief requested herein is granted, plaintiffs will suffer immediate and irreparable injury, loss and damage.

JAMES O. PHILLIPS
James O. Phillips

Subscribed and sworn to before me this 22 day of December, 1966.

ISOBEL C. DUNN
Notary Public

State of Vermont
County of Addison, ss:

Russell Allen, being first duly sworn, desposes and says that he has read the foregoing Complaint by him subscribed, that he knows the contents thereof, and that the things and matters therein stated he verily believes to be true; and that unless the relief requested herein is granted, plaintiffs will suffer immediate and irreparable injury, loss and damage.

RUSSELL ALLEN
Russell Allen

Subscribed and sworn to before me this 23rd day of December, 1966.

DWIGHT E. BURNHAM, JR.
Notary Public

State of Vermont
County of Addison, ss:

Dwight Burnham and Dwight Bessette, being first duly sworn, depose and say that they have read the foregoing Complaint by them subscribed, that they know the contents thereof, and that the things and matters therein stated they verily believe to be true; and that unless the relief requested herein is granted, plaintiffs will suffer immediate and irreparable injury, loss and damage.

DWIGHT BURNHAM
Dwight Burnham

DWIGHT BESSETTE
Dwight Bessette

Subscribed and sworn to before me this 23 day of December, 1966.

DWIGHT E. BURNHAM, JR.
Notary Public

State of Vermont
County of Addison, ss:

Henry La Flam, being first duly sworn, deposes and says that he has read the foregoing Complaint by him subscribed, that he knows the contents thereof, and that the things and matters stated therein he verily believes to be true; and that unless the relief requested herein is granted, plaintiffs will sustain immediate and irreparable injury, loss and damage.

HENRY LA FLAM
Henry La Flam

Subscribed and sworn to before me this 23 day of December, 1966.

DWIGHT E. BURNHAM, JR.
Notary Public

CHARLES PATRICK RYAN
Charles Patrick Ryan
400 Prudential Building
1334 G Street, N.W.
Washington, D. C. 20005
Attorney for Plaintiffs.

[Filed Dec. 27, 1966]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

JAMES O. PHILLIPS, et al.,
Plaintiffs,

v. Civil Action No. 3379-'66

ORVILLE L. FREEMAN, Secretary
of Agriculture of the U.S.,
Defendant.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, James O. Phillips, Dr. Ray Collins, Russell Allen, Dwight Burnham, Dwight Bessette and Henry La Flam, individually and as representatives of their class of milk producers similarly situated, move the Court for an order granting a preliminary injunction enjoining the defendant, Orville L. Freeman, Secretary of Agriculture of the United States, and his statutory agent, the Market Administrator for the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001, their agents, attorneys and employees, from computing and announcing the uniform or blended price for pool milk delivered in December, 1966, pursuant to said Order in such a manner as to subtract therefrom the monies of milk producers for payments of the Farm Location differentials, 7 C.F.R. 1001.72, to "nearby" producers, and requiring the defendant, his said Market Administrator, their agents, attorneys and employees, to compute, announce and cause to be paid to all producers a uniform or blended price for their said milk delivered in December, 1966, and thereafter, without the subtraction or deduction of such differential therefrom under said Order; or, in the alternative, requiring that such computation and announcement of the uniform or blended prices to provide that the producers' monies representing said Farm Location differential not be paid over to the "nearby" milk producers specified in 7 C.F.R. 1001.72, but that the same be collected, placed

and retained in a special escrow account of the registry of this Court by defendant, his said Market Administrator, their agents, attorneys and employees, in respect to the amounts that would otherwise be payable in January, 1967, for pool milk delivered in December, 1966, and each succeeding month for such milk delivered the previous month, and further providing that defendant, his said Market Administrator, their agents, attorneys, and employees, shall keep such records as will disclose the amounts so set aside, the sums which would otherwise be payable to individual milk producers in the Farm Location differential areas, and the quantities of pool milk delivered in December, 1966, and thereafter by each milk producer delivering milk subject to pricing and pooling under said Order, and further requiring that defendant, his Market Administrator for said Order, their agents, attorneys and employees, take all necessary action to effectuate the foregoing collection, placement and retention of the disputed differential payments and that all records and calculations regarding and identifying the source of the funds, the nearby producers, and the amounts to which they would have been entitled under said Order be retained by defendant, his said Market Administrator, their agents, attorneys and employees, who shall report to the Court and plaintiffs' attorney each month the total of such amount so collected, placed and retained, all of the foregoing during the pendency of this action or until further order of the Court, all upon the grounds set forth in the verified Complaint and in accordance with the prayers as set forth therein and also for the reasons appearing in plaintiffs' Points & Authorities attached hereto and made a part hereof, said grounds including the following:

(1) That defendant has performed the acts complained of since October 1, 1964, under said Order, and he will continue to perform the same unless restrained by the Court.

(2) Such action has resulted in irreparable injury, loss and damage to plaintiffs, and they will continue to sustain definite, immediate and continuing injury, loss and damage in the future unless defendant is restrained by this Court.

(3) The issuance of such preliminary injunction will not cause undue inconvenience or injury to defendant, but will prevent irreparable injury and hardship to plaintiffs and their class.

/s/ Charles Patrick Ryan
Attorney for Plaintiffs
400 Prudential Bldg.
ST 3-0004

[Filed Jan. 5, 1967]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

RUSSELL ALLEN, et al.,
Plaintiffs,

v. Civil Action No. 3379-66

ORVILLE L. FREEMAN,
Secretary of Agriculture
of the United States,
Defendant,

NEW ENGLAND MILK PRODUCERS' ASSOCIATION, et al.,
Applicants for Intervention.

MOTION OF NEW ENGLAND MILK PRODUCERS' ASSOCIATION, CONNECTICUT MILK PRODUCERS ASSOCIATION, LOCAL DAIRYMEN'S COOPERATIVE ASSOCIATION, INC., PRODUCERS DAIRY COMPANY, MASSACHUSETTS COOPERATIVE MILK PRODUCERS FEDERATION, INC., AND MODERN MILK MARKETING ASSOCIATION, FOR LEAVE TO INTERVENE AS DEFENDANTS.

The applicants move, on the grounds set forth herein, for leave to intervene as defendants in this action, generally and in order to assert the defenses set forth in a Memorandum of Points and Authorities in Opposition to the Plaintiffs' Motion for Preliminary Injunction, to be filed prior to the hearing on said Motion.

Each of the applicants is an organization of milk producers, the individual members of which produce and market milk in the Massachusetts-Rhode Island marketing area subject to the Order of the Secretary of Agriculture, 7 C.F.R. 1001 (hereinafter called the "Order"). The plaintiffs herein seek, by preliminary injunction and permanent order, to enjoin the enforcement of that Order in regard to "nearby differential" payments or during the pendency of the action to require that "nearby differential" payments determined pursuant to said Order be collected, placed and retained in a special escrow account of this Court, which payments otherwise would be paid over to those entitled thereto including members of the applicants.

Applicant New England Milk Producers' Association is a cooperative association of milk producers organized under the laws of the Commonwealth of Massachusetts and having its principal place of business in Boston. It has a membership of approximately 6,000 milk producers whose farms are located in the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York. Approximately 85 percent of the milk produced and sold by said members is marketed in the Massachusetts-Rhode Island marketing area covered by said Order. A substantial number of the members of said association whose milk is marketed in the Massachusetts-Rhode Island marketing areas have their farms located in the so-called "nearby differential" area and receive the "nearby differential" payments provided by said Order which payments the plaintiffs seek to enjoin or require payment into a special escrow account.

Applicant Connecticut Milk Producers Association is a cooperative association organized under the laws of the State of Connecticut and has its principal place of business in Newington, Connecticut. The association has a membership of approximately 1,400 milk producers. Certain of its members market in the Massachusetts-Rhode Island Marketing Area and some of those members have their farms within the so-called "nearby differential" area for the Massachusetts-Rhode Island

Marketing Area. Practically all of the members of said association have their farms within the "nearby differential" area for the Connecticut Marketing Area covered by the Milk Marketing Order No. 15 of the Secretary of Agriculture (7 C.F.R. 1015).

Applicant Local Dairymen's Cooperative Association, Inc. is a cooperative association of milk producers organized under the laws of the State of Rhode Island with its place of business in Providence, Rhode Island. It has a membership of approximately 600 members located in the state of Massachusetts, Connecticut and Rhode Island. Virtually all of the milk of its members is marketed in the Massachusetts-Rhode Island Marketing Area and all the members of the said association have their farms in the so-called "nearby differential" area for that market.

Applicant Producers Dairy Company has a membership of approximately 35 producers, all of whom have their farms located within the Commonwealth of Massachusetts. The members market their milk in the Massachusetts-Rhode Island Marketing Area, and all of their farms are located within the so-called "nearby differential" area.

Applicant Massachusetts Cooperative Milk Producers Federation, Inc. is a corporation organized under the laws of the Commonwealth of Massachusetts with its principal place of business in Deerfield, Massachusetts. It has approximately 180 producer-members, almost all of which have their farms located in the Commonwealth of Massachusetts. Two-thirds of the milk produced by these members is marketed in the Massachusetts-Rhode Island area. Nearly all of the farms are located in the "nearby differential" area for that market.

Applicant Modern Milk Marketing Association is a nonstock cooperative corporation organized under the laws of the State of Connecticut with its principal place of business located in Cheshire, Connecticut. It has approximately 220 members whose farms are located in Connecticut and New York. Some of their milk is marketed in the Massachusetts-Rhode Island Marketing Area and some farms are located within the "near-

by differential" area for that market. Most of the farms are located within the "nearby differential" area for the Connecticut market which is subject to Milk Marketing Order No. 15 of the Secretary of Agriculture (7 C.F.R. 1015).

The intervention by the various applicants and their position in support of the Order of the Secretary of Agriculture have been approved by their respective Boards of Directors.

The applicants seek intervention of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. The members of the applicants' cooperative associations have a direct, immediate and real economic interest in this action. The issuance of a preliminary injunction, any withholding of "nearby differential" payments in escrow, and any permanent injunction against enforcement of said Order would seriously disrupt the Massachusetts-Rhode Island Marketing Area and would deprive many members of the applicants of "nearby differential" payments either temporarily or permanently.

No other party has such an immediate and direct economic stake in this action. Accordingly, the applicants are so situated that the disposition of the action in a real and practical manner will impair or impede their ability to protect their interests. Since the applicants' interest in this action is immediate and direct, and no other party is so situated, their interest cannot be adequately represented by the other parties hereto.

In any event permissive intervention pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure is clearly appropriate. Applicants' support of the Order of the Secretary of Agriculture for the Massachusetts-Rhode Island Marketing Area, set out in its Memorandum of Points and Authorities in Opposition to the Motion for Preliminary Injunction, and supporting affidavit thereto, raises questions of law and fact which are common to the pending litigation. By permitting intervention, multiplicity of suits may be avoided which otherwise might arise as a result of any change in, or injunction against, enforcement of the said Order of the Secretary of Agriculture.

The plaintiffs' Motion for Preliminary Injunction has been set down for hearing on Wednesday, January 11, 1967, at 1:45 P.M. In view of the immediate pendency of the hearing on this motion and the applicants' position as parties with an immediate, direct and real economic stake in the outcome of the motion, the petitioners request either (1) that its motion to intervene be heard at the same time, or (2) the hearing on the Motion for Preliminary Injunction be postponed and continued until applicants' Motion to Intervene is heard.

The time limits of the pending hearing on the Motion for Preliminary Injunction do not permit filing of an answer to plaintiffs' Complaint herewith. However, the applicants will file an answer to the plaintiffs' Complaint as promptly as possible and in any event prior to the expiration of the time provided in the applicable rules or extension thereof.

WHEREFORE, the applicants pray that this Court:

(1) hear their Motion to Intervene prior to hearing the plaintiffs' Motion for Preliminary Injunction;

(2) grant the motion for intervention;

(3) permit applicants to file a Memorandum of Points and Authorities in Opposition to the Plaintiffs' Motion for Preliminary Injunction before the hearing on said Motion;

(4) afford applicants a full opportunity to participate in the oral argument of the plaintiffs' Motion for Preliminary Injunction; and

(5) such other relief as may be appropriate in the premises.

Respectfully submitted,

/s/ Lawrence D. Hollman

/s/ Carlyle C. Ring, Jr.

Attorneys for the Applicants

Klagsbrunn & Hanes
1200 - 18th Street, N.W.
Washington, D.C. 20036

Of Counsel:

Reuben Hall
75 Federal Street
Boston, Massachusetts

January 5, 1967

[Filed January 11, 1967]

[Caption Omitted in Printing]

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Comes now defendant by his attorney, the United States Attorney for the District of Columbia, and opposes plaintiffs' motion for preliminary injunction on the following grounds:

1. Adverse effect to public interest and injury to other producers outweigh *de minimis* injury to individual plaintiffs, who do not truly represent the class.
2. Plaintiffs have made no strong showing of the likelihood that they will prevail on the merits.

Incorporated herein (by reference) are the following exhibits, which were filed on defendant's behalf at the hearing of January 9, 1967 on plaintiffs' motion for temporary restraining order:

Gov't Ex. No.	*Description*
1	Affidavit of Herbert L. Forest, Director, Dairy Division, U.S. Department of Agriculture, executed January 9, 1967
2	Affidavit of Reuben Hall, General Counsel, New England Milk Producers Association, executed January 6, 1967

In support hereof, defendant submits a Memorandum of Points and Authorities.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

Affidavit of Reuben Hall in Opposition to Plaintiffs' Motion for Temporary Injunction

[Filed January 19, 1967]

I, Reuben Hall, first being duly sworn on oath, depose and say that he is a resident of Newton, County of Middlesex, Commonwealth of Massachusetts, and has been duly admitted as a member of the Bar of the Commonwealth of Massachusetts.

That he is General Counsel for New England Milk Producers' Association, an intervener in the above-entitled action, and has served in that capacity for more than forty years, and as such he is familiar with the operations and policies of said Association.

That he has participated in Administrative hearings before State and Federal Agencies in matters concerning the regulation of the marketing of milk by milk producers in various New England markets.

That he has participated in Administrative hearings conducted by the Secretary of Agriculture respecting the terms and conditions of Orders to be issued by the Secretary regulating the marketing of milk in the Massachusetts-Rhode Island market, the present regulation being Order #1 (7 CFR 1001).

That he has participated in the Administrative hearings relating to the Orders issued by the Secretary of Agriculture regulating the marketing of milk in each of the New England markets since the enactment of the Agricultural Adjustment Act in 1933.

For many years prior to the enactment of the Agricultural Adjustment Act of 1933 and the issuance of the license regulating the marketing of milk in the Greater Boston, Massachusetts market effective as of November 3, 1933, there had been in effect in the Greater Boston market a differential paid to "Nearby Producers" as a

result of negotiations between the milk handlers to whom such milk was sold, and the cooperative association of which these producers were members.

That the license issued by the Secretary of Agriculture under the Agricultural Adjustment Act regulating the marketing of milk in the Greater Boston market which became effective November 3, 1933, continued the existing trade practice of paying to nearby producers a differential other than the differential represented by a difference in transportation costs and direct delivery from farm to handler's plant in the market.

When the license was declared invalid by the United States District Court for the District of Massachusetts and the Agricultural Adjustment Act provisions, in so far as they purported to authorize the issuance of licenses by the Secretary of Agriculture regulating the marketing of milk, were declared to be unconstitutional, the Agricultural Adjustment Act was amended in 1935 to provide for the issuance of Orders regulating the marketing of milk by the Secretary of Agriculture.

The form of the 1935 enactment is basically the same as the form in which the reenactment and amendment of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 et seq) were adopted.

Under the provisions of the 1935 revision of the Agricultural Adjustment Act, an Order was issued by the Secretary of Agriculture regulating the marketing of milk in the Greater Boston market area, said Order being called Order #4, which Order was involved in the case of H. P. Hood & Sons vs. United States 307 U.S. 588 and in the Green Valley Creamery Inc. vs. United States 108 F2d 342 (CA 1 1939).

In Order #4 there were contained provisions for nearby differentials. Subsequent to 1939, other Orders were issued regulating the marketing of milk in markets other than

the Greater Boston market, namely, Lowell-Lawrence later known as Merrimack Valley; Worcester, Massachusetts; Greater Springfield, Massachusetts; Southeastern New England; each of which contained provisions for the payment of nearby differentials. All of said Orders were merged and combined into one Order presently known as the Massachusetts-Rhode Island Milk Marketing Order #1, and is the Order involved in this litigation.

At the time of the amendment of the Agricultural Adjustment Act of 1935, it was the intent of the draftsmen of that Act, of whom your affiant was one, that the existing trade practices which had been in effect for a number of years prior thereto should be continued and not be disturbed, and it was on this basis with this thought in mind that the Act provided for an adjustment for volume, marketing, and production differentials customarily applied by handlers subject to such Order.

Order #4 regulating the marketing of milk in the Greater Boston, Massachusetts market was issued in 1936 and was in effect at the time of the reenactment of the Agricultural Marketing Agreement Act of 1937. Said Order #4, as above stated, had the provision for differentials in favor of nearby producers.

Section 4 of the Agricultural Marketing Agreement Act of 1937 specifically ratified, legalized and confirmed the marketing agreements, licensing, orders, regulations, provisions, and acts which had been executed, issued, approved or done under the Agricultural Adjustment Act or any amendment thereof by the Secretary of Agriculture.

The practice of paying nearby producers a differential has been in effect in the Boston and other New England markets for more than forty years either as a result of negotiations between producers and their cooperative associations and the handlers, or through the medium of provisions in the licenses and orders issued by the Secretary of

Agriculture under the Agricultural Adjustment Act as it was amended from time to time and reenacted by the Agricultural Marketing Agreement Act of 1937.

It was on the basis of these provisions for nearby differentials that the producers whose approval of such orders was a necessary prerequisite to their being made effective, did express their approval. Except as from time to time there may have been proposals as to the revision of the amount of these nearby differentials, considered at Administrative hearings, there has been no challenge of the validity of these provisions since the decision of the Court of Appeals for the First Circuit in Green Valley Dairy, Inc. v. United States 108 F2d 342.

The Secretary and producers both within and without the nearby differential zones have accepted the propriety of the now contested provisions of Order #1 and have acted in full reliance thereon.

Far from constituting any trade barriers as alleged by the Complaint, it might be pointed out that the plaintiffs in this action prior to ten years ago did not market their milk in any of the New England markets and it is only in the last ten years that their milk has been so marketed. That, as these producers are presently located, they have an election as to whether their milk shall be marketed in the New England markets or in the New York markets. The return to the plaintiffs on the milk marketed in the Massachusetts-Rhode Island market with the nearby differentials taken into account, is in excess of the returns which they would receive if they marketed their milk in the New York market.

The number of producers in the nearby differential zones is and has for several years been declining. The percentage of milk furnished by producers in the nearby differential zones of the total requirements of the marketing area, as defined in the Order, has also been declining.

The area from which milk is drawn to furnish the milk required for the marketing area comprehended by Order #1 has been expanding, all of which refutes the allegation that the nearby differential constitutes a trade barrier.

According to information published by the United States Department of Agriculture in a Bulletin revised as of August 1966 entitled "Farm Costs and Returns", commercial farms by type, size and location, "Economic Research Bulletin", Agricultural Information Bulletin #230, the average dairy farm in the Central Northeast including New England, in 1955 had a capital investment of $47,900.; total cash receipts in 1965 $15,051., of which $13,302. were cash receipts from dairying. Total cash disbursements $12,089. Total operating expense $11,811. leaving a net farm income for 1965 $4,271. before any charge for interest on capital. If charge for interest on capital, at current rate is taken into account, this would be $2,754. leaving a labor return for the dairy farmer $1,517. The average production per cow on an annual basis was 9550 lbs. and the average farm had 34 head of dairy cattle, which would make an annual production per farm 324,700 lbs. At 46¢ cwt. which represents the nearby differential in the first zone, this would amount to $1,493.62. If this amount were withheld from the producer in the nearby zone, pending the determination of this action, it would eliminate virtually the entire labor income of the producer. During that period, it would impose serious and substantial economic hardship and would accelerate the rate at which producers in the nearby differential zone would go out of business. It would disturb the existing stable market conditions. It would cause the producers in these areas to seek alternate markets where they might have an opportunity of getting better returns than they would otherwise receive if they were deprived of these nearby differentials. It would create supply problems for the handlers, particularly the small handler in the area and because of the

problems involved in locating new supplies, small handlers would be forced out of business.

Another consequence would be to disrupt the program of the Secretary of Agriculture to encourage additional milk production to meet the needs of the Nation for milk and other dairy products.

The participation of the interveners in these proceedings has been authorized by their respective Board (sic) of Directors.

REUBEN HALL
Reuben Hall

Subscribed and sworn to before me this Sixth day of January, 1967.

JOHN J. MURPHY
Notary Public

My commission expires September 24, 1971.

[Filed January 9, 1967]

Affidavit

DISTRICT OF COLUMBIA, SS.

Herbert L. Forest, being duly sworn deposes and says:

The statements in this affidavit are based upon my personal knowledge or upon records and publications of the United States Department of Agriculture, and upon information made available to me from records of the Market Administrator of the Massachusetts-Rhode Island Federal Milk Order 1.

1. I am the Director of the Dairy Division within the United States Department of Agriculture, and have been, since May 1954, responsible for the formulation and administration of the milk market order programs. I graduated from the University of Massachusetts and did grad-

uate work in Economics at Harvard University. I joined the staff of the United States Department of Agriculture in 1934 for work on the milk market order program and have been with the Department continuously from that date working in intimate, and, for the most part, continuous association with the development and administration of Federal Milk Orders. Since 1945, I have had increasing responsibility for the formulation, supervision, and administration of all milk marketing orders, including the Massachusetts-Rhode Island Order.

Significance of Farm Location Differential Payments

Prior to the advent of the federal regulatory program for milk, handlers in the New England milk markets historically paid more for milk produced on farms closest to the heavily populated areas than they did for milk produced at more distant locations. This additional value for milk produced nearest the market was more than was represented by just the advantage in the costs of transportation involved. With the advent of the federal milk order program under the Agricultural Adjustment Act of 1933, its amendments, and the re-enactment of certain provisions thereof as the Agricultural Marketing Agreement Act of 1937, the federal milk orders in New England provided for adjustments to the basic uniform minimum price structure established by such orders. The authority to make these adjustments was contained in the original act, and the provisions thereof were re-enacted without change in the Agricultural Marketing Agreement Act of 1937. Specifically, the Secretary is authorized to make adjustments to the uniform prices under milk orders to account for "(a) volume, market, and production differentials customarily applied by the handlers subject to such order, . . .(c) the locations at which delivery of such milk is made . . .". (7 U.S.C. 608c(5)(B)(ii)).

The original Boston Order of February 9, 1936, provided for differential payments to be made to producers

based upon the location of their farms in relation to the State House in Boston. This was done to reflect in the pricing structure of the order the historical price relationships by location which prevailed in the market. The validity of the farm location differential payments in the Boston Order was before the First Circuit Court of Appeals in *Green Valley Creamery, Inc.* v. *United States* (C.C.A. 1, 108 Fed. 2d, 342, December 15, 1939). The opinion of the First Circuit Court in that case affirmed the Secretary's interpretation of his authority to include this type of an adjustment to preserve the "status quo" of the prevailing marketing relationships. Provision for identical "nearby" differential payments has been included in the Boston Order since its inception in 1936.

Subsequent to the First Circuit Court's opinion in the *Green Valley Case* confirming the Secretary's interpretation of his authority to provide for this kind of "nearby" differential adjustment in milk orders, similar provisions were included in several federal milk orders covering marketing areas in the New England states. In the promulgation proceedings under the statute relating to the several New England orders the Secretary found in each instance that, historically, as aforesaid, milk produced nearest the heavily populated markets had a greater value than milk produced at more distant locations.

Producers in the Massachusetts-Rhode Island market have favored the "nearby" differential payments continuously since the beginning of the federal milk order program. The statute requires at least two-thirds approval by producers voting in referendum for any order or amendments to be effective. Fewer than 25 per cent of producers in the Massachusetts-Rhode Island market receive these payments, yet far more than that number have approved these payments even though they themselves do not receive them. This is significant, because it indicates the broad acceptance among producers that these are proper

payments and are effective provisions in the marketing orders which are designed to protect their interests.

In 1964, the Boston Order and several of the other New England orders containing identical "nearby" differential payment provisions were merged into one order. This order, called the Massachusetts-Rhode Island Order (7 CFR Part 1001), continues the "nearby" differential payments to producers at rates of 46¢ and 23¢ depending on the location of the producer's farm (Section 1001.72). In his decision relative to the merging of the several New England orders into the Massachusetts-Rhode Island Order in 1964, the Secretary specifically found that "nearby" differentials had been in effect under the several New England orders since their inception. He also found "The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets." (29 F.R. 1123).

Throughout the years the producers in New England have increased deliveries of their milk to handlers in bulk tank trucks. A bulk tank truck is a very large mobile over-the-road tanker which receives milk directly from a producer's holding tank on the farm. Usually, one tank truck picks up milk from many producers daily on a regular route. Each producer's milk is commingled with every other producer's milk in the tank. The bulk tank truck serves essentially the same function that was formerly performed by handlers' country receiving plants. For all practical purposes a handler takes delivery of a producer's milk on the farm when it is received in his bulk tank truck. In September 1966, the most recent month for which such information is available, 97 per cent of all milk produced for the Massachusetts-Rhode Island market was delivered by producers to handlers who picked it up in bulk tank trucks on the farms.

For over 30 years the "nearby" differential payments in milk orders have constituted an integral and important

part of the regulatory program for milk in New England. They have been and are one of the principal adjustments to basic uniform minimum pricing formulas providing for orderly marketing of milk. This type of adjustment is favored by the producer cooperatives in New England. It is significant that the "nearby" differentials in New England orders have not been challenged in litigation since the decision in the *Green Valley* case, *supra,* in 1939. Any sudden upset of the long-standing economic balance in marketing relationships which depend on the "nearby" differentials would result in chaotic marketing conditions.

Nearby Producers Will Suffer Irreparable Injury by a Temporary Withholding of the "Nearby" Differential Payments.

Data provided from the records of the Market Administrator of the Massachusetts-Rhode Island Order are appended in a table as Appendix "A". These data cover the most recent 12-month period for which current information is available; *i.e.,* December 1965 through November 1966. The table shows the total volume of production and the total number of producers in the entire area by month, the number of producers whose farms are located in the area covered by the 46¢ per cwt. "nearby" differential, together with the volumes of their production, the number of producers whose farms are located in the area covered by the 23¢ per cwt. "nearby" differential, together with the volumes of their production, and the amounts of payments to producers in each of the "nearby" differential areas. This table shows that in the last 12 months an average of 2,287 producers received "nearby" differential payments each month. Of these by far the greater number, 2,181, were located in the 46¢ "nearby" differential area. The average total number of producers supplying the market each month was 8,841. Thus, approximately 24½ per cent of the producers in the market

received "nearby" differential payments at the 46¢ per cwt. rate while only slightly more than 1 per cent received payments at the 23¢ per cwt. rate. Approximately 27 per cent of all the milk produced in the entire Massachusetts-Rhode Island marketing area is covered by "nearby" differential payments. It is expected that this situtation (sic) will not materially change in the foreseeable future.

It is evident that substantial volumes of production and large numbers of producers have been and are affected by "nearby" differential payments on their milk. The economic impact of this price adjustment throughout the years is reflected over the entire area in concommitant (sic) adjustments in land values of the affected producers, investments in facilities, size of dairy herds, and rates of payment for farm labor. The sudden cutting off or withholding of these payments, representing as they do such a substantial part of the affected producers immediate return for milk, would cause all of them severe hardship and many of them irreparable damage. Their working capital position would be seriously impaired. Farmers need to turn over their working capital rapidly because much of it is used to buy feed, particularly in these winter months when natural pasture is practically nonexistent. The milk order particularly provides for rapid payment by handlers to farmers by requiring a first or immediate initial payment within 5 days after the end of the month, with final payment to follow within 15 days (Section 1001.70). Timely payment of all money to producers is imperative.

During the last twelve months, on an average, producers in the 46¢ "nearby" differential area received approximately $148 per month in "nearby" differential payments. This constituted approximately 7.8 per cent of the average total monthly returns of these producers. 24½ per cent of the producers in the entire market received payments at this highest rate.

As recently as March 31 of last year the Secretary of Agriculture held extensive emergency public hearings on proposed amendments to the pricing provisions of all milk marketing orders. He found that declining milk production in the United States had reached a critical stage and was trending downward rapidly. In order to ameliorate this condition, general increases in basic prices were made effective on an emergency basis. The increase in the level of the Class I price made effective in the Massachusetts-Rhode Island Order was 22¢ per cwt. Translating this immediate Class I price increase into the uniform or blend price in the market resulted in an approximate 13¢ over-all increase in producers returns, generally. After most careful consideration of all of the facts involved, it was considered that this amount of price increase on an emergency basis would arrest the decline in milk production and bring about the necessary corrections to meet the situation. If the 46¢ or 23¢ per cwt. "nearby" differential payments were suddenly to be withheld from the 2,287 "nearby" producers in the Massachusetts-Rhode Island area who are receiving these payments, it is obvious that the recent emergency corrective action taken by the Department of Agriculture would be entirely undone. The effect on the "nearby" producers would be immediate and drastic.

From my intimate knowledge of the milk industry in New England, I believe that it is so marginal in today's economy that many farmers in the area could not and would not continue in production if they did not promptly receive the accustomed "nearby" differential payments. This is particularly true if a situation were created now whereby the payments were withheld with the possibility that they would not be received in the future. In this situation many of the "nearby" producers would just quit production altogether.

Producers Who Do Not Receive "Nearby" Differentials Will Not Be Irreparably Injured Unless Such Payments Are Presently Withheld.

The effect of withholding the "nearby" differentials from producers who count on them would be to disrupt the status quo which has existed for many years. It would not perserve the present position of the "outside" producers who do not receive them. In the event that the plaintiffs in this action ultimately prevail, the most that they would receive is a windfall in the basic blend price which they receive.

Computations based on the average blend price for milk paid in the Massachusetts-Rhode Island market during the preceding 12 months, together with the amount paid as "nearby" differentials, discloses that if there had been no provision for "nearby" differential payments in the order the blend price in the area would have been increased by approximately 12¢ per cwt. Producers receiving the "nearby" differentials would have had their returns reduced by 34¢ and 11¢ per cwt., respectively. Approximately 98 per cent of the "nearby" producers would have had their returns reduced by 34¢ per cwt. Thus, the adverse effect on the 2,181 "nearby" producers in the 46¢ area would have been 3 times as great as the gain to the "outside" producers. In the present circumstances, if "nearby" differentials are temporarily withheld no producers will receive the money involved for current operations.

If the "nearby" producers do not continue to receive these "nearby" differentials now, they will be irreparably injured for the reasons I have previously stated. No payment to them at a future date would bring lost production into being or restore the damage done to them and to the market which they supply. Continuing the payments will have no present effect on "outside" producers. Any possible ultimate gain to "outside" pro-

ducers, should they eventually prevail, would be *de minimus* when compared with the immediate and irreparable damage that would result to the "nearby" producers and the market if the "nearby" differentials were to be withheld.

The Public Interest Would Be Adversely Effected by Temporary Withholding of "Nearby" Differentials to Producers.

The express purpose of the Agricultural Marketing Agreement Act of 1937 is to promote and maintain orderly marketing conditions, avoid unreasonable fluctuations in supplies and prices and insure a sufficient supply of pure and wholesome milk. The accomplishment of this objective requires a most careful balancing of the many economic factors dealing with production, supply, pricing, and marketing relationships. I have previously stated that the temporary disruption of one of these economic balance factors, the non-payment of "nearby" differentials, would have a most serious and immediate adverse effect on a large segment of producers supplying the Massachusetts-Rhode Island market. If this disruption were to occur, the public interest would also be most seriously injured.

The Massachusetts-Rhode Island Order price structure is carefully aligned to prices in adjacent markets. The adjacent Connecticut marketing order also presently provides for "nearby" differentials. All producers located in Connecticut are eligible to receive "nearby" differentials at the 46¢ rate under either the Massachusetts-Rhode Island or the Connecticut Order. Approximately 256 producers presently supplying the Massachusetts-Rhode Island market are located in Connecticut. During the last 12-month period the blend price in the Connecticut market has been, on an average, 8¢ above the Massachusetts-Rhode Island blend price. To suddenly withhold the "nearby" differential payments in the Massachusetts-Rhode Island market would, with respect to these 256 producers, create an

immediate price disparity of 54¢ per cwt. These producers would undoubtedly all shift their milk into the Connecticut market immediately. Particularly, in the face of the possibility that they might not receive them at all. Over the last 12-month period these 256 producers shipped a total of 127,206,000 pounds of milk into the Massachusetts-Rhode Island market. This extremely large shift of producers from the Massachusetts-Rhode Island market to the Connecticut market would seriously disrupt the available supplies of fluid milk into the Massachusetts-Rhode Island area, disrupt existing transportation facilities and create disorderly marketing conditions in the Connecticut market by the sudden dumping of large quantities of milk on that market. Additionally, the many handlers in the Massachusetts-Rhode Island market who depend on these particular producers for their supplies would be cut off from their dependable sources of supply, unless they pay premiums.

One of the principal objectives of the Federal milk marketing program is to provide for and maintain orderly markets in milk. Based on my experience, I believe that the withholding of the "nearby" differentials in the Massachusetts-Rhode Island market would bring about chaotic conditions in that market immediately. This one action would so misalign the existing price structure, injure producers, and so seriously disturb long-standing marketing relationships that permanent injury to milk supply for the consumers in the area would result. The public interest definitely would be seriously injured. Should it eventually be determined that "nearby" differentials should not be paid, then a completely new approach in an order to achieve orderly marketing in the area must be considered. In such an event, the interests of all segments of the market would have to be considered and weighed, including the public, handlers, the relationships affecting other and adjacent markets, as well as interests of producers. This

type of action can be properly undertaken only through the established statutory procedure of a public hearing on the full matter.

(s) HERBERT L. FOREST
Herbert L. Forest
Director, Dairy Division
Consumer and Marketing Service

Subscribed and sworn to before
me this 9th day of January, 1967.

s/ AGNES STASEK
Notary Public

My commission expires 2-1-67.

APPENDIX "A"

TABLE 1

Massachusetts — Rhode Island Order

Number of Producers, Volume of Production, and Amounts Paid re Farm Location Differential Areas

	46¢ Differential Area		23¢ Differential Area		Outside Differential Areas		Total All Areas Under Order		Amount of Differential Paym	
	Number of Producers	Pounds (thous.)	Number of Producers	Pounds (thous.)	Numbe- of Producers	Pounds (thous.)	Number of Producers	Pounds (thous.)	46¢ Area	23¢ Area
December 1965	2,265	70,550	100	2,844	6,812	185,623	9,177	259,017	$ 322,829.00	$ 6,649.21
January 1966	2,220	72,460	101	2,945	6,706	190,587	9,027	265,992	332,784.76	6,888.17
February	2,210	66,107	102	2,806	6,633	172,985	8,945	241,898	301,011.26	6,582.28
March	2,211	75,087	105	3,378	6,628	205,802	8,944	284,267	342,811.24	7,943.12
April	2,202	75,362	106	3,507	6,630	213,358	8,938	292,227	344,700.90	8,228.01
May	2,196	79,427	108	3,772	6,577	227,447	8,881	310,646	362,895.66	8,824.04
June	2,209	74,373	107	3,627	6,522	227,181	8,838	305,181	339,678.48	8,515.08
July	2,158	68,463	110	3,217	6,517	196,482	8,785	268,162	314,126.60	7,400.10
August	2,162	68,413	104	3,038	6,450	182,426	8,716	253,877	312,244.01	6,987.55
September	2,129	65,537	104	2,921	6,457	179,617	8,690	248,075	297,660.44	6,756.94
October	2,112	67,198	108	3,108	6,423	179,276	8,643	249,582	306,776.78	7,203.68
November	2,102	64,149	111	3,149	6,293	166,668	8,506	233,966	293,346.29	7,318.10
2 Month Period	SA 2,181	847,126	SA 106	38,312	SA 6,554	2,327,452	SA 8,841	3,212,890	$3,870,865.42	$89,296.28

APPENDIX "A"

TABLE 1

Massachusetts — Rhode Island Order

Number of Producers, Volume of Production, and Amounts Paid re Farm Location Differential Areas

¢ Differential Area		23¢ Differential Area		Outside Differential Areas		Total All Areas Under Order		Amount of Differential Payments		
ber of ucers	Pounds (thous.)	Number of Producers	Pounds (thous.)	Numbe of Producers	Pounds (thous.)	Number of Producers	Pounds (thous.)	46¢ Area	23¢ Area	Total Area
65	70,550	100	2,844	6,812	185,623	9,177	259,017	$ 322,829.00	$ 6,649.21	$ 329,478.21
20	72,460	101	2,945	6,706	190,587	9,027	265,992	332,784.76	6,888.17	339,672.93
10	66,107	102	2,806	6,633	172,985	8,945	241,898	301,011.26	6,582.28	307,593.54
11	75,087	105	3,378	6,628	205,802	8,944	284,267	342,811.24	7,943.12	350,754.36
02	75,362	106	3,507	6,630	213,358	8,938	292,227	344,700.90	8,228.01	352,928.91
96	79,427	108	3,772	6,577	227,447	8,881	310,646	362,895.66	8,824.04	371,719.70
09	74,373	107	3,627	6,522	227,181	8,838	305,181	339,678.48	8,515.08	348,193.56
68	68,463	110	3,217	6,517	196,482	8,785	268,162	314,126.60	7,400.10	321,526.70
82	68,413	104	3,038	6,450	182,426	8,716	253,877	312,244.01	6,987.55	319,231.56
29	65,537	104	2,921	6,457	179,617	8,690	248,075	297,660.44	6,756.94	304,417.38
12	67,198	108	3,108	6,423	179,276	8,643	249,582	306,776.78	7,203.68	313,980.46
03	64,149	111	3,149	6,293	166,668	8,506	233,966	293,346.29	7,318.10	300,664.39
81	847,126	SA 106	38,312	SA 6,554	2,327,452	SA 8,841	3,212,890	$3,870,865.42	$89,296.28	$3,960,161.70

[Filed January 11, 1967]

[Caption Omitted in Printing]

DEFENDANT'S MOTION FOR ORDER CONSOLIDATING HEARING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION WITH HEARING ON MOTION(S) FOR SUMMARY JUDGMENT, AND FIXING EXPEDITED "TIMETABLE" SCHEDULE FOR CONSOLIDATED HEARING

Comes now defendant by his attorney, the United States Attorney for the District of Columbia, and moves the Court for an order:

(A) Consolidating the hearing on plaintiffs' motion for preliminary injunction with all motions for summary judgment which may be filed in this cause; and

(B) Fixing expedited "timetable" schedule for such consolidated hearing, as follows:

(i) Defendant shall file his motion for summary judgment on or before January 27, 1967;

(ii) If the Court grants leave to intervene, intervenors shall, if they desire to do so, file their motion(s) for summary judgment on or before January 27, 1967;

(iii) Plaintiffs shall, if they desire to do so, file their motion(s) for summary judgment on or before February 3, 1967; and

(iv) Consolidated hearing on all such motions shall be on February 8, 1967.

In support hereof, defendant submits a Memorandum of Points and Authorities.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

[EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS]

[January 11, 1967]

[3] THE COURT: Good afternoon, gentlemen.

MR. HOLLMAN: If the court please, I have one preliminary matter I would like to raise.

THE COURT: Very well.

MR. HOLLMAN: I would like to move at this time for the admission of Reuben Hall to the Bar of this Court for the special purpose of this cause. Mr. Hall is a Member of the Bar of the Supreme Court, Judicial Court of the Commonwealth of Massachusetts in good standing and he has been a Member of that Bar for forty years.

THE COURT: Do you want Mr. Hall to argue this Motion for Intervention?

MR. HOLLMAN: Yes, Ma'am. He will be arguing the Motion to Intervene and, if granted in opposition to the Motion for Preliminary Injunction.

* * *

[90] [The Court:] * * * You have made a motion that this be advanced under this Rule 65?

MR. ZIMMERMAN: Yes.

THE COURT: Would you like to have it advanced just for trial?

MR. ZIMMERMAN: We would like to have that timetable schedule observed in any event Your Honor—as looking to the disposition of the summary judgment—yes, Your Honor.

We think that we should like Your Honor to approve that order, even though Your Honor does not include with it the postponement of the ruling on the preliminary injunction.

THE COURT: Do you want to say anything about any consideration the Court might give to advancing this case?

MR. RYAN: Yes, Your Honor.

I would like to say this: That the resources of the government are considerable here. These plaintiffs, of course, do not have available those resources and I have had to put in a great amount of time in this case [91] and I have not seen a

lot of the material here because it is only available from the Agricultural Department.

Not only that, but I am served with this motion as I walk in here—I have never seen it before and I don't even know what is in it.

I will say this: I will attempt to expedite the hearing but not to the degree of injustice to my clients.

THE COURT: I will pass upon that point a little later—about whether or not I will advance the case for trial.

MR. ZIMMERMAN: What is Your Honor's pleasure as to a fixed date by which they must file an answer if you expedite it—I would like to have that clear.

THE COURT: Well there are rules for answering things.

MR. ZIMMERMAN: It could be expedited, Your Honor.

THE COURT: Yes, it can be, but I think you all have your hands full in preparing these papers now following the ruling I have made. I will be here for quite a little while.

MR. ZIMMERMAN: Is Your Honor stating—I think they have usually five days within which to respond to that motion and then Your Honor will rule—is that what Your [92] Honor is now telling me?

THE COURT: Yes, they will have the regular time to answer and when the answer is filed, why then the matter can proceed. Of course, your motion is really in a sense a combining motion—for combining the preliminary injunction with the final hearing.

MR. ZIMMERMAN: I will if I may now amend it—In answer to your inquiry of me, Your Honor, as Your Honor has not seen fit to combine the two, may it nonetheless be considered as a motion to expedite?

THE COURT: Well I thought that maybe you both might want some date set for a hearing, but since apparently Mr. Ryan feels like he needs a little more time—at least time to read the motion—

MR. ZIMMERMAN: Yes.

THE COURT: He may have that time.

MR. ZIMMERMAN: In this regard, does Your Honor wish to set it down for some specific date after that date?

THE COURT: No. The Motions Clerk here will have to fix up the date. I have things on the calendar for days in advance–in fact into February–and I don't know what date she will have when I can hear you.

[93] MR. ZIMMERMAN: I am merely suggesting, Your Honor, that we would like to leave with the Court the request that to the extent that Your Honor is able to give it prompt consideration, we would waive a hearing if Your Honor could even rule upon the papers–if Mr. Ryan would be willing to waive a hearing–and maybe we could get get an earlier disposition of this matter.

THE COURT: Do you have any comments on Bond, Mr. Ryan? What kind of Bond?

* * *

AFFIDAVIT OF HERMAN L. SPARROW (Designated by Respondents, One of Eighteen Affidavits by Nearby Farmers Filed on January 11, 1967.)

Northboro, Massachusetts
January 9, 1967

I, Herman L. Sparrow, have for fourteen years owned and operated a dairy farm in the town of Northboro, Worcester County, Massachusetts, which has been in my family since 1900 and on which I produced 1,118,967 pounds of milk during 1966 which was sold to a handler regulated under the Massachusetts-Rhode Island federal milk order. My income from the farm operation for this year was about $74,000 and my expenses for the year amounted to about $72,100 without allowing for any return on approximately $27,000 of new capital invested in the business. Net return for my labor and management above expenses was therefore $1,900 and allowance for five per cent return on capital invested would reduce this figure to $550. Without the $.46 per hundredweight differential payment I now receive, my gross income would have been $5,147.40 less in 1966 and I would have begun to seri-

ously consider disposing of my property for a housing development. I just completed construction of a milking parlor for 100 head, the $17,000 investment for which was financed with the full expectancy of continued income from milk production in 1967 at prices like those in 1966. Faced with a sure increase of $1,400 in real estate property taxes, failure to receive the $.46 differential payment on an estimated 100,000 pounds per month in 1967 would at least cause me to advise my sons to forget about higher education in agriculture. Prices under federal order in Massachusetts have been low enough even including the differential payment, and I will strongly oppose any federal order for this area that does not make provision for it.

/s/ Herman L. Sparrow

[Jurat Omitted in Printing]

Order Denying Applicants' Motion for Intervention

[Filed January 16, 1967]

Upon consideration of the applicants' motion for intervention as defendants herein and the plaintiffs' Opposition thereto, as well as the affidavits, exhibits, and points and authorities filed herein and after hearing argument of counsel in open court, and it appearing to the Court therefrom that the applicants for intervention have not filed the necessary pleading with their said motion as required under Rule 24(c), that the applicants have no interest in the subject of this action as required under Rule 24, and that the defendant is adequately representing the validity of the regulation challenged herein and the interests of those milk producers who would be adversely affected by an invalidation of such regulation, and it further appearing to the Court that the plaintiffs have filed this action as a class action for themselves, individually, and for all other similarly situated non-nearby milk producers,

and that plaintiffs propose to fairly and adequately protect said class, it is by the Court this 16th day of January 1967,

ORDERED that the motion of applicants, New England Milk Producers Association, et al., for leave to intervene as defendants in this action be and the same hereby is denied.

BURNITA SHELTON MATTHEWS
Judge

Preliminary Injunction

[Entered January 16 1967]

This cause came on for hearing on the Motion for Preliminary Injunction filed herein by plaintiffs and the Opposition thereto filed by defendant, and the Court having considered the verified complaint, affidavits and other exhibits and the points and authorities filed herein, and having heard argument of counsel for each party, the Court makes the following

FINDINGS OF FACT

1. Plaintiffs are dairy farmers and milk producers as defined in the Agricultural Marketing Agreement Act of 1937, as amended, and the milk order regulating the handling of milk in the Massachusetts-Rhode Island milk marketing area, 7 C.F.R. 1001. They bring this action for themselves, individually, and for the benefit of all other milk producers similarly situated who produce and sell their milk under the said milk order, which was promulgated by defendant effective October 1, 1964, and is still in effect at the present time. The plaintiffs seek a judgment that Section 1001.72 of said milk order, the nearby farm location provision thereof, is invalid and void. They also request a permanent injunction against the continued enforcement of said milk order provision, and a preliminary injunction during the pendency of the action with escrow-

ing of the sums constituting the nearby farm location differential payments made under said milk order provision, 7 C.F.R. 1001.72.

2. The Massachusetts-Rhode Island milk order promulgated by defendant contains the aforesaid nearby farm location differential provision, 7 C.F.R. 1001.72, which provides that milk producers whose farms are located in either of two designated areas, as determined by certain enumerated towns, cities, counties and States in each area, are entitled to receive an additional payment for their milk, over and above the uniform blended price received by all milk producers serving the market, of 46 cents or 23 cents per hundredweight, respectively, depending upon in which of the two "nearby" designated areas their farms are located.

3. The nearby farm location differentials are deducted from the equalization pool proceeds belonging in equity to all producers serving the market, and such deduction reduces the uniform blended price which the plaintiffs and their class would otherwise receive for their milk, 29 Fed. Register 5590, their farms being so located that they are not in either of the two designated nearby areas which are eligible for the said nearby farm location differential payments.

4. This action by plaintiffs has been brought as a class action, that is as an action for plaintiffs, individually, and for all other milk producers similarly situated who produce and sell their milk under the said milk order. The defendant, through the promulgation of said milk order provision establishing the eligible and non-eligible class of milk producers for said nearby differential, has acted on grounds generally applicable to the class, thereby making appropriate the relief requested with respect to plaintiffs' class of milk producers as a whole. The plaintiffs and their class constitute approximately 6,600 of the 8,800 milk producers whose milk is produced and sold under said

order and whose farms are so located as to be ineligible for said nearby differential provision.

5. The plaintiffs and their class are required by the operation and provisions of said milk order nearby differential section, 7 C.F.R. 1001.72, to sustain a reduction in the uniform blended price which they would otherwise receive, in the absence of said differential provision, of approximately $3,000,000.00 per year, the total differential payments under Section 1001.72 amounting to approximately $4,000,000.00 per year.

6. There is no way that said nearby differential payments may be recovered from nearby milk producers by plaintiffs and their class once such payments are made, in that the involved producers number approximately 8,800 and are located in many different jurisdictions in various New England and other states, and such attempt at recovery would involve a multiplicity of parties and actions.

7. On November 18, 1966, the United States Court of Appeals for the District of Columbia Circuit handed down a decision in the case of *Lorton Blair, et al.* v. *Orville Freeman, Secretary of Agriculture of the United States*, No. 19,801, in which it held that the nearby farm location differential of the New York-New Jersey milk marketing order, 7 C.F.R. 1001.71(b) is unauthorized and void, and granted a declaratory judgment to such effect and a permanent injunction against its continued enforcement by defendant. Said judgment was stayed for 90 days pending determination by defendant as to whether to appeal said decision. The sums constituting the nearby differential payments under the New York-New Jersey milk order have been ordered to be escrowed until final judgment is entered.

8. There is no substantial difference between the operation of the New York-New Jersey milk order nearby differential provision and that of the Massachusetts-Rhode Island milk order being contested herein. Both provide

for nearby payments from the equalization pool proceeds through reduction of the uniform blended price, and said differential payments reduce pro tanto the amount which plaintiffs and their class would otherwise receive for their milk each month under the respective milk orders.

Now, Therefore, the Court makes the following

CONCLUSIONS OF LAW

1. The plaintiffs and their class are entitled to the granting of the requested preliminary injunction during the pendency of this cause in order to preclude further irreparable injury to them, and they have no adequate remedy at law.

ORDER

Wherefore, it is by the Court this 16th day of January 1967,

Ordered, that defendant be and he hereby is restrained and enjoined during the pendency of this cause from making payment of the contested nearby differential payments, 7 C.F.R. 1001.72, to producers classified as nearby under the Massachusetts-Rhode Island milk marketing order, either directly or indirectly, or by or through his Market Administrator for said milk order or their agents, servants, attorneys or employees, or by or through any other persons in active concert or participation with them, and it is further

Ordered, that defendant take all necessary action to effectuate the required changes in the pertinent provisions of the Massachusetts-Rhode Island milk order to accomplish the foregoing, and it is further

Ordered, that defendant, his said Market Administrator, their agents, servants, attorneys and employees, and all

persons in active concert or participation with them, take all necessary action to collect, place and retain the sums constituting the nearby differential payments in a separate interest-bearing bank account or accounts in a bank or banks duly approved as a federal depository for such sums, said account to be in the name of defendant as trustee thereof and designated to reflect the true purpose thereof, or the same may be invested in short-term U. S. Government securities, and it is further

ORDERED, that defendant or his said Market Administrator shall keep such records as will disclose the amounts so set aside, the sums which otherwise would be payable to individual producers in the nearby differential areas, and the quantities of milk delivered in December 1966, and thereafter by each milk producer subject to pricing and pooling under said milk order, and it is further

ORDERED, that the said account, and all pertinent records and calculations identifying the source of the funds, the nearby producers, and the amounts to which they would have been entitled to under said milk order shall be retained by defendant, his Market Administrator and their agents, servants, attorneys and employees, except that defendant shall advise the Court and plaintiffs' attorney, Charles Patrick Ryan, 400 Prudential Building, Washington, D. C., 20005, by letter as to the total amount of each monthly deposits in all banks collectively, and total amounts invested in short-term U. S. Government securities and the date thereof, and it is further

ORDERED, that this order shall apply to the nearby differential payments applicable to milk delivered under said milk order in December 1966, and thereafter pending the further order of this Court or the pendency of this action, provided the plaintiffs or one of them furnish an undertaking in the amount of $250.00 with surety approved by the Court, for the payment of such costs and damages as

may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

BURNITA SHELTON MATTHEWS
Judge

[Filed January 27, 1967]

PRAECIPE

The Clerk of said Court will please withdraw Defendant's Motion for Order Consolidating Hearing on Plaintiff's Motion for Preliminary Injunction with Hearing on Motion(s) for Summary Judgment and Fixing Expedited "Timetable" Schedule for Consolidated Hearing, as orally amended.

[Subscription Omitted in Printing]

[Filed January 30, 1967]

[Caption omitted in printing.]

MOTION TO ADD PARTIES PLAINTIFF

Plaintiffs, Russell Allen, et al., hereby move the Court for an order allowing the addition of parties plaintiff to this action, and for grounds thereof they say as follows:

1. Plaintiffs bring this suit as a class action, but defendant questions the right to the maintainance thereof in view of the fact that the Complaint lists but 5 individual plaintiffs.

2. Plaintiffs do not believe that numbers of plaintiffs constitute the basis for a class action, but they propose to add the attached 163 additional names as plaintiffs to satisfy defendant's objections, baseless as they may be. Plaintiffs have an additional 150 plaintiffs available to be added to the Complaint if defendant still objects to the number thereof, and 1,000 can be added in a short time if required.

[Subscription Omitted in Printing]

Excerpts from Transcript of Hearing
January 31, 1967

* * *

[43] MR. GOLDBLOOM: To begin with, Your Honor, I don't know of any case that has arisen under a Milk Marketing Order of this variety which has been prosecuted as a class action and I want to make one thing clear right now.

THE COURT: Was the Blair case prosecuted as a class action?

MR. GOLDBLOOM: No Your Honor—it was not.

THE COURT: It wasn't?

MR. GOLDBLOOM: No, it was not prosecuted as a class action and nor was Stark v. Wickard and nor were any of the other cases. * * *

* * *

Order

[Filed February 1, 1967]

Upon consideration of the plaintiffs' motion for an order determining that this case is maintainable as a class action under Rule 23, FRCP, the affidavits, exhibits, and points and authorities filed herein, and after hearing argument of counsel for each party, the Court makes the following

FINDINGS OF FACT

1. Plaintiffs are dairy farmers and milk producers as defined in the Agricultural Marketing Agreement Act of 1937, as amended, and the federal milk order regulating the handling of milk in the Massachusetts-Rhode Island milk marketing area, 7 C.F.R. 1001. They bring this action for themselves, individually, and for the benefit of all other milk producers similarly situated who produce and sell their milk under the said milk order, which was promulgated by defendant effective October 1, 1964, and is still

in effect at the present time. The plaintiffs seek a judgment that Section 1001.72 of said milk order, the nearby farm location provision thereof, is invalid and void. They also request a permanent injunction against the continued enforcement of said milk order provision by the defendant.

2. On January 16, 1967, pursuant to the motion of the plaintiffs, this Court entered an order granting a preliminary injunction during the pendency of this action enjoining the defendant from paying over to the eligible class of milk producers the monies representing the contested nearby farm location differentials of said milk order, 7 C.F.R. 1001.72, and requiring that defendant collect, place and retain the monthly sums that would otherwise be paid under said order provision in an escrow fund during the pendency of this action or until further order of the Court.

3. The Massachusetts-Rhode Island milk order promulgated by defendant contains the aforesaid nearby farm location differential provision, 7 C.F.R. 1001.72, which provides that milk producers whose farms are located in either of two designated areas, as determined by certain enumerated towns, cities, counties and States in each area, are entitled to receive an additional payment for their milk, over and above the uniform blended price received by all milk producers serving the market, of 46 cents or 23 cents per hundredweight, respectively, depending upon in which of the two "nearby" designated areas their farms are located. Those milk producers serving the market whose farms are not located in either of the two "nearby" designated areas do not receive the said farm location differential payment.

4. The nearby farm location differentials are deducted from the equalization pool proceeds belonging in equity to all producers serving the market, and such deduction reduces the uniform blended price which the plaintiffs and their class would otherwise receive for their milk, 29 Fed-

eral Register 5590, their farms being so located that they are not in either of the two designated nearby areas which are eligible for the said nearby farm location differential payments.

5. The plaintiffs and their class of ineligible milk producers constitute approximately 6,600 of the 8,800 milk producers serving the market, and they are required by the operation and provisions of said milk order nearby differential section, 7 C.F.R. 1001.72, to sustain a reduction in the uniform blended price which they would otherwise receive, in the absence of said differential provision, of approximately $3,000,000.00 per year, the total differential payments under Section 1001.72 amounting to approximately $4,000,000.00 per year.

6. There is no way that said nearby differential payments may be recovered from nearby milk producers by plaintiffs and their class of ineligible milk producers once such payments are made, in that the involved producers number approximately 8,800 and are located in many different jurisdictions in various New England and other States, and such attempt at recovery would involve a multiplicity of parties and actions.

7. This action by plaintiffs has been brought as a class action, that is an action for plaintiffs, individually, and for all other milk producers similarly situated who produce and sell their milk under the said milk order. The defendant, through the promulgation of said milk order provision establishing the eligible and non-eligible class of milk producers for said nearby differential payments, has acted on grounds generally applicable to the class, thereby making appropriate the relief requested with respect to plaintiffs' class of milk producers as a whole.

8. The plaintiffs' class of non-eligible milk producers are so numerous that joinder of all members is impracticable. There are questions of law or fact common to the class,

and the claims of the representative parties are typical of the claims of the class. The Court finds that the present plaintiffs as representative parties will fairly and adequately protect the interests of their class of non-eligible milk producers, and that any judgment in this action shall include all of the non-eligible class of milk producers, that is those milk producers whose farms are so located as to make them ineligible for said nearby differential payments under said milk order, whether or not such judgment is favorable to plaintiffs' class of non-eligible milk producers.

Now, Therefore, the Court makes the following

CONCLUSIONS OF LAW

1. This suit may be maintained as a class action under Rule 23(a) and Rule 23(b)(2), FRCP, and the present plaintiffs are entitled to bring and maintain this action for themselves, individually, and as representatives of all of their class of milk producers similarly situated who produce and sell their milk in the market under the Massachusetts- Rhode Island federal milk marketing order, 7 C.F.R. 1001, and whose farms are so located as to make them ineligible for the nearby farm location differential payments under the provision promulgated by the defendant.

ORDER

Wherefore, it is by the Court this 1st day of February, 1967,

Ordered, that the motion of the plaintiffs for an order determining that the present suit is maintainable by them as a class action as representatives of their class of non-eligible milk producers be and the same hereby is granted.

(Signed) Burnita Shelton Matthews
Judge

Order

[Filed February 1, 1967]

Upon consideration of the motion of the plaintiffs to add parties plaintiff to this cause, and of the points and authorities filed in support thereof, it is by the Court this 15th day of February, 1967,

ORDERED, that the plaintiffs' motion to add parties plaintiff to this cause, consisting of the 163 names and addresses of dairy farmers who produce and market their milk under the Massachusetts-Rhode Island federal milk marketing order, 7 C. F. R. 1001, and whose farms are so located as to render them ineligible for the nearby farm location differential payments of said milk order, 7 C.F.R. 1001.72, which said list of names and addresses of such dairy farmers is attached to plaintiffs' motion filed herein, be and the same is hereby granted.

(Signed) BURNITA SHELTON MATTHEWS
Judge.

Plaintiffs' Motion for Summary Judgment

The plaintiffs, individually, and as representatives of all of their class of dairy farmers who produce and sell their milk under the Massachusetts-Rhode Island Milk Marketing Order, 7 C.F.R. 1001, hereby respectfully move the Court, by their attorneys, for summary judgment pursuant to Rule 56, FRCP, upon the ground that there is no genuine issue as to any material fact and that the plaintiffs are entitled to judgment as a matter of law, and for grounds of this motion they allege as follows:

1. There is no genuine and true issue as to any material fact in this case. The complaint and facts set forth by plaintiffs have been verified by affidavit, the same being made part hereof, or have been taken from official decisions

or publications issued by defendant or his statutory agent, the Market Administrator for the Massachusetts-Rhode Island Federal milk order, 7 C.F.R. 1001.

2. The plaintiffs are entitled to a judgment as a matter of law for the relief prayed for in the complaint because:

(a) This is a familiar representative action in equity by dairy farmers to enjoin the Secretary of Agriculture from enforcing a provision of an administrative order which is illegal on its face and for declaratory relief, in which situation Federal Courts have previously entertained jurisdiction of the subject matter. The Complaint alleges that plaintiffs have a proprietary interest in a fund under the control of and administered by the defendant and from which he is making unlawful diversions, and that they also have certain rights by virtue of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 et seq., and the Order that are capable of judicial enforcement.

(b) The nearby farm location differential of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, is unauthorized and void under the statute, Agricultural Marketing Agreement Act of 1937, as amended, as being in excess of the powers conferred to the Secretary thereunder, and it illegally varies uniform milk prices which all dairy farmers are entitled under said Act to receive for their milk, in that such provision respects or relates to the uses of milk of producers instead of complying with the Act's purpose, policy and specific command that all dairy farmers are to receive a uniform price for their milk irrespective of the use thereof.

(c) The said order provision illegally and unconstitutionally discriminates against plaintiffs and their class by placing them in a category in which they are ineligible for such nearby differential and by the establishment of a preferred and favored class of producers to whom

preferential treatment is accorded by the deduction of such nearby differential payments from the milk producers' settlement fund or pool, belonging in equity to all producers, and the setting or paying over of those payments to the class of nearby producers.

(d) The defendant Secretary failed to make any valid finding in respect to the promulgation of the differential in his decision, and his conclusions were inconsistent, unreasonable and arbitrary, and the nearby differential is therefore illegal.

(e) And for the reasons set forth in the attached Points & Authorities and the brief in elaboration thereof.

CHARLES P. RYAN
400 Prudential Building
Washington, D. C. 20005
ST-3-0004
Attorney for Plaintiffs.

Plaintiffs' Exhibit "A"

MASSACHUSETTS-RHODE ISLAND MARKET
SOURCES OF MILK
DECEMBER 1965

	Producers	Producer Deliveries (1,000 Pounds)	Percent of Producer Deliveries
Connecticut	256	10,082	3.9
Maine	863	17,383	6.7
Massachusetts	1,532	46,039	17.8
New Hampshire	637	16,157	6.2
New York	980	34,207	13.2
Rhode Island	232	7,288	2.8
Vermont	4,677	127,861	49.4
Total	9,177	259,017	100.0

Plaintiffs' Statement of Material Facts as to Which There Is No Genuine Issue

1. Plaintiffs are dairy farmers whose farms are located in the State of Vermont. They sue individually and as representatives of all of their class of dairy farmers similarly situated in the States of Vermont, New Hampshire, Maine and other States whose milk is disposed of in the Massachusetts-Rhode Island Milk Marketing Area, being priced and pooled under the provisions of the Massachusetts-Rhode Island Milk Marketing Order, 7 C.F.R. 1001, and whose farms are so located as to render them ineligible to receive the nearby farm location differentials of said milk order, 7 C.F.R. 1001.72.

2. The plaintiffs' complaint seeks a declaration of the invalidity of the said nearby differential provision of the Order and a permanent injunction against its continued enforcement, as well as injunctive relief and escrowing of monies constituting the contested nearby differential payments of the Order during the pendency of the action. Plaintiffs allege that such nearby differential is unauthorized and void under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 et seq., the law under which the defendant Secretary purports to have promulgated the same. Plaintiffs' complaint herein also alleges other grounds under which they maintain that the nearby differential provision of the Order is illegal and invalid.

3. Plaintiffs and their class are dairy farmers and milk producers as contemplated and defined in the Order and the Act.

4. The defendant is Orville Freeman, Secretary of Agriculture of the United States, who administers the milk order through his statutory agent, The Market Administrator for the Order, whose office is located in Boston, Massachusetts.

5. The Order was promulgated as aforesaid by the defendant Secretary effective October 1, 1964, after due

notice and hearing as provided for in the Act. The Order amended and consolidated under Part 1001, C.F.R., the order provisions regulating of milk in the Greater Boston, Southeastern New England (all of Rhode Island and a substantial part of southeastern Massachusetts), Worcester, and the Springfield marketing areas, and it redesignated the reconstituted area as the Massachusetts-Rhode Island marketing area. 29 Fed. Reg. 5583 (recommended decision); 29 Fed. Reg. 11205 (decision); 29 Fed. Reg. 12236 (order).

6. The Act establishes a regulatory plan under which the defendant Secretary is authorized to promulgate regional milk marketing orders. The basic function of these milk orders is to establish minimum prices for the classifications of milk utilization included in the orders, the different uses of milk having substantially differing monetary value by virtue of the Government administered regulation, and to require the payment of such uniform minimum prices by all handlers and the receipt of a uniform price by all producers, irrespective of the use made of their milk by the particular handler to whom it is delivered by them. (See *Blair* v. *Freeman*, No. 19801, Nov. 18, 1966; *H. P. Hood & Sons, Inc.* v. *U. S.*, 307 U.S. 588, 593-94; *Lehigh Valley Co-op., Inc.* v. *U. S.*, 370 U.S. 76.

7. The Order here involved classifies milk according to use or the form in which it is disposed of by handlers. 7 C.F.R. 1001. 47-51. Thus, milk used for drinking purposes or for fluid use is classified as Class I, and milk used or disposed of for other specified purposes is classified as Class II, such as that used for manufacturing ice cream, cheese, etc.

8. Each use classification is assigned a monetary value or minimum price which all handlers must pay, and such Class I and Class II minimum prices are computed from pricing formulas set forth in the Order. 7 C.F.R. 1001.60, 1001.61. Class I or milk for fluid use is assigned a much

higher price than that for Class II, primarily manufactured milk, and the latter is also referred to as surplus milk.

9. The Order also provides for equalization of the monetary returns to milk producers by means of a market-wide pooling system, such method being authorized by the Act. 608c(5)(B)(ii). Under this marketwide pool system all producers should receive the same uniform or blended price for their milk from handlers, irrespective of the use made of their milk by the handler, and the defendant stated as follows in his recommended decision, 29 Fed. Reg. 5597, in concluding that marketwide pooling should be provided for under the Massachusetts-Rhode Island milk order (Issue No. 9, Method and scope of pooling):

> ". . . the values of milk delivered by all producers to all regulated handlers in the market are combined into one fund and all producers supplying the market are paid the same blended price except for adjustments for butterfat and location of the plant of the plant of receipt. . . . The application of market-wide pooling under a merged order will promote market stability by insuring that all producers supplying the Massachusetts-Rhode Island market will share on a uniform basis the Class I and Class II utilization in the entire market and thus assist to permit the assembly of supplies in an economical manner for available outlets." 29 Fed. Reg. 5597-98.

10. Among the separate differential adjustments provided by the terms of the Order are the following: a butterfat differential to adjust for varying butterfat content of milk; a zone differential which adjusts for the cost involved in transporting the milk and a separate differential within the zone differential which relates to the cost incurred in receiving a producer's milk at a country plant rather than directly at a city plant, the defendant stating as follows in promulgating said Order: (Issue No. 3)

> "This amount, determined on the basis of previous hearings, is related to the difference in cost to city

plant operators of receiving milk directly from producers at such plants as compared to the cost of purchasing milk which is first received from producers at country plants located in the 21st zone and then moved to a city plant. . . . The present nearby plant Class I zone differential of 54 cents is based upon two principal factors: (1) Freight charges for hauling milk from plants located in the 21st zone to city plants, and (2) the difference between costs incurred in the assembly of producer milk at country plants for transfer to city plants and costs incurred in receiving milk at city plants directly from producers." 29 Fed. Reg. 5587-88.

The foregoing is known as a direct delivery differential, and is separately provided for in some milk orders. Under Issue No. 4 involved in promulgation of said Order, entitled "Farm Location differentials", the defendant acknowledged in his recommended decision, 29 Fed. Reg. 5590, that 9 cooperatives, which represented principally producers located outside any of the specified farm location differential areas, proposed that such differentials be eliminated from the Order and that considerable testimony in support of removal of the provisions was received, but that "it was not established that the farm location differential provisions are resulting in unstable or disruptive marketing conditions which warrant their deletion from the order at this time".

11. Under Section 608c(4), the Secretary "shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing, . . . that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601-604, . . .".

12. The Act also specifies that the Order shall contain one or more of the enumerated terms and conditions and no others, 608c(5), and that any incidental terms and condi-

tions of the Order shall be not inconsistent with and shall be necessary to effectuate the other terms and conditions of the order.

13. Under the nearby farm location differential of the Order, producers whose farms are located within the enumerated towns, cities, counties and States (including all of the State of Rhode Island) are paid such differential in the amount of 46 cents per hundredweight over the uniform blend price received by other producers serving the market, or such lesser sum as will equal the price of the Class I or fluid milk. 7 C.R. 1001.72(a). Under (b) thereof, additional towns, cities, counties and States are enumerated, and those producers serving the market whose farms are located within such area receive 23 cents over and above the uniform blended price for their milk, or such lesser sum as will equal the Class I or fluid milk price.

14. The farms of plaintiffs and their class are not located in either nearby differential area, and they are ineligible to receive such nearby payments. Such nearby differential payments are met by deductions from the Producer Settlement Fund or equalization pool belonging in equity to all producers serving the market. Such deduction each month reduces pro tanto the uniform blended price which plaintiffs and their class would otherwise receive for their milk except for such differential deductions. 29 Fed. Reg. 5590.

15. Under the Order, all handlers are required to report to defndant's Market Administrator by the 8th day of the month all of their sales in the different use categories of milk, in addition to other pertinent information, made by them in the previous month at the different minimum prices. 7 C.F.R. 1001.40-45. From such reports the Market Administrator computes the value of the milk sold by each handler by following the formula set forth in Sec. 1001.63 of the Order, and he then uses computations in computing the market uniform or blended price for all pool milk delivered by producers the previous month under Sec.

1001.64. In making payment to the Producer Settlement Fund or equalization pool, however, the handlers are given a credit in the amount of the nearby differential that they must pay to the producers in the nearby areas who delivered their milk to such handlers. The handlers are notified of the uniform or blended price after computation of the same by the Market Administrator from the reports previously furnished by the handlers by the 12th day of the month for milk delivered the previous month. Under Sections 1001.80-84 of the Order dealing with the Producer Settlement Fund, those handlers whose use value of milk exceeds the announced uniform blended price for the market (for each zone plant location) are required to pay such excess into the Producer Settlement Fund or equalization pool, and those handlers who disposed of their milk in primarily manufactured form, and therefore at a lower price or value than the uniform blended price, are entitled to draw out from the Fund such difference in order that such handlers might pay their producers the uniform blended price. As heretofore stated, however, all handlers are allowed a credit in an amount equal to the sums that they owe their producers for the nearby differentials in reporting and paying into the Producer Settlement Fund or equalization pool. In this manner, the nearby differential payments are borne by the Fund or pool, rather than the handlers, and such differential payments are therefore paid out of the pockets of the non-nearby dairy farmers through reduction in the uniform blended milk price which he would otherwise receive except for such nearby differential.

16. The deduction or reduction in respect to the nearby differential payments do not show on the monthly milk checks which producers receive from their handler, payments being made under the Order twice a month for their milk—on or before the 5th day after the end of the month, each handler pays the producer for the approximate value of milk received from him during the first 15 days of the

month. On or before the 20th day of the month following delivery of the producer's milk, the handler makes final payment to him at not less than the uniform blended price, adjusted by the zone, butterfat, and farm location differential payments, and minus the amount previously paid to him on or before the 5th day of the month. This is made possible by virtue of the fact that the Market Administrator keeps an account for each handler in administering the Producer Settlement Fund, and he notifies each handler of the amount he owes or is entitled to withdraw from the Fund, computed from the reports furnished by the handlers, by the 15th day after the end of the month. The handlers who owe the Fund are required to make payment to the Administrator before the 18th day after the end of the month, and the Administrator makes payment of those sums to which a handler is entitled by the 20th of the month after delivery of the producer's milk the previous month. In this way each producer may be paid the same price by all handlers.

17. Such nearby differential payments amounted to a total of $4,181,052.00 during the period from October, 1964, when the Order was promulgated, through September, 1965, a twelve months period, according to the *Monthly Uniform Price Announcement* of the Massachusetts-Rhode Island Market Administrator. According to a USDA publication, "Source of Milk For Federal Order Markets By State and County," published excerpts therefrom in the Market Administrator's *Bulletin* for the Mass.-R. I. area indicated that 79% of producer milk was received by handlers for the Mass.-R. I. marketing area from farms outside of Massachusetts and Rhode Island. Massachusetts producers numbered 1,532 and produced 17.8% of the deliveries in 1965, Rhode Island producers numbered 232 and produced 2.8% of the deliveries, and Vermont dairy farmers numbered 4,677 and produced 49.4 percent of the milk delivered. Maine, New York, and New Hampshire, the majority of whose producers are also located outside of the

nearby area, produced another 26.1 of the milk deliveries and numbered 2,480 producers. (Copy of page from *Bulletin* attached hereto).

18. In his recommended decision prior to promulgation of the milk order in 1964, defendant Secretary found that 37 cents per hundredweight represented a reasonable allowance for moving milk to market from the base or 201-210 mile zone, and that the difference in country and city plant handling amounted to 10 cents per hundredweight, or a total of 47 cents for the zone differential. The zone differential was reduced by 7 cents from the perior 54 cents because of the fact that it was found to be excessive, in respect to the "costs generally incurred in receiving milk at country plants and moving such milk to city plants." He also found that because of such fact handlers were purchasing their supplies from "upcountry" sources in increasing amounts, and that nearby producers were experiencing great difficulty in obtaining an outlet for their milk other than for manufacturing purposes.

19. Of the zone differential of 47 cents per hundredweight, it shall be paid within 80 miles of Boston, whereas the rest of the milkshed is broken up into 10 mile zones. The base or middle zone of 201-210 miles does not receive a zone allowance, but 1.2 cents is added to the uniform price for each ten mile zone as delivery of milk is made progressively nearer to Boston until the 80 mile zone is reached and the flat zone rate of 47 cents applies anywhere therein. As the ten mile zones get further away from the base zone of 201-210 miles, 1.0 cents is deducted from the uniform price until the 400 mile zone is reached, where 19 cents is deducted therefrom. The zone differential therefore amounted to a difference of 66 cents between the 1-80 and the 400 mile zone.

20. In his recommended decision promulgating the Order in 1964, defendant Secretary "found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the

principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed". He did not state when this finding was made or in what way the higher value was accounted for, but he did state that such farm location differentials have been in effect since the inception of the New England orders, and "were adopted to reflect in the pricing structure of the order's historical price relationships by location which prevailed in these markets".

21. Without regulation all milk tends to be priced at the lowest level, manufacturing milk prices, by reason of a continuing surplus and the very law of supply and demand.

22. The nearby differential provision of the milk order reduces the uniform or blended price to plaintiffs and their class in the approximate amount of 12.5 cents per hundredweight, or approximately $3,000,000.00 per year.

23. Copies of the aforesaid recommended decision, decision, and Order published in the Federal Register have previously been furnished.

MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS

[Filed February 24, 1967]

The applicants move on the grounds set forth herein for leave to intervene as defendants in this action on behalf of themselves and of all other nearby producers similarly situated to assert the defenses set forth in the attached Answer and to protect their direct and immediate economic interest in the funds escrowed and to be escrowed by the Order issued by this Court on January 16, 1967. All these funds otherwise would have been paid to the applicants and their class of nearby producers in the Massachusetts-Rhode Island milk marketing area. (See Order of the Secretary of Agriculture, 7 C.F.R. 1001.72.)

The applicants (eight in number) are dairy farmers located in the nearby differential area. All have marketed their milk in the Massachusetts-Rhode Island milk marketing area, and, prior to this Court's Order escrowing the nearby differential payments, all received such payments pursuant to the Secretary's Order. Regardless of the outcome of the instant action on the merits, all have a claim of right to at least a portion of the funds presently being held in escrow by the Order of this Court. Their total annual 1966 net return (after provision for return on invested capital) was only $19,740.43 and their nearby differential payments now being withheld in escrow annually total approximately $20,865.00, thus entirely eliminating any return to the applicants for their own labor. (See the Affidavits of applicants previously filed in this action as Government Exhibit No. 3 and incorporated herein by reference; see also Table I attached to Applicants' Memorandum of Points and Authorities.) Their grave economic plight is typical of that of the 2,300 producers who, prior to the Court's Order, received nearby differential payments as authorized by the Secretary's Order. The applicants seek to intervene on behalf of themselves individually and also for the benefit of all other producers in the nearby class who are similarly situated.

The applicants seek intervention of right pursuant to Rule 24(a)(2), as well as under Rule 23 of the Federal Rules of Civil Procedure, and, alternatively, seek permissive intervention under Rule 24(b)(2), and assert also that they and their class are indispensable parties to the instant matter under Rule 19 of the Federal Rules, on the following grounds:

1. *Applicants and Their Class Have a Direct and Immediate Interest Relating to the Subject Matter of this Action and In the Escrow Fund Created by the Court*

The applicants and their class presently are entitled under the Secretary's Order to the entire fund now being accumulated in the escrow account pursuant to the Order of this Court. Absent representation of their adverse claims to the fund, the fund cannot be distributed without depriving the applicants and their class of property without due process of law. On the question of the validity of the nearby differential payment provision of the Secretary's Order, the applicants' property interests are directly involved and they are indispensable parties.

2. *Applicants and Their Class Are Entitled to Intervene of Right Because Disposition of This Action Will Impair and Impede the Ability of the Applicants and Their Class to Protect Their Interests.*

In the event the funds escrowed under the Court's Order are distributed to the approximately 6,600 non-nearby producers, then as a practical matter the applicants would be deprived of any realistic opportunity to assert their claim to the funds. As a practical matter, it would be impossible to trace and bring action against 6,600 individual farmers to assert claims against such amounts as such non-nearby producers might individually receive. If denied intervention, the present action would not be *res judicata* as to the applicants and their class, but nonetheless their rights would be effectively and permanently impaired.

3. *The Interests of the Applicants and Their Class Do Not Fully Coincide With That of the Defendant and Their Interests Would Not Therefore Be Adequately Represented by the Defendant.*

The defendant has no monetary or economic interest in the escrow fund. The applicants have a direct, immediate interest in that fund and an economic interest in maintaining the validity of the Secretary's Order. In the earlier hearings before this Court, the defendant expressly stated that it represented the Government and the public interest but not necessarily the interests of the individual producers which may not coincide at all times with the public interest as the defendant sees it. The defendant has not raised certain of the defenses asserted by the applicants in their Answer attached hereto and may not at any time raise such defenses for public or internal governmental reasons although such defenses are of utmost importance to the protection of the applicants' interests.

The applicants seek to present additional facts and grounds to support the validity of the nearby differential and of the Secretary's Order. Since they, and not the Government, have a direct and immediate financial stake in the outcome of this action, they and they alone can bring to the attention of the Court the most facts and can best explain their implications. See *Textile Workers Union of America v. Allendale Co.*, 96 U.S.App.D.C. 401, 226 F.2d 765 (1955), *cert. denied*, 351 U.S. 909 (1956); *Atlantic Refining Co. v. Standard Oil Co.*, 113 U.S.App.D.C. 20, 304 F.2d 387 (1962).

4. *Alternatively, Applicants Should Be Granted Leave to Intervene Under Rule 24(b)(2).*

The applicants and their class should, in any event, be granted leave to intervene as permissive interveners. The defenses raised by applicants have questions of law and fact in common with the instant action. Their intervention will in no way unduly delay or prejudice the adjudication of the rights of the present parties to the instant action.

WHEREFORE, the applicants pray that this Court:

1. Grant the motion for intervention, and

2. Grant such other relief as may be appropriate in the premises.

[Subscription Omitted in Printing]

[Filed March 13, 1967]

[Caption Omitted in Printing]

OPPOSITION TO MOTION FOR ORDER DIRECTING ACTION TO BE HELD IN ABEYANCE AND TO MOTION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

Plaintiffs say as follows in opposition to defendant's motion for holding these proceedings in abeyance "pending exhaustion of administrative remedies":

1. Defendant promulgated the order provision under attack herein on October 1, 1964, when he first issued the Massachusetts–Rhode Island milk order, and it is the nearby differential provision of that order that plaintiffs seek to declare invalid and void. That order is a final order, and the plaintiffs' complaint alleges that they are sustaining irreparable injury by virtue of the illegal promulgation and operation of such order provision. The fact that defendant may have under consideration an amendment to said order does not lessen its finality, nor does it preclude plaintiffs from seeking the relief requested in their complaint. The hearing to which defendant refers was concluded months ago, and all that remains is for defendant to issue his recommended decision and his decision. No evidence can be presented, and, in fact, an amended order may never be issued. The plaintiffs acknowledge the general rule concerning exhaustion of administrative remedies and its applicability to those cases where a prescribed administrative remedy is granted by statute, etc., and where no final action has yet been taken by the agency that injures individuals subject to the regulation of the agency. Those factors are not present here, for the plaintiffs have shown that they are

being irreparably injured by defendant's action and the order provision. The fact that the contested payments involving the nearby differential are presently in escrow is without significance in respect to whether plaintiffs have a right to bring this suit. Nor is it of any significance in respect to whether they have a right to pursue their action to a conclusion. It does reflect, however, upon the allegations of the defendant and the applicants for intervention that the nearby producers are in dire financial condition as a result of the present action, in that the defenses raised by both the defendant and said applicants are conducive to delay in determining the validity of the nearby farm location differential.

2. The doctrines of exhaustion of administrative remedies and primary jurisdiction do not apply to this action for the additional reason that only a question of law is involved herein, a fact acknowledged by defendant in January when he proposed a timetable for the hearing of this case on cross-motions for summary judgment, proposing that he file his said motion on January 27, 1967. It is well settled that when a case involves a question as to whether an administrative agency has acted in excess of its statutory powers, that question must be decided by the courts—for the administrative agency cannot determine the limits of its own statutory power or authority. In fact, if the agency transcends the boundaries of its authority under the Agricultural Marketing Agreement Act of 1937, as amended, and promulgates an order that is not authorized by law, the courts have the *duty* to step in and they must "jealously scrutinize" such agency's action when milk producers allege that defendant is illegally diverting their monies in violation of the Act. *Stark v. Brannan*, 87 App.D.C. 388, 185 F.2d 871, affd. 72 S.Ct. 433, 342 U.S. 451; *Stark v. Wickard*, 321 U.S. 288, 64 S.Ct. 559. The cases cited by defendant concerning exhaustion of administrative remedies and primary jurisdiction are separately referred to hereinafter, but it is noted that they involved a specific statute where an exclusive manner of administrative or judicial review was prescribed or where an entirely different fact situation existed.

In *Parker v. Lester,* 112 F.Supp. 433, the Court stated:

> "Exhaustion of administrative remedies is not required as a prerequisite to judicial relief where questions of *fact* and administrative expertise are not involved but the issue is one of law and there is a showing of inadequacy of the prescribed procedure and of threatened or impending irreparable injury flowing from delay incident to following of prescribed procedure."

In the instant case, the only administrative remedy prescribed by the Act and for judicial review of administrative action is that under Sec. 608c(15) relating to handlers, not producers. This is why the plaintiffs may not appeal to the Secretary concerning a provision of an order or seek judicial review in many instances–the Act regulates handlers, not producers. The latter have standing only when they can show interference by the defendant with a legal right of producers –such as diversion of their monies and action in excess of statutory authority. The case of *Stark v. Wickard,* supra, giving producers standing to sue under such circumstances indicates that the courts should be sure to look closely at producers' complaints, since they have little opportunity to correct any injustices that they may sustain. In that case, the Supreme Court said at page 569:

> "The only opportunity these petitioners had to complain of the contested deduction was to appear at hearings and to vote for or against the proposed order, Act, Sec. 8c(3), 8c(9) and 8c(19); Order, preamble. So long as the provisions of the Order are within the statutory authority of the Secretary such hearings and balloting furnish adequate opportunity for protest . . . . But where as here the issue is statutory power to make the deduction required by the Order, . . . a mere hearing or opportunity to vote cannot protect minority producers against unlawful exactions which might be voted upon them by majorities. It can hardly be said that opportunity to be heard on matters within the Secretary's discretion would foreclose an attack upon the inclusion in the Order of provisions entirely outside the Secretary's delegated powers."

It should be noted that there was real, not threatened, injury to the plaintiffs in this case by virtue of the fact that the challenged order provision was already in existence. Many cases hold that there is no need to exhaust administrative remedies or supposed remedies in cases involving void orders, *Phillips v. Fidalgo Island Packing Co.*, 230 F.2d 638; *Sunshine Dairy v. Peterson*, 193 P.2d 543 (last paragraph) 560, wherein it is stated:

> "The rule requiring plaintiff to exhaust his administrative remedies before resorting to the courts has no application when the attack upon the administrative order is based upon the contention that the administrative body is without statutory power to issue the order. *Skinner & Eddy Corp. v. United States*, 249 U.S. 557; *Varney v. Warehime*, 6 Cir., 147 F.2d 238."

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, the Court stated at page 254:

> ". . . We know of no case where the Court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. It would be a travesty of law and an abuse of the judicial process to force litigants to undergo an expensive and merely delaying administrative proceeding when the case must eventually be decided upon a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency . . .".

The Court is also respectfully referred to the cases of *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285, and to the separate opinion in *Fed. Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, wherein it is stated:

> "Contrariwise, where a decision of a case depends on determinations of a question of law as such, either because of explicit statutory outlawry of some specific conduct or by necessary implication of judicial power because not involving the exercise of administrative discretion or the need of uniform application of specialized competence, the doctrine of primary

jurisdiction has no function, because there is no occasion to refer a matter to the administrative agency. (citing cases)".

In fact a serious question arises as to whether defendant or applicants can even bring up the doctrines of administrative remedies and primary jurisdiction at this stage of the proceedings. If brought up at the start of the proceedings, they obviously could not have precluded the court from recognizing the plaintiffs' claim of irreparable injury, and the asserted defenses should therefore not even be available at this stage. Defendant is aware of the status of his own proceedings, even if his agent-attorney was not so informed, and he may not obstruct an appeal to this court by plaintiffs through the issuance or delay in the issuance of decisions that relate to the court action. In *Union Producing Co. v. FPC,* 127 F.Supp. 88, Judge Holtzoff stated:

> "It appears from the allegations of the complaint, however, that the plaintiff has in fact filed with the Commission a petition for rehearing, which still remained undetermined when the regulations were about to go into effect and this action was brought. An administrative agency may not obstruct an appeal to the courts by unreasonable delaying a decision or an application for administrative redress and then turning around and claiming that the party has not exhausted his administrative remedies."

Contrary to the allegations in paragraph number 4(a) at page 3 of defendant's Motion, the defendant's 1964 "offer" to review nearby differentials "when it is shown that further consideration in hearing is appropriate" does not provide a basis for referring the whole matter to defendant at this time. The defendant was required in 1964, under the Act, to determine that such differentials would effectuate the declared policy of the Act and of the provision relating to uniformity of prices to producers. Sec. 608c(4). Instead, he found that "it was not established that the farm location differentials provisions are resulting in unstable or disruptive marketing conditions which warrant their deletion from the order at this time". an

entirely different thing from that which he was required and failed to find under the Act. Under these circumstances, such an invitation cannot be construed to preclude the plaintiffs from seeking judicial relief. The plaintiffs also regard such invitation to be of nebulous and doubtful nature in respect to application to themselves for the reasons set forth in the following paragraph.

3. In an administrative hearing, as well as in a referendum regarding approval or disapproval of a milk order, a cooperative association is allowed by the Act to represent its members. Consequently, very few dairy farmers participate in such hearings, and it is quite evident that a handful of dairy farmers would not possess the technical knowledge to present their views in a manner which would require acceptance by the defendant. Their view might be at variance with that of their cooperative and, in any event, would normally be very brief and limited. During the hearings that resulted n promulgation of the 1964 milk order, a question was raised as to whether some cooperatives actually represented their membership in said hearing and also as to whether some cooperatives even consulted their membership concerning topics or matters considered at such hearings, as indicated by the excerpts from the transcript of said hearing set forth below:

> [3928] EXAMINER HOLSTEIN: Off the record.
>
> MR. HALL: No, on the record.
>
> EXAMINER HOLSTEIN: I am not going to let you prove what the law is. That is not in issue here.
>
> THE WITNESS: If it will save time I will withdraw the statement that we have a pretty good bonding law.
>
> MR. HALL: I am not saying we don't but I am saying it is not what you say it is.
>
> THE WITNESS: What I meant was I think it has worked fairly well over the years.
>
> EXAMINER HOLSTEIN: That is all, Mr. Hall.
>
> MR. HALL: Just a moment, Mr. Hearing Examiner.
>
> EXAMINER HOLSTEIN: Yes, take your time.

By Mr. Hall:

Q. Do you feel, Mr. Garelick, that the existence of the Federal regulations is of benefit to the non member?

A. Of benefit to the non member?

Q. Yes.

A. The existence of regulations where?

Q. In any of these New England markets where they are presently in effect?

A. Let me say that I don't think it is of benefit to a lot of non members in relation to the amount of regulations in New England prior to the southeast order.

Q. Would you mind repeating that? I don't quite understand.

A. I don't think it is a benefit to a lot of non members if we compare it to their position in 1958.

Q. Is it your view that the existence of the federal order in southeastern New England prejudices a number of producers?

A. Definitely. Prejudiced, some in favor and some against.

Q. Do the non members in any great numbers attend the hearings where proposals for amendment to the federal orders are being considered?

A. I don't think they do any more or any less than producers that belong to cooperatives.

Q. Producers that belong to cooperatives have representatives here?

A. That is your opinion.

. . . Laughter . . .

Q. Whether you like the representatives or not is not important. They have representatives.

A. I have no quarrel socially with the representatives. My quarrel is whether they truly represent them.

Q. Do you think that the producers would be better off if they appeared themselves representing themselves?

MR. CHERNAUSKAS: Mr. Examiner, this is a very nice interchange, but I think we are not really helping the record.

EXAMINER HOLSTEIN: I will sustain that.

MR. CARROLL: May not like the answer.

MR. HALL: The answers don't concern me too much. I think that is all.

EXAMINER HOLSTEIN: Any further questions?

Mr. Sykes.

By Mr. Sykes:

Q. Mr. Garelick, is it your position that there is no choice as to the expenditures which a non member must make in the case of the non member marketing deductions and it is your position that there should be some choice?

A. It is my position that they should not have to pay for a service they don't want, especially when it has been voted in by people who don't pay for the service.

Q. Now with reference to the calibration of bulk tank in the Commonwealth, you agree this is a function of the Division of Standards in the Bureau of Labor, and Industries?

A. I don't think so.

Q. Are you familiar with the fact that the law specifies that recalibration shall be done every two years?

A. I understand that there was a law recently passed within the past couple of years that more funds were appropriated and this is why we are getting this recalibration.

Q. Do you also understand that the law provides that —

EXAMINER HOLSTEIN: Mr. Gallup has handed me a tabulation entitled "Population of 19 Massachusetts Towns, 1950-1955-1960," the source of which is indicated on the bottom of the tabulation, which he has

requested to be marked as an exhibit and admitted in evidence.

Are there any questions on this doucment?

If there are no objections, the tabulation is marked Exhibit 99 and is admitted in evidence and becomes a part of the record.

(Exhibit No. 99 marked for identification and received in evidence.)

EXAMINER HOLSTEIN: You may step down, Mr. Gallup.

(Witness excused)

EXAMINER HOLSTEIN: We will have a ten minute recess.

(Whereupon, a short recess was taken.)

EXAMINER HOLSTEIN: Let us come to order, please.

Mr. Hall, I understand you have a two line statement that won't take over a half hour.

MR. HALL: That is correct.

EXAMINER HOLSTEIN: You have been sworn?

MR. HALL: No, this is not in the nature of any testimony, Mr. Hearing Officer.

EXAMINER HOLSTEIN: I thought you wanted to testify. You can make a statement from the floor at any time.

MR. HALL: A statement as attorney for New England Milk Producers Association, Northern Farms, Maine Dairymen's Association and on behalf of the Cooperative Dairy Service, I would like to register each of those organization as opposed to Proposal No. 57. We feel that that involves legal questions which are not appropriate to be discussed at this hearing but which we will discuss in brief.

EXAMINER HOLSTEIN: Thank you, sir.

MR. AMON: Does that statement allow me to ask one question?

EXAMINER HOLSTEIN: You can ask him anything you want off the record.

MR. AMON: I have been doing that for too long a period of time. I want it on the record. I don't care about the fact he is not sworn.

EXAMINER HOLSTEIN: A statement made from the floor is not subject to cross examination.

MR. AMON: I wish to ask whether or not any poll of the membership of any of the organizations that he has referred to has been taken authorizing the same statement that he has made.

EXAMINER HOLSTEIN: Do you care to answer that question, Mr. Hall?

MR. HALL: We have not taken a poll of the individual members of any of these organizations, any of the producer members of these organizations.

EXAMINER HOLSTEIN: All right, sir.

Mr. Lee, I understand you have a statement you wish to make or testimony you wish to give.

MR. LEE: Yes.

EXAMINER HOLSTEIN; Let the record show that Mr. Lee has been previously sworn.

Whereupon,

JAMES D. LEE

was called as a witness and, having been previously duly sworn, testified as follows:

DIRECT TESTIMONY

THE WITNESS: I wish to put in some supplementary information in opposition to Proposals 23 and 24 which simply takes the form of introducing some additional material from the Market Administrator's Review.

It will be recalled that I testified that the Administrator's Marketing Service Program was eminently successful and I referred to the checking of the calibration of non-members' bulk tanks. I wish to have official notice taken of the following articles which have appeared in issues of the Review.

MR. MAHONEY: Are those issues already in evidence?
EXAMINER HOLSTEIN: Do you wish to offer them as exhibits or ask for official notice to be taken?

* * *

In view of the fact that many of the plaintiffs' class would be represented at an administrative hearing by the cooperative which attempted to intervene herein as a defendant and in favor of the validity of the nearby differential, could those plaintiffs actually have any administrative remedy? If such cooperative may cast the votes of its members for or against a milk order, would such requested referral of these proceedings to the agency actually amount to a denial of an opportunity to contest the challenged differential? The plaintiffs note that the same law firm that represents such cooperative composed primarily of non-nearby producers now represents the applicants for intervention herein—nearby producers. The plaintiffs raise the question, in view of such circumstances and of the Government's interwoven defense herein with both applicants herein, cooperative and now nearby producers, whether the referral of the instant proceedings for administrative determination would be a compromise of the plaintiffs' right for judicial declaration of the invalidity of the nearby differential. It is a matter of record in these proceedings that the defendant and such applicants have adopted the arguments, affidavits, etc., of each other and that the defendant has evidenced a position herein that the nearby differential is valid and will be maintained in the milk order. The Court may also note that the hearing referred to by defendant also included proposals to increase the area to which the nearby differential applies, which would result in even greater injury to plaintiffs if adopted. Plaintiffs believe that under the facts presented in this case, and in view of the *Blair* decision, the defendant should actually hold his hand until determination of the legal question by the Court, for otherwise only confusion and delay would result if the agency attempted to exercise the power accorded to the courts by Article III of the Constitution and the doctrine of separation of executive and judicial power.

Plaintiffs make the following observations concerning the cases cited by *defendant* in support of his motion:

In *United States v. Ruzicka,* the Court stated at page 295:

> "We are dealing here solely with the right of *handlers.* This is not *Stark v. Wickard,* 321 U.S. 288. In that case it was concluded that since Congress had provided no administrative remedy for a producer to review the legality of an order against him, presumably the courts were not closed to him. But by Sec. 8c(5) Congress has made precisely such provisions for handlers. As to them the procedural scheme is complete."

In *Fed. Power Com. v. Colorado Interstate Gas Co.,* the Natural Gas Act was involved, which "prescribes explicitly the procedure to be followed by any person seeking judicial review of an order of the FPC and limits the scope of that review as follows . . .". The Court then pointed out that Sec. 19(a) and (b) of the Act require that objections must be made before the Commission in order that they may be raised before the Circuit Court, etc.

In *Interstate Commerce Commission v. Atlantic,* a question was involved concerning the reasonableness of carriers' rates, an appropriate subject for administrative determination. In addition, this case involved the Interstate Commerce Act, which provides for the relief and procedure available to challenge the Commission's action or that of carriers in Sec. 8 and 9 thereof. The Court stated that "accordingly, a shipper who commences his Sec. 9 reparations proceeding in the District Court will nevertheless be required to repair to the Commission for decision of issues like the reasonableness of rates, which call the primary jurisdiction doctrine into play." The Court also referred to these "questions of fact" at page 591 of that case, and to the Act's provisions (Sec. 17(9) and 16(2)) for statutory judical review. The Court made mention of the fact that the Commission could make provision for uniform rates by carriers in determining the reasonableness of the same, but that various court actions would provide a lack of uniformity in the reasonableness of rates charged by carriers.

In *Meyers v. Bethlehem Shipbuilding Corp.*, the National Labor Relations Act was involved, in which Congress provided an appropriate procedure before the Labor Board and an adequate opportunity, through review by the Circuit Court of Appeals, to secure judicial protection against possible illegal action by the Board; "and the grant to the Board and the Circuit Court of Appeals of *exclusive* jurisdiction is to prevent any person from engaging in any unfair labor practice affecting commerce is constitutional". The employer involved in the case did not go to the Board concerning the charge of unfair labor practice against him, and the Court referred to the provision of the Act which stated:

> "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

In *Unemployment Comp. Com. v. Aragon*, a question concerning whether an "active" labor dispute and negotiations regarding the same was involved, and the Court necessarily regarded the determination of this factual issue and interpretation of the word "active" as being proper for the Commission to decide.

In *Aircraft & Diesel Corp. v. Hirsch*, the Court pointed out that the Renegotiation Act provided for administrative determination of excessive profits by the War Contracts Price Adjustment Board and for a redetermination *De Novo* by the Tax Court, and that consequently the petitioner could not seek relief in the District Court. The Court further added that petitioner, a contractor, had an adequate remedy at law by suit against three subcontractors, a remedy the plaintiffs do not have in this case.

In *Stark v. Wickard*, cited by *plaintiffs*, the Court distinguished United States v. Morgan, cited by defendants, in respect to the adequacy of a hearing and judicial review.

In *Addison v. Holly Hill Fruit Products, Inc.*, the only other case cited by defendant, the Court stated at page 616:

> "The determination of the extent of authority given to the delegated agency by Congress is not left for the decision of him in whom authority is vested."

In that case, the Court found that the administrator had exceeded his authority in designating a specific number of employees within a definition that also involved an interpretation of other language, and that the latter should not be stricken because of the invalidity of the separate but interwoven minor part of the order, and it consequently referred the matter to the * * *

4. The contention that the proposal to delete the differential precludes this action because it was made by a non-nearby dairy farmer does not merit a reply. That producer did not represent plaintiffs' class as such, but only himself in such hearing, and the fact that plaintiffs now represent the class of non-nearby dairy farmers in this legal action is an entirely separate matter. In addition, the plaintiffs have already established the virtual impossibility of their class being truly represented in any administrative hearing under the circumstances present in this case.

5. The defendant adopts the final argument of applicants that the latter are entitled to an administrative hearing wherein the defendant may make new findings or further findings, "and, if necessary, conduct new hearings and frame a new order". The applicants maintain that the defendant must find, prior to any Court decision, that the order without the nearby differential meets the declared policy of the Act. It is difficult to conceive of how the elimination of an illegal provision from the order by the Court would violate the policy of the Act or the duties of the Secretary thereunder. In plaintiffs' estimation, it would do just the opposite and insure a proper and legal order and legal action by the defendant. The order would still be in existence in all other respects except the illegal provision, and no constitutional rights are violated by the court's action in declaring such invalidity at this time. It is the plaintiffs' position that this is the only way that their constitutional rights to due process may be redressed, in that the administrative action complained of consists of the defend-

ant's confiscation of their property and the giving of the same to the preferred class of nearby producers, the latter having no right thereto except under and by virtue of the operation of the illegal nearby differential provision. In *Blair*, the defendant raised many of these same arguments, and the pleadings herein reflect that he will adequately represent any claim that the applicants might make herein, since the latter has raised no argument or defense which has not been adopted or embraced by defendant in his pleadings herein.

Further, it is apparent that upon the declaration of the invalidity of the nearby differential by judicial action, the defendant may still issue the proposed amended order without such differential. It is possible that he might have done so without judicial declaration of the differential's invalidity, and the applicants would have no basis for complaint concerning further findings, another hearing, a voting referendum, etc. Under these circumstances, it is obvious that the contentions of the defendant and the applicants are totally without merit, since the Court would be performing its proper function, and its determination that the differential was unauthorized and void would actually assist the defendant in the issuance of any legal amended order. From all of the foregoing, it is evident that the question as to whether defendant has exceeded his statutory powers is exclusively within the domain of the Courts, and it is not to be determined by the agency claiming such power or by a vote or referendum conducted by defendant among cooperative associations.

6. Pages 3-6 of defendant's motion relate to the *Green Valley* case of 1939, wherein the First Circuit stated that nearby differentials could be sustained as Market differentials and Location differentials. Plaintiffs have already stated that such "holding" was dictum, for only handlers were before the Court and the Court itself belatedly acknowledged that the handlers had no standing to even raise the question of nearby differentials–since the payment of the same was not made by handlers but by producers from out of the marketwide pool. The Court of Appeals in *Blair* also noted this obvious fact in foot-

note 34 on page 14 of its opinion, and it thoroughly considered the contentions raised by defendant in respect to the "market differential" argument, since the analogy of the Boston nearby differential and the New York-New Jersey differential as expounded in *Green Valley* constituted the main argument of defendant and the *amici* in the New York case– as is evidenced by the briefs filed in that case. One of the outstanding features of the *Blair* opinion is the extent of its holding; it covered virtually all loose ends because it undoubtedly realized that attempts might be made to limit the significance of the case. Defendant states on page 6 that "Thus, *Blair* appears not to have reached the "market differential" ground on which *Green Valley* rests." It is noted that the Court in *Blair* stated at page 15:

> "Third, the court indicated that it was *primarily* persuaded by its belief that the adjustment could be sustained as "customary market differentials based upon the location of farms . . ." 108 F.2d at 346. Although Section 8c(5)(B)(a) does permit "market . . . differentials customarily applied by the handlers" concerned, it is plain that this type of allowance turns not on the location of the producer's farms but on the nature of the market to which they deliver their milk. The "market differential" rationale is plainly not a tenable basis for the nearby differential."

The Court in *Blair* also referred to the fact that *Green Valley* rested upon the alleged ground that milk from nearby farms would be "delivered to handlers at points nearby the market", and that in the N.Y.-N.J. milk order the Secretary "has elsewhere provided differentials to compensate for deliveries made to nearby handlers", referring in footnote 35 on page 15 to "the transportation differential and direct delivery differential". Since the Massachusetts-Rhode Island milk order contains these identical differentials in the zone differential, it is obvious that the alleged ground relied upon by the First Circuit is unavailable to the defendant and that he could not have relied upon such decision in respect to the nearby differential as a logical basis therefor. In *Blair*, the Court of

Appeals refers to the fact that "the First Circuit referred to evidence indicating that nearby farmers had a more uniform level of production", but that this factual hypothesis was negatived by the Secretary himself as justification for the nearby differential. At page 10 of its opinion in *Blair*, the Court noted that the Secretary found "that there is considerable variation in the seasonal pattern of production among *individual* producers in all sections of the milkshed . . .", and that a "base rating" plan might be appropriate to compensate producers for this factor. In 1937 when the nearby differential was first promulgated by defendant in the Boston milk order, he also found that "only about one-fifth of the producers in the market could be called even under this definition. These even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors". During the 1964 hearing, the defendant referred to the "base excess" plan of distributing producer returns and his findings are set forth in his decision, 29 Fed. Reg. 11205, at page 11225, middle paragraph (c), wherein he also refers to the fact that such plans "have been incorporated in a number of Federal orders, but only for the statutory purpose of minimizing seasonal fluctuations in milk production". He then refers to the fact that adoption of such plan was undesirable, in that the function thereof was already being performed by the establishment of prices which tend to equate demand and supply for the market. In this connection, the problem of seasonality of production presently affords no basis for the promulgation of the nearby differential or the apportionment of the fluid milk market. In fact, a recent amendment to the Act requires that any base rating plan be subject to *individual* vote of producers, recognizing the potential harm that such a device could occasion if not properly promulgated and if adequate safeguards did not exist to preclude the abuse of such a provision. It would therefore appear that the only other alleged ground utilized by the Court in *Green Valley*, a more uniform level of production, is not available to the defendant or applicants as a basis for the nearby

differential, just as *Blair* indicates that it was not available as such basis in the N.Y.-N.J. milk order. Under these circumstances it is difficult for plaintiffs to perceive any basis for avoiding the decision in *Blair*, especially when the holding in that case expressly referred to the fact that the defendant could not divert a portion of the uniform price from the plaintiffs by virtue of the nearby differential, irrespective of his reasons therefor, and that if any "value" existed in respect to nearby milk (other than that attributable to quality and transportation) it might afford a basis for payment of the same by handlers, not producers. It is plaintiffs' contention that no opposing points and authorities have been filed herein to their motion for summary judgment for the evident reason that there is no ground upon which to defend the unauthorized action of the defendant in promulgating the nearby differential, and that the only opportunity to avoid the holding in *Blair* is by the attempted referral of the matter to the administrative agency. The defendant's motion for such relief must be denied.

7. In respect to the matter of the administrative record, it is noted that this was not a problem on January 11, 1967, when defendant proposed that his motion for summary judgment be filed on or before January 27th. Now that the contested funds are being escrowed it would seem that this would constitute more reason for expediting the proceedings—as defendant proposed even after the granting of the preliminary injunction. The only other conclusion is that the nearby producer is not in the dire financial straits as presently represented, and it is noted that the affidavits filed in behalf of the nearby producers prior to the preliminary injunction referred to their farm investments of over $200,000 in some instances and that it might be necessary to sell the farm for a housing division or development if such differentials were not forthcoming as usual from the non-nearby dairy farmers' pockets.

The plaintiffs contend that the record referred to in *Blair* relates to the recommended decision and the decision issued by defendant Secretary, as published in the Federal Register and concerning which the Court can take judicial notice. This

is where the Secretary's "underlying rationale" and his findings and conclusions are set forth in respect to the promulgation of the nearby differential. As stated in *Blair*, the Court must take into account the "narrow confines of the Secretary's power", and it must determine the validity of the order provision in the light of "the purported source of authority" and "the underlying rationale that the record discloses were relied on by the Secretary". In other words, where is the provision in the Act that specifically authorizes this order provision and where is the Secretary's justification or rationale for such promulgation under the particular provision of the Act? In a case of statutory power or authority, this simply involves placing the Act beside the order provision and the examination of the Secretary's decision tying the two together. It is not a case of administrative law involving a question as to whether there is substantial evidence in the record to support the defendant's determination or decision. The basic issue is one of statutory power, and if the defendant has acted in excess of his powers it does not matter what evidence is in the administrative record. The latter is composed almost exclusively of hearsay, opinions, self-serving testimony and like material, and the plaintiffs maintain that the rationale of the defendant as expressed in his decision is to be compared with that specific part of the Act upon which he claims such nearby differential provision is authorized. Defendant's finding at 29 Fed Reg. 11213 regarding "historical price relationships by location" and "customarily somewhat higher values" of nearby milk, above transportation costs or even handling costs, constitutes no justificaton or acceptable rationale for the nearby differential under any part of the Act. The preservation of price preferences actually violates the Act's command that all producers shall be paid a uniform price for their milk, and the question of "value" is a factor for the consideration of the handler, not for payment by fellow producers, all of which is conclusively settled by *Blair*. Further, the order involved here is the Massachusetts-Rhode Island milk order, not the several milk orders consolidated into such order in 1964, and the administrative records of those prior milk orders

are not necessary herein. It therefore does not appear that the compilation of such administrative records is a just ground for further delaying the disposition of this case on motions for summary judgment.

8. Plaintiffs appreciate that the Department of Justice attorney may be assigned to another case before this Court and that he or they are not listed as of counsel on the defendant's motion for extension of time and for referral of the proceedings to the defendant. They have been listed on all other papers filed herein, including those of the defendant filed on February 27th containing the defendant's Answer herein, and they are presumably familiar with all aspects of the present proceedings. Plaintiffs feel that under all the circumstances they are forced to ask the Court to deny the requested extension of time to file defendant's motion for summary judgment. With all respect to said attorneys, it is noted that the Assistant United States Attorney involved in representing the defendant herein also represented him in the District Court in the *Blair* case—and secured a favorable ruling for the defendant in that case. The defendant is much more than adequately represented herein. Plaintiffs do not believe such request is fair to their counsel, the farmers involved, or to the Court. The Court has given a great deal of its time to this case, and it should proceed to hear the motions for summary judgment without delay, or at least by March 20th. Plaintiffs' counsel also has commitments of his time. He has obtained the assistance of additional counsel because this case is taking up more than his normal work-day, and he has scheduled his time and work with a view to disposing of this case on the merits in the next week. Such delay would further upset his schedule and cost him additional loss of income. Plaintiffs feel that the balance weighs heavily against any additional delay. They further feel that such extension is improper after plaintiffs have filed their motion for summary judgment, for it would allow defendant about two months instead of 10 days to study plaintiffs' motion and formulate a response thereto. A like extension of 30 days was also requested by defendant after plaintiffs filed their motion herein for determination that the

suit was maintainable as a class action, in order that defendant might "study" said motion. Plaintiffs do not feel that such extensions are proper under all the circumstances of this case.

WHEREFORE, plaintiffs request that the motion for extension of time and that for an order holding these proceedings in abeyance be denied.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

(Filed Mar. 13, 1967)

Order Denying Motion to Hold Proceedings in Abeyance

Upon consideration of defendant's motion filed herein March 6, 1967 to hold proceedings herein in abeyance pending an alleged exhaustion of administrative remedies and of the opposition thereto, and it appearing to the Court that this action involves certain provisions of a milk marketing order promulgated by defendant in the year 1964, that plaintiffs challenge said provisions on the ground that they are in excess of the statutory authority of defendant under the Agricultural Marketing Agreement Act of 1937 and that plaintiffs have been injured thereby, and it further appearing to the Court that the issue presented is one for judicial determination, it is by the Court this 13th day of March 1967:

ORDERED that the motion of defendant to hold the proceedings in abeyance be and the same is hereby denied.

BURNITA SHELTON MATTHEWS
Judge

[Filed Mar. 13, 1967]

[Caption Omitted in Printing]

ORDER EXTENDING TIME

Upon consideration of the motion of defendant filed herein March 6, 1967 for an extension of time for the filing by defendant of his response to plaintiffs' motion for summary judgment, it is by the Court this 13th of March 1967:

ORDERED that the time for defendant to respond to plaintiffs' motion for summary judgment be and the same is hereby extended from March 6, 1967 to and including March 20, 1967.

/s/ Burnita Shelton Matthews
Judge

March 17, 1967–Margin endorsement on "Objections to a Proposed Order Concerning Denial of Intervention" filed by Zuber, et al., was as follows: "Objection overruled."

[Filed Mar. 17, 1967]

[Caption Omitted in Printing]

DESIGNATION OF PARTS OF ADMINISTRATIVE RECORD RELATING TO PROMULGATION OF NEARBY DIFFERENTIAL OCTOBER 1, 1964

The following pages of the administrative record, exclusive of exhibits, briefs, etc., involved in the promulgation of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001, on October 1, 1964, contain references to the nearby differential or related matters, this recitation not being a waiver of any objections thereto by plaintiffs but provided solely for the purpose of preventing any additional delay on the hearing of plaintiffs' motion for summary judgment by either defendant or applicants for intervention, who could also obtain said record or review the same at the Department of Agriculture if the same is necessary in order to file opposing points and authorities to plaintiffs' said motion, rather than rely upon

the defendant to furnish the said record to applicants for intervention herein:

Volume	*Pages*	*Volume*	*Pages*	*Volume*	*Pages*
A	205-210	E	1700-63	H	2639-41
A	220-224			H	2647
A	237	F	1944-54		
A	254-55	F	1996	J	3334-47
		F	2091-92	J	3392-42
B	470	F	2125-51	J	3474-75
B	584-594	F	2164-74		
B	686			K	3709-12
		G	2277-81	K	3750-63
C	928-932	G	2290-92	K	3770-01
C	937-955	G	2305-14	K	3929-30
		G	2321-36	K	3979-72
D	1264-70	G	2390-04	K	
D	1348	G	2449-50	L	4123-41
D	1430	G	2524-57	L	4258-79
				L	4288-93
				L	4359-70
				L	4486-87
				L	4497-06

[Subscription Omitted in Printing]

[Filed Mar. 17, 1967]

[Caption Omitted in Printing]

MODIFICATION OF PRELIMINARY INJUNCTION

This Court having on January 16, 1967 entered a preliminary injunction in this cause, requiring that all amounts payable to nearby milk producers under the nearby "farm location differential" provisions in the Massachusets-Rhode Island Milk Marketing Order (7 C.F.R. 1001.72), for milk delivered in December 1966 and thereafter, be placed in an Escrow Fund *pendente lite;* plaintiffs, however, having disavowed any claim to such portion of said differentials as is *pro rata* attributable to the marketing by the nearby milk producers of their own milk delivered in December 1966 and thereafter; and the parties having consented to modification of the preliminary

injunction, so as to permit ratable distribution to the nearby milk producers of such *pro rata* share of said differentials.

It is by the Court this 17th day of March, 1967,

ORDERED that the preliminary injunction issued in this cause on January 16, 1967 be, and hereby is, modified as follows:

1. That defendant Secretary, acting by or through his Market Administrator for the Massachusetts-Rhode Island Milk Marketing Order, shall as soon as practicable ratably distribute to each milk producer whose farm is located within the "farm location differential" areas specified in 7 C.F.R. 1001.72 (herein referred to as "nearby milk producers") that portion of the sum (including interest accrued thereon) in the Escrow Fund as is *pro rata* attributable to the milk he delivered during the months of December 1966, and January and February 1967, under the said Milk Marketing Order.

2. That beginning with milk delivered on and after March 1, 1967, like ratable monthly distribution shall be currently made on or about the 20th day of the succeeding month to each nearby milk producer of that portion of the nearby "farm location differentials" as is *pro rata* attributable to the milk he delivers monthly under the said Milk Marketing Order; the remaining portion of such differentials shall continue to be placed in the Escrow Fund established under the preliminary injunction issued January 16, 1967, pending further order of this Court; and the records and monthly reports required thereunder shall henceforth disclose both the *pro rata* amounts paid out to the nearby milk producers under this modification of the preliminary injunction, and the remaining amounts of the said differentials retained or hereafter placed monthly in the Escrow Fund.

3. That defendant Secretary shall calculate the *pro rata* share of such differentials to be paid to each nearby milk producer under paragraphs 1 and 2 above, by multiplying the aggregate quantity of milk delivered by such nearby milk producer in the period for which distribution is to be made by a rate per hundredweight computed for purposes of paragraph

1 hereof by dividing the total sum (including interest) then in the Escrow Fund by the total hundredweight of pool milk delivered by all milk producers under the Milk Marketing Order in the months of December 1966 through February 1967; and computed for purposes of paragraph 2 hereof by dividing the aggregate total of such differentials for the month by the total hundredweight of pooled producer milk used to compute the basic blended price for such month; and in each case rounding the result to the nearest tenth of a cent.

4. That ratable monthly distribution to nearby milk producers in accordance with paragraphs 1 and 2 above may be made by defendant Secretary or his Market Administrator directly or indirectly, including, where appropriate, distribution through handlers or to or through cooperative associations of which the affected nearby milk producers are members.

5. All provisions of the preliminary injunction entered January 16, 1967, not specifically modified hereby, shall continue in full force and effect pending further order of this Court.

/s/ Burnita Shelton Matthews
United States District Judge

We consent:

/s/ Charles Patrick Ryan
Attorney for Plaintiffs

/s/ Gil Zimmerman
Assistant United States Attorney
Attorney for Defendant

Consent to Filing of Brief as Amicus Curiae by Frederick T. Zuber, et al.

[Filed February 16, 1967]

The plaintiffs, in conformity with the representations in their pleading filed herein opposing the motion of Frederick T. Zuber, et al., for intervention as defendants in this action, and in further conformity with their sub-

sequent oral representations concerning the filing of a brief as amicus curiae in behalf of Frederick T. Zuber, et al., hereby formally consent thereto, provided that the same will not further delay the hearing of the plaintiffs' motion for summary judgment, a copy of the excerpts from the administrative record concerning the nearby differential provision promulgated on October 1, 1964, being available to such applicants by virtue of the attached list of pertinent pages of said record that has heretofore been furnished by plaintiffs, and provided also that service of such brief is made upon plaintiffs' counsel in accordance with the rules of this Court.

CHARLES PATRICK RYAN
400 Prudential Building
Washington, D. C. 20005
ST 3-0004
Attorney for Plaintiffs.

Opposition to Plaintiffs' Motion for Summary Judgment

[Filed March 20, 1967]

Comes now defendant, the Secretary of Agriculture, by his undersigned attorneys, and respectfully opposes plaintiffs' motion for summary judgment on the following grounds:

1. Summary judgment should be denied since the challenged provisions of the Massachusetts-Rhode Island Milk Marketing Order (7 CFR Part 1001), involving the farm location differential have been expressly upheld as a valid exercise of the authority of the Secretary of Agriculture by the United States Court of Appeals for the First Circuit in *Green Valley Creamery, Inc.* v. *United States*, 108 F.2d 342 (C.A. 1, 1939). No facts have been set forth by plaintiffs in their motion for summary judgment which, in any manner, undermine the validity of the *Green Valley* decision, and, therefore, this Court should uphold the validity of the challenged provisions of the Massachusetts-

Rhode Island Milk Marketing Order on the basis of the Court of Appeals' ruling in the *Green Valley* case.

2. If the Court should feel that the *Green Valley* decision is not controlling and dispositive of the issues raised in the instant case, the Court should defer ruling on plaintiffs' motion for summary judgment on the ground that the issues raised are not ripe for adjudication under the doctrines of primary jurisdiction and exhaustion of administrative remedies. As heretofore set forth in papers filed with this Court by defendant, the provisions of the Massachusetts-Rhode Island Milk Marketing Order challenged in this case were originally issued as part of the Boston Milk Marketing Order in 1937. Since then, that order has from time to time been amended and consolidated with other marketing orders; the last effective determination and promulgation by the Secretary of Agriculture having been made on August 4, 1964 (29 F.R. 11205 *et seq.*). However, since August, 1964, the Secretary of Agriculture has commenced rule-making proceedings relating to the provisions of the Massachusetts-Rhode Island Milk Marketing Order and among the various proposed amendments to said order, there is a proposal (Proposal No. 40) which seeks to have the Secretary of Agriculture delete the challenged "farm location differential" provisions from the milk marketing order. In view of the fact that the challenged provisions of the Massachusetts-Rhode Island Milk Marketing Order have been in effect for nearly 30 years and have heretofore been expressly ruled valid by a United States Court of Appeals, and since the defendant Secretary has relied upon the judicially confirmed legality of the farm location differential provisions, this Court should defer ruling upon the validity of said provisions until the Secretary has had an opportunity to consider the matter in the pending rule-making proceedings relating to the Massachusetts-Rhode Island Milk Marketing Order. In this pending administrative proceeding, the Secretary of Agriculture will have an opportunity to give

due consideration to any intervening matters relating to the validity of the farm location differential provisions and in particular to the decision of the Court of Appeals for this Circuit in *Blair* v. *Freeman*, 370 F.2d 229, decided November 18, 1966. Defendant relies primarily upon *United States* v. *Ruzicka*, 329 U.S. 287 (1946); and *United States* v. *Lewes Dairy, Inc.*, 337 F.2d 827 (C.A. 3, 1964), *cert. denied*, 379 U.S. 1000, for his position that the Court should defer ruling upon plaintiffs' motion for summary judgment in the event this Court should find that the *Green Valley* decision is not controlling and dispositive of the issues presented in this case.

3. The farm location differential provisions of the Massachusetts-Rhode Island Milk Marketing Order, as issued on August 4, 1964, and as originally issued in 1937, are in accordance with law and are based upon evidence found in the record of various proceedings conducted by the Secretary of Agriculture in connection with the promulgation of the various provisions of the marketing order. The excerpts from various records before the Secretary of Agriculture, although not constituting the complete record in support of the challenged provisions, fully support the legality of the farm location differential provisions and plaintiffs in their motion for summary judgment have not demonstrated that the challenged provisions are not supported by the administrative record.

In support of this opposition, the Court is respectfully referred to the affidavit of Howard C. Feddersen, attached hereto, and the affidavits of Herbert L. Forest and Reuben Hall, previously filed by defendant in opposition to plain-

tiffs' motion for preliminary injunction, and the memorandum of points and authorities filed herewith.

Respectfully submitted,

BAREFOOT SANDERS
Assistant Attorney General

HARLAND F. LEATHERS
IRWIN GOLDBLOOM
Attorneys, Department of Justice
Washington, D. C. 20530
Attorneys for Defendant

Of Counsel:

JOHN G. LIEBERT
Attorney,
U. S. Department of Agriculture

[Filed March 20, 1967]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 3379-66

RUSSELL ALLEN, et al., *Plaintiffs*

v.

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States, *Defendant*

Affidavit

DISTRICT OF COLUMBIA } ss

Howard C. Feddersen, being duly sworn deposes and says:

The statements in this affidavit are based upon my personal knowledge or upon the records and publications of the United States Department of Agriculture.

1. Your deponent is now and has been since June 14, 1955, Deputy Director of the Dairy Division, Consumer and Marketing Service, United States Department of Agriculture, which division is responsible for the formulation and administration of the milk marketing order program, including Order No. 1, regulating the handling of milk in the Massachusetts-Rhode Island marketing area. I am a graduate of the University of Colorado, a graduate of the Law School of George Washington University, and a member of the District of Columbia Bar. In July 1934 I became a member of Consumer Counsel of the United States Department of Agriculture as an agricultural economist, specializing in regulatory functions of the Department concerned with dairying. In 1941 I became a member of the Dairy Division of the United States Department of Agriculture. I have been, since 1934, continuously

engaged in the milk marketing activities of the United States Department of Agriculture and in particular in the promulgation and administration of Federal milk orders.

2. The hearing records and public documents relating to farm location differentials, as the provisions appear in Order No. 1 regulating the handling of milk in the Massachusetts-Rhode Island order, are very voluminous and cover over 30 years in their scope. The first federal records dealing with adjustments in prices for milk produced nearest the metropolitan area of Boston were made in 1933 in relation to programs under the Agricultural Adjustment Act of 1933. These early records are available in their entirety only in the Archives. In 1935, this Act was amended so as to provide for marketing orders instead of licenses and the provisions of sections 5(A) and (B) of the Act were inserted in the Act at that time. In 1937, certain provisions, including sections 5(A) and (B), of the Agricultural Adjustment Act of 1933, as amended in 1935, were re-enacted and amended and denominated the Agricultural Marketing Agreement Act of 1937. The hearing records pertinent to the New England orders from 1935 to date are maintained by the Department of Agriculture. It is pursuant to the Agricultural Marketing Agreement Act of 1937 that the Massachusetts-Rhode Island Order No. 1 was promulgated in 1964, this order being a merger of the previously existing Southeastern New England, Springfield, Worcester and Boston orders. Each of these Orders had also previously contained substantially identical farm location differential provisions.

3. The records pertinent to the farm location differential provisions of the Massachusetts-Rhode Island Order include, not only the records made in 1963, but also the records made for each of the several orders which were merged into the Massachusetts-Rhode Island Order. All together these records are not only numerous but ex-

tremely voluminous. Time has not permitted a complete analysis and summary of the contents of each of these records for purposes of this proceeding.

4. As a result of a recent hearing held in June of 1966, the Department is presently engaged in preparing a recommended decision on several proposals one of which is to delete the farm location differentials from Order No. 1. Evidence available to the Secretary on this proposal is being analyzed and evaluated at this time.

5. For purposes of presenting to the Court some of the factors involved and reasons for farm location differentials, as well as their place in Marketing Order No. 1, certain excerpts from several of the above-mentioned hearing records have been selected and duplicated by members of my staff to be presented to the Court. They are attached hereto in two volumes as Exhibit "A" to this affidavit. Such excerpts are representative of the type and nature of the information relating to the economic factors involved in and the historical background relating to farm location differentials and their place in Marketing Order No. 1 as they were presented to the Secretary of Agriculture. These excerpts are not, however, complete, nor fully illustrative of all of the evidence before the Secretary. Their purpose is only to give the Court as clear an understanding as possible at this time of the facts bearing on the problem in issue.

H. C. FEDDERSEN
Howard C. Feddersen,
Deputy Director, Dairy Division, Consumer and Marketing Service

Subscribed and sworn to before me
this 20th day of March 1967.

/s/ AGNES STASEK
Notary Public

My commission expires 2-14-72.

Order Denying Applicants' Motion for Intervention

[Entered March 21, 1967]

Upon consideration of the applicants' motion for intervention as defendants herein and the plaintiffs' Opposition thereto, as well as the points and authorities and other papers filed herein and after hearing argument of counsel in open court, and it appearing to the Court that the application for intervention is not timely, in that the plaintiffs filed this action on the 27th day of December, 1966, and their motion for summary judgment on the 24th day of February, 1967, and it also appearing to the Court that the requested intervention will unduly delay the adjudication of this action, the applicants not having filed any proposed points and authorities in opposition to the said motion for summary judgment although the same were due on March 6, 1967, or shown any defense to the question of statutory authority involved herein or any grounds or defense other than those set forth or included in defendant's pleadings herein, and it also appearing that the requested intervention may prejudice the adjudication of the rights of the parties, in that defendant is responsible for the regulatory program involved and determinations in respect to the public interest, and it appearing that the defendant is adequately representing the validity of the regulation challenged herein and the interests of those milk producers who would be adversely affected by the invalidation of such regulation, it is by the Court this 21st day of March 1967,

ORDERED that the motion of the applicants, Frederick T. Zuber, et al., for leave to intervene as defendants in this action be and the same hereby is denied.

(Signed) BURNITA SHELTON MATTHEWS
Judge.

[Filed May 24, 1967]

Memorandum

The plaintiffs' motion for summary judgment is granted on the authority of *Blair, et al.* v. *Freeman,* U.S. App. D.C. , No. 19,801, decided November 18, 1966.

Counsel for plaintiffs will submit an appropriate order.

JOSEPH C. MCGARRAGHY
Judge

May 24, 1967

Affidavit in Support of Plaintiffs' Supplemental Points and Authorities

DISTRICT OF COLUMBIA, SS:

Charles Patrick Ryan, being first duly sworn, deposes and says that on May 12, 1967, he telephoned the Office of the Hearing Clerk, U. S. Department of Agriculture, and spoke to Mr. Eugene Meyer, Hearing Clerk, relative to the administrative hearing records that resulted in promulgation of the Worcester, Springfield and Southeastern New England federal milk orders; that the affiant was informed that the said records were being prepared for certification to the Court on Monday, May 15, 1967, and that said Office would also include the certified record of one of the orders for the Greater Boston area, the pertinent excerpts therefrom having been previously certified to the Court for the 2/9/26 and 8/1/37 Greater Boston orders. Affiant further states that such certification was of the entire record and that no question existed as to whether such records would be available, in that they were to be transmitted to defendant's attorneys that date, May 12, 1967.

/s/
CHARLES PATRICK RYAN

Subscribed and sworn to before me this 22nd day of May, 1967.

/s/
Notary Public, D. C.

[Filed June 15, 1967]

Order Granting Motion for Summary Judgment and Judgment for Declaratory and Injunctive Relief

This cause came on for hearing on the Motion for Summary Judgment filed herein by the plaintiffs, and the Court having considered the Motion and Opposition thereto, the verified complaint, pleadings, affidavits, points and authorities, exhibits, and other papers filed herein, and having heard argument of counsel for each party and being fully advised in the premises in respect to the entire record, the orders entered herein, the pertinent portions of the administrative record, the arguments of the amicus curiae and former applicants for intervention, and all other considerations, the Court makes the following

FINDINGS OF FACT

1. The plaintiffs and their class are dairy farmers and milk producers as defined in the Agricultural Marketing Agreement Act of 1937, as amended, and the federal milk order regulating the handling of milk in the Massachusetts-Rhode Island milk marketing area, 7 C.F.R. 1001. They have brought this action for themselves, individually, and for the benefit of all other milk producers similarly situated who produce and sell their milk under the said milk order, which was promulgated by the defendant effective October 1, 1964, and is still in effect at the present time. The plaintiffs seek a judgment that Section 1001.72 of said milk order, the nearby farm location differential provision thereof, is invalid and void. They also request a permanent injunction against the continued enforcement of said milk order provision by the defendant.

2. The Massachusetts-Rhode Island milk order promulgated by defendant contains the aforesaid nearby farm location differential provision, 7 C.F.R. 1001.72, which provides that milk producers whose farms are located in either of two designated areas, as determined by certain enumerated towns, cities, counties and States in each area, are entitled to receive an additional payment for their milk, over and above the uniform blended price received by all milk producers serving the market, of 46 cents or 23 cents per hundredweight, respectively, depending upon in which of the two "nearby" designated areas their farms are located.

3. The nearby farm location differential payments are deducted from the equalization pool proceeds belonging in equity to all milk producers serving the market, and such deduction reduces the uniform blended price which the plaintiffs and their class would otherwise receive for their milk, 29 Fed. Reg. 5590, 29 Fed. Reg. 11213, their farms being so located that they are not in either of the two designated nearby areas which are eligible for the said nearby farm location differential payments.

4. The plaintiffs and their class are required by the operation and provisions of the said milk order nearby differential section, 7 C.F.R. 1001.72, to sustain a reduction in the uniform blended price which they would otherwise receive, in the absence of said differential provision, of approximately $3,000,000.00 per year, the total differential payments under Section 1001.72 amounting to approximately $4,000,000.00 per year.

5. The plaintiffs and their class of ineligible milk producers constitute approximately 6,600 of the 8,800 milk producers serving the market, and there is no way that the said nearby differential payments may be recovered from the "nearby" milk producers by the plaintiffs and their class once such payments are made, in that the 8,800 milk producers are located in many different jurisdictions in various New England and other States and such attempts

at recovery would involve a multiplicity of parties and actions.

6. This action has been brought by the plaintiffs as a class action, that is as an action for plaintiffs, individually, and for all other milk producers similarly situated who produce and market their milk under the said milk order. The defendant, through the promulgation of said milk order provision establishing the eligible and non-eligible class of milk producers for said nearby farm location differential payments, has acted on grounds generally applicable to the class, thereby making appropriate the relief requested with respect to plaintiffs' class of milk producer as a whole. The plaintiffs' class of non-eligible milk producers are so numerous that joinder of all members is impracticable. There are questions of law common to the class, and the claims of the plaintiffs as representative parties are typical of those of the class. The Court has found that the plaintiffs as representative parties will fairly and adequately protect the interests of their class of non-eligible milk producers, and it has entered an order herein authorizing the maintenance of this suit as a class action under Rule 23 (a) and (b) (2), FRCP. The Court has also found and entered an order herein that the defendant is adequately representing any interests of the eligible or "nearby" milk producers that would be adversely affected by the invalidation of the milk order provision, by virtue of the defendant's defense of the nearby farm location differential payments, and it has considered the arguments and defenses of the applicants for intervention as set forth in their pleadings and those of the defendant, including the defendant's motion to hold these proceedings in abeyance. The Court finds that both the plaintiffs and the defendant have adequately represented the interests of the respective classes of ineligible and eligible milk producers, and this judgment includes in its application the said two classes of milk producers, those whose farms are so located as to make them either eligible or ineligible for the nearby farm location differential payments of the milk order.

7. On January 16, 1967, pursuant to the motion of the plaintiffs, this Court entered an order granting a preliminary injunction during the pendency of this action or until further order of the Court enjoining the defendant from paying over to the eligible class of milk producers the monies representing the contested nearby farm location differential payments of the said milk order and requiring that the defendant collect, place and retain the monthly sums that would otherwise be paid over under said order provision in an escrow account subject to the control of the Court. On March 17, 1967, the said preliminary injunction was modified by a consent order to allow the disbursement from said escrow account of those monies therein attributable to the marketings of milk of the nearby or eligible class of milk producers and for the future payment to them of the said amounts that would otherwise be escrowed except for such modification of the preliminary injunction. The defendant is required by the terms of such order to make monthly reports concerning the escrow deposits and to furnish the same to the Court and to the plaintiffs' attorney, but it has failed to do so since its report pertaining to the said nearby differential payments attributable to the marketing of milk during January, 1967. The monies in the said escrow account presently consist of those withheld from the ineligible or non-nearby milk producers by virtue of the aforesaid reduction in the uniform blended price which they would otherwise receive for their milk except for the said nearby differential provision.

8. On March 21, 1967, this Court denied the motion of Frederick T. Zuber, et al., for leave to intervene herein as defendants, and the applicants' motion for summary reversal of said order of this Court was denied by the United States Court of Appeals for the District of Columbia Circuit on May 5, 1967, "without prejudice to such action as the appellants may be advised to take following final judgment in the District Court where so far as presently appears there will have been accorded to those appellants by

such judgment such recognition of their claims as they may be entitled to receive;". The said Order of the Court of Appeals further stated that the denial of their motion did not constitute a bar to renewing the motion for the purpose of showing in what respect the defendant failed to adequately represent the appellants' interests in the District Court. The proceedings in the Court of Appeals in respect to the appellants' appeal of said Order denying intervention were suspended pending decision of this Court on the plaintiffs' motion for summary judgment, in respect to designation of the record to be printed and the filing of briefs, for a period of twenty days from the date of the ruling of this Court on said motion. Said Order of the Court of Appeals of May 24, 1967, suspending the proceedings in that Court as aforesaid was unopposed by the plaintiffs, who filed a formal consent herein to the filing of a brief amicus curiae by Frederick T. Zuber, et al., for the presentation of any defense or argument that they might desire to place before this Court and who furnished the said applicants with a designation of the page references of the administrative record relating to the nearby farm location differential. The said applicants did not avail themselves of the opportunity to file such a brief in this Court as proposed by the plaintiffs or file any other response thereto, although the same local law firm that represented the applicants Frederick T. Zuber, et al., did file such a brief as local counsel for the Commonwealth of Massachusetts with the consent of plaintiffs on the 15th day of May, 1967, the day prior to the hearing on the plaintiffs' motion for summary judgment.

9. On November 18, 1966, the United States Court of Appeals for the District of Columbia Circuit handed down a decision in the case of *Lorton Blair, et al.* v. *Orville Freeman, Secretary of Agriculture of the United States,* No. 19,801, ... U.S. App. D.C. ...., 370 F.2d 229, in which it held that the nearby farm location differential provision of the New York-New Jersey federal milk marketing order,

7 C.F.R. 1002.71(b) was unauthorized and void, and it ordered the reversal of the decision of the District Court, C. A. No. 498-65, and the granting of a judgment declaring the invalidity of said milk order provision and the issuance of a permanent injunction against its continued enforcement by the defendant. The time for petitioning the Supreme Court of the United States for the issuance of a writ of certiorari has expired in said case. There is no substantial difference between the operation of the nearby farm location differential provision of the New York-New Jersey milk order declared invalid and void in the case of *Blair* v. *Freeman,* supra, and that of the Massachusetts-Rhode Island milk order contested in this action. Both provide for the nearby differential payments from the equalization pool proceeds through reduction of the uniform blended price, and the said payments to the nearby or eligible milk producers reduce pro tanto the amount which the plaintiffs and their class would otherwise receive for their milk under the respective milk orders.

10. On the authority of *Blair* v. *Freeman,* supra, the Court finds that the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, is invalid and void as being in excess of the statutory power of the defendant Secretary of Agriculture, in that the said differential is not one of the adjustments to the uniform blended price authorized under the Agricultural Marketing Agreement Act of 1937, as amended, and constitutes a diversion of that portion of the uniform blended price represented by said differential to which the plaintiffs and their class are entitled under the said Act. The said nearby differential provision does not constitute the adjustments authorized under either 608c(5)(b)(ii) (a) or (c) of the Act, nor is it authorized under 608c(7) of the Act as incidental, consistent and necessary in respect to the other terms and conditions of the Act. The said nearby differential payments to the eligible milk producers are determined on the basis of the location of their farms and are

not authorized as production or market differentials under the Act. H.R. Rep. No. 1241, 74th Cong., 1st Sess. 10 (1935). Nor does eligibility for such nearby differential payments turn on the location at which delivery of the milk is made, but solely on the location of the farms in the areas designated in Section 1001.72 of the milk order.

As in *Blair*, the differential involves considerations involving the use of milk of the eligible "nearby" milk producers and the payments thereof are also geared to the use of fluid milk, thus violating the prohibitions of the Act concerning payment to all producers of a uniform price for their milk irrespective of use thereof. For these and the other reasons stated in *Blair*, the nearby farm location differential provision of the Massachusetts-Rhode Island milk order is invalid and void. The Court has fully considered the other claims and defenses of the defendant, the amicus curiae, and the applicants for intervention herein, including that claim of Frederick T. Zuber, et al., applicants for intervention, that invalidation of the nearby differential by this Court would deprive nearby milk producers of property without due process of law and concerning the alleged non-separability of the provisions of the milk order, Section 1001.96, and the Court finds that the same do not constitute a basis for denial of the plaintiffs' motion and the relief requested in their complaint. Further, the Court has found that the plaintiffs and their class are sustaining irreparable injury by virtue of the nearby differential payments and that the issues presented are properly those for judicial determination.

Now, Therefore, the Court makes the following

Conclusions of Law

1. The plaintiffs and their class are entitled to the granting of the motion for summary judgment filed herein by them on the 24th day of February, 1967.

2. The plaintiffs and their class are entitled to the relief requested in their complaint, namely declaration of the invalidity of Section 1001.72 of the Massachusetts-Rhode Island milk order and a permanent injunction against its continued enforcement by the defendant, in order to preclude further irreparable injury to them, and they have no adequate remedy at law.

ORDER

WHEREFORE, it is by the Court this 15th day of June, 1967,

ORDERED, that the motion for summary judgment filed herein by the plaintiffs and their class be and the same hereby is granted, and it is further

ORDERED, ADJUDGED and DECREED, that the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, be and the same hereby is declared invalid and void, and it is further

ORDERED, ADJUDGED and DECREED, that the defendant Secretary of Agriculture, his Market Administrator for the Massachusetts-Rhode Island milk marketing area, their agents, attorneys, servants and employees, and all persons in active concert or participation with them, be and they hereby are restrained and enjoined from enforcing the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, Section 7 C.F.R. 1001.72, at any time in the future under the same or any other name or designation, either directly or indirectly, and it is further

ORDERED, ADJUDGED and DECREED, that the defendant take all necessary action to effectuate the required termination of the operation of said milk order provision, and it is further

ORDERED, that the defendant, his Market Administrator for the Massachusetts-Rhode Island milk marketing area,

their agents, employees, attorneys and servants, comply with the orders of this Court of the 16th day of January, 1967, and the 21st day of March, 1967, requiring that a separate report be filed with the Court and furnished to plaintiffs' counsel, Charles Patrick Ryan, 400 Prudential Building, Washington 5, D. C., concerning the information relating to deposits of the differential payments in the escrow fund established under the control of this Court, for those months for which such a report was not filed or furnished, to and including the report relating to the milk delivered during the month of April, 1967, the said reports to be filed and furnished on or before the 30th day of June, 1967, and it is further

ORDERED, that the defendant and his said Market Administrator retain the monies representing the nearby differential payments deposited in the said escrow fund pending further order of this Court to be entered concerning distribution of the said fund after compliance with the filing and furnishing of the said monthly reports as aforesaid and after a ruling by the United States Court of Appeals for the District of Columbia Circuit in respect to the appeal of Frederick T. Zuber, et al., No. 20,931, of the Order of this Court denying them intervention in this action, dated March 21, 1967, said appeal being presently pending in the Court of Appeals.

JOSEPH C. McGARRAGHY
District Judge.

[Filed July 5, 1967]

ORDER

[of Court of Appeals for D.C. Circuit, Dkt. No. 20,931]

These appellants having heretofore appealed from the District Court's denial of their motion to intervene and having thereupon moved for summary reversal and this court having entered its order of May 5, 1967 denying the motion for sum-

mary reversal but having noted that our order was without prejudice and that the appellants might receive in the District Court all relief to which they could be said to be entitled;

and the District Court having on the 15th day of June 1967 entered its order granting summary judgment in favor of the appellees basing its judgment on *Blair v. Freeman*, ___ U.S. App.D.C. ___, 370 F.2d 229 (1966), no review having been sought;

and it having appeared that the Department of Justice contemplates no effort to stay the District Court's judgment and that the Secretary has until August 14th within which to perfect an appeal;

and these appellants having now sought to stay the effect of the order of the District Court following summary judgment, and it having appeared to the satisfaction of the court that although there is no reason to believe that the interests of appellants were not adequately represented in the District Court proceedings, it is not clear that those interests will receive the protection of appellate review, and on that account that those appellants should be entitled to be admitted as intervenors in the action in the District Court for the purpose, if they be so advised, of prosecuting an appeal from the judgment of the District Court;

and this court being further of the view that no such showing has been made as would entitle those appellants to an order staying the effectiveness of the District Court's judgment;

Now, upon consideration of the foregoing, the memoranda filed by the Commonwealth of Massachusetts and the State of Connecticut, respectively, as amici curiae, the motion for stay filed by those appellants, the opposition thereto, and after oral argument, and on the record of proceedings in the District Court, judicial notice of which has been taken,

It is by the court ORDERED:

(1) The motion for stay of the effectiveness of the District Court's order is denied;

(2) That this court's order of May 5, 1967 is vacated;

(3) The District Court is directed to grant the motion of those appellants for leave to intervene for the purpose of prosecuting an appeal from the judgment of the District Court entered June 15, 1967;

(4) The appellants are directed to inform the court within 15 days following allowance of their motion to intervene in the District Court whether or not they intend to prosecute an appeal from the judgment and if they shall decide to do so, the parties shall work out with the Clerk of this court an expedited briefing and hearing schedule and the appellants' appeal in No. 20931 will thereupon become moot;

(5) The order of this court herein shall be without prejudice to such order as the District Court shall find itself advised to enter respecting preservation of the status quo pending appeal or the further order of this court.

Per Curiam

[Filed July 7, 1967]

ORDER

This Court, having on the 15th day of June, 1967, entered an order granting summary judgment (McGarraghy, J.) in favor of the plaintiffs;

and the Court of Appeals, having on the 5th day of July, 1967, entered an order directing this Court to grant the motion of the applicants for intervention, Zuber, *et al.*, for the purpose of prosecuting an appeal from the said judgment of this Court;

and this Court, having executed an order on this day of July, 1967, granting such intervention;

and the intervenors, having requested of this Court in chambers, at which both plaintiffs and defendant were present by counsel, that the status quo be preserved temporarily pending

the earliest possible full hearing before Judge McGarraghy of this Court on a motion by intervenors to preserve the status quo pending disposition of the appeal noted by intervenors from the order granting summary judgment;

and the Government, having supported the request of intervenors for such temporary action by this Court pending the earliest possible full hearing before Judge McGarraghy of this Court;

and recognizing that the preservation of the status quo simply requires continuation of payments into an escrow account already established by order of this Court pending such further action as this Court may take;

Wherefore, it is by the Court this 7th day of July, 1967,

ORDERED, that, pending further order of this Court, the status quo in this matter shall be preserved; and

ORDERED, that the net amount of the nearby farm location differential provided for in the Massachusetts–Rhode Island milk order, 7 C.F.R. 1001.72, which under the June 15, 1967 order of this Court would be paid to plaintiffs and the class which they represent shall continue to be deposited in an escrow account in the registry of this Court in accordance with the terms set forth in the preliminary injunction of this Court entered on January 16, 1967, as modified by this Court on March 17, 1967.

/s/ Joseph C. Waddy
District Judge

July 7, 1967

[Filed July 7, 1967]

ORDER GRANTING INTERVENTION

On consideration of the order of the United States Court of Appeals in the case of *Zuber, et al. v. Allen, et al.*, dated July 5, 1967, in which it is provided:

> "The District Court is directed to grant the motion of these appellants for leave to intervene for the pur-

pose of prosecuting an appeal from the judgment of the District Court entered June 15, 1967;"

it is

ORDERED, that Frederick T. Zuber, George R. Medeiros, Herbert Kallmann, Alexander F. Tripp, John T. Savage, Kendall F. Crocker, II and Carl W. Proctor, Applicants for Intervention, are hereby granted leave to intervene as defendants for the purpose of prosecuting an appeal from the "Order Granting Motion for Summary Judgment & Judgment for Declaratory and Injunctive Relief," dated June 15 1967.

/s/ Joseph C. Waddy
Judge

July 7, 1967

[Filed July 19, 1967]

MOTION FOR ORDER PRESERVING EFFECTIVENESS OF JUDGMENT AND FOR DEFENDANT AND OTHERS TO SHOW CAUSE CONCERNING NONCOMPLIANCE THEREWITH

Plaintiffs respectfully represent to the Court as follows:

1. On June 15, 1967, this Court (McGarraghy, J.) signed and entered an order granting the plaintiffs' motion for summary judgment, stating additionally therein as follows:

"ORDERED, ADJUDGED and DECREED, that the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, be and the same hereby is declared invalid and void, and it is further

"ORDERED, ADJUDGED and DECREED, that the defendant Secretary of Agriculture, his Market Administrator for the Massachusetts-Rhode Island milk marketing area, their agents, attorneys, servants and employees, and all persons in active concert or participation with them, be and they hereby are restrained and enjoined from enforcing the nearby farm location differential

provision of the Massachusetts-Rhode Island milk order, Section 7 C.F.R. 1001.72, at any time in the future under the same or any other name or designation, either directly or indirectly, and it is further

"ORDERED, ADJUDGED and DECREED, that the defendant take all necessary action to effectuate the required termination of the operation of said milk order provision * * * *".

2. Prior to June 15, 1967, the defendant had submitted a proposed order and objected to that submitted by the plaintiffs, further requesting that the Court's order and judgment be stayed pending any appeal that might be taken by the defendant. The plaintiffs opposed such request for a stay and the Court's order and judgment was not stayed. Thereafter, Frederick T. Zuber, et al., applicants for intervention as defendants in the District Court and appellants in the Court of Appeals in respect to denial of their motion to intervene, moved the Court of Appeals for a stay of this Court's order and judgment of June 15, 1967, granting plaintiffs' motion for summary judgment. After a hearing on July 3, 1967, the Court of Appeals issued an order on July 5, 1967, stating therein:

"(1) The motion for stay of the effectiveness of the District Court's order is denied; * * *

"(5) The order of this court herein shall be without prejudice to such order as the District Court shall find itself advised to enter respecting preservation of the status quo pending appeal or the further order of this court."

The said order of the Court of Appeals also directed the District Court to grant the motion of Frederick T. Zuber, et al., for leave to intervene "for the purpose of prosecuting an appeal from the judgment of the District Court entered June 15, 1967", the Court stating that "it is not clear that those interests will receive the protection of appellate review" and noting that "the Secretary has until August 14th within which to perfect an appeal". The defendant has not noted any appeal as yet, although plaintiffs' counsel is informed that he intends to do so.

3. On June 27, 1967, defendant's Deputy Administrator, Regulatory Programs, signed a recommended decision and a recommended order amending the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001, relating to administrative hearings held in 1966, and the said recommended decision and order was published on July 6, 1967, in the Federal Register at 32 F.R. 9902. In his recommended decision at pages 9918-21, the issue of "farm location differentials" is presented and it is stated that "The farm location differential provisions under the Massachusetts-Rhode Island order should be continued". A discussion of the "history" of the differential is set forth with "findings" relating to alleged evidence presented in hearings held 30 years ago, which "findings" are not those set forth in the 1936 and 1937 orders, the latter referring to the use of nearby producers' milk for fluid use purposes. The matters referred to in said recommended decision were all presented to the District Court during this case, and the defendant presumably is still attempting to rectify the lack of valid findings made during the promulgation of the Massachusetts-Rhode Island order in 1964. After discoursing on the various legal points raised by defendant in this case and an alleged distinction between this case and the *Blair* case, the recommended decision states as follows:

> "We do not, of course, by our *present* findings in the matter intend to ignore or circumvent in any way the recent decision of the District Court in the Allen case. In the present circumstances and pending final disposition of the Allen case in such appellate proceedings as may be taken, in furtherance of our authority and responsibility under the Act we are constrained to state our full views in the matter."

In another part of the recommended decision, the defendant proposes the enlargement of the marketing area and that the order be designated the "Massachusetts-Rhode Island-New Hampshire" milk marketing order. After the filing of exceptions by July 26, 1967, the recommended decision states that the provisions of the recommended order shall become effective at such time as the Secretary might declare the same.

4. The order of this Court declaring the invalidity of the nearby differential and the injunction enjoining the enforcement of the nearby differential at any time in the future under the same or any other name or designation, either directly or indirectly, was in force as of June 15, 1967, as was the Court's order for effectuation of the termination of the operation of the differential. Plaintiffs submit that the action of the defendant or his agents constitutes an acknowledged non-recognition of this Court's order and judgment of June 15, 1967. They also submit that defendant or his agents intend to further violate the same by the promulgation of a "new" order provision, thereafter contending that the latter is in effect by virtue of the "present findings" and such amended order, and that reinstitution of the present legal proceedings is necessary under such circumstances. The recommended decision reflects not only the contention that this Court is in error, but that defendant or his agents may determine the limits of the Secretary's statutory authority and proceed to act solely in conformity with such self-made interpretation irrespective of the orders of this Court. Plaintiffs contend that possible appellate proceedings do not constitute justification for ignoring or violating of the Court's order and judgment, and that the action taken and impending is within the prohibitions of said order and judgment. Such action also constitutes irreparable injury to plaintiffs and their class, and is not embraced within the subsequent order of Judge Waddy temporarily preserving the status quo until a full hearing on the question of a stay, motion for such relief to be filed herein by Frederick T. Zuber, et al., in the near future.

WHEREFORE, plaintiffs respectfully request:

1. That defendant, his agents, attorneys, servants, and employees be required to obey the order and judgment of this Court of June 15, 1967, by issuance of a restraining or other order, or other appropriate means, and that the decision to be issued by defendant or his agent eliminate the aforesaid discussion and "findings" relative to the nearby farm location differential, except for such reference as may be necessary and in conformity with this Court's order and judgment.

2. That defendant, his agents, attorneys, servants, and employees be required to show cause, if any they have, concerning noncompliance and intended future noncompliance with the order and judgment of this Court of June 15, 1967, concerning issuance of any "new" order provision differential,

3. And for such other relief as may be appropriate.

[Subscription Omitted in Printing]

[Filed July 24, 1967]

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR ORDER PRESERVING EFFECTIVENESS OF JUDGMENT AND FOR DEFENDANT AND OTHERS TO SHOW CAUSE CONCERNING NONCOMPLIANCE THEREWITH

Defendant, by his undersigned attorneys, respectfully opposes plaintiffs' Motion for Order Preserving Effectiveness of Judgment and for Defendant and Others to Show Cause Concerning Noncompliance Therewith on the grounds that it is wholly lacking in merit, is without foundation or substance and is patently frivolous.

The burden of plaintiffs' motion is that the Deputy Administrator, Regulatory Programs, Department of Agriculture, issued a Recommended Decision (32 F.R. 9902 et seq.), relating to the Massachusetts-Rhode Island Milk Marketing Order pursuant to the responsibilities of the Department of Agriculture under the Agricultural Marketing Agreement Act, as amended, 7 U.S.C. 601 et seq., and that in the course of discussing a proposal to delete the farm location differential from the order failed to recognize this Court's order and judgment of June 15, 1967. Plaintiffs' contention is wholly without merit. Defendant has previously advised the Court of the pendency of administrative proceedings relating to a variety of proposals to amend several provisions of the Massachusetts-Rhode Island Milk Marketing Order. In carrying out the responsibility of the Department of Agriculture in connection with such quasi-legis-

lative administrative proceedings, the Department of Agriculture issued its Recommended Decision relating to the various proposals which had been pending before it for several months. The discussion of the proposals covers some twenty-one pages in the Federal Register. The discussion of the farm location differential considers the various aspects of the differential in the light of the specific proposal to delete the provision from the marketing order. Thereafter, the Recommended Decision specifically states that there is no intention to ignore or circumvent in any way the decision of this Court in this proceeding but simply to state the views of the Department. 32 F.R. 9920. Thus the Recommended Decision, insofar as is here relevant, only sets forth, as required by the Agricultural Marketing Agreement Act of 1937, as amended, and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 C.F.R. Part 900), the decision of the Secretary based upon the record before him in connection with the proposal to delete the nearby differential from the Massachusetts-Rhode Island Milk Marketing Order.

Plaintiffs' motion completely fails to set forth any facts or circumstances which demonstrate in any way the failure by the Secretary to comply with the orders of this Court. Without such facts, plaintiffs' motion is without any merit. In these circumstances, plaintiffs' motion should be denied.

[Subscription and certificate of service omitted in printing]

[Filed August 18, 1967]

OPPOSITION TO MOTION ENTITLED "MOTION FOR PRESERVATION OF STATUS QUO PENDING APPEAL OF ORDER OF SUMMARY JUDGMENT DATED 6/15/67 AND FOR OTHER RELIEF" FILED HEREIN BY DEFENDANT INTERVENORS.

The plaintiffs respectfully say as follows concerning the motion of the defendant intervenors:

1. The defendant intervenors, through the New England Milk Producers Association and other cooperative associations representing "nearby" milk producers, attempted to intervene in this case in early January, 1967, shortly after the action was filed, and many of the same arguments concerning "irreparable" injury to nearby producers were made at that time by the same attorneys who presently represent the defendant intervenors, as well as by the defendant Secretary who supported the validity of his nearby differential provision and the position of the defendant intervenors. Despite such arguments concerning the one-sided view of the status quo, the Court (Matthews, J.) entered a preliminary injunction in recognition of the irreparable injury being sustained by the plaintiffs and their class, many of whom have been and are being forced out of business by lack of a decent return for their milk and who could continue in business in many instances if they did not have the differential payments extracted from them, and the Court also denied the motion to intervene of the New England Milk Producers Association. The Court noted the prejudicial attempt to enter the case by the Association to represent all of its members, most of whom are non-nearby producers in the plaintiffs' class and several of whom are individual plaintiffs herein, and it is not difficult to perceive that this action and the basic rights of the plaintiffs and their class would have been totally compromised if the Court had been deceived by these representations and request for intervention for such purpose. The said Association, instigator of the nearby differential years ago, also made the same argument as that of the present individual defendant interve-

nors and their same counsel, in respect to remand for administrative determinations, etc., because the said Association would speak for its non-nearby members at any administrative hearing and would also vote for them concerning any Decision by the Secretary. In view of the fact that both the Association, or rather the minority block that runs it, and the defendant Secretary both support the nearby differential payments of about $150 per month to the large nearby producers, it is apparent that the Court was being asked to partake in a nullification of the rights of the plaintiffs and their class, including the basic right to bring a legal action through counsel of their choice and in the forum of their choice. The defendant intervenors and their counsel were not content at that time to seek intervention for themselves, but they attempted to enter the proceedings to oust the plaintiffs and their class from their only remedy. This conduct must be considered by a court of equity when application is made to it for relief, especially when that relief would aggravate the irreparable injury being sustained by plaintiffs and their class. The Court is respectfully referred to the papers filed by such applicants (Associations) for intervention prior to the hearing on the plaintiffs' motion for preliminary injunction, the affidavits filed by their counsel and the defendant which state that plaintiffs and their class have accepted the propriety of the differential and have voted in favor of it, and to the representations made to the same effect on the hearing for preliminary injunction. These actions preclude the granting of any equitable relief, and further evidence of the lack of consultation of the Association with its rank and file members is reflected in the attached excerpts from the administrative hearing that resulted in promulgation of the nearby differential, attached hereto as Exhibit "C" and made a part hereof, the cavalier attitude displayed at said hearing conflicting with the representations made to the Court by counsel:

> "The individual producers in the zones that do not receive these nearby differentials have been consulted and to the extent they have been consulted (and they have been consulted in substantial numbers) they take

> the position that they want the Order as it presently stands to continue in effect and if there is any desire to modify the order, that is the rate differentials as presently expressed in the order, that proposition can be presented to the Secretary at the appropriate time in an administrative hearing when evidence can be presented in such hearing for the Secretary's consideration in due course, and his ultimate decision." (p. 4-6, Hearing of Jan. 11, 1967).

The plaintiffs and their class could not be represented by counsel for defendant or applicants for intervention as defendants, and the Court disposed of this inequitable contention in short order.

2. After denial of intervention, a request was made to the Secretary to suspend the nearby differential during the pendency of the legal proceedings, an action that would have precluded the escrowing of the contested differential payments, since such payments were necessarily contingent upon the continued operation of the nearby differential provision. The purpose of the requested suspension was to enable nearby producers to obtain their 12 cents per cwt. that was being escrowed along with the identical amount of non-nearby producers' monies. Such suspension would have also resulted in the payment to plaintiffs and their class of their 12 cents per cwt., since no monies could have been escrowed under the suspended differential provision. Such payments to plaintiffs' class would have been admittedly "irretrievable", and the defendant intervenors were willing to sustain this "irreparable injury" in order to get their own monies of 12 cents per cwt. and to prevent their escrowed portion from possibly being forfeited in damages for past differential payments, the statement in *Blair* about picking and choosing nearby producers from whom to demand financial redress being inappropriate when the monies of all nearby producers were in a single fund against which such claims could have been made by plaintiffs' class. The requested suspension is a complete acknowledgement of lack of real "irreparable" injury, since it actually constituted a request to pay to the plaintiffs' class those monies of the

plaintiffs' class which the defendant intervenors ask this court to escrow. Such inconsistent representations also bear on their right to presently ask this Court for equitable relief, especially in view of the fact that the nearby differential has been ruled illegal and the plaintiffs' class continues to sustain irreparable injury because of non-receipt of their monies.

3. After the Secretary denied the request for suspension during the entire time that the case would be in the courts, the plaintiffs suggested a modification of the preliminary injunction, upon considerations of equity, that would allow not only the disbursement of that portion of the nearby producers' monies in escrow but also the receipt by them of their 12 cents per cwt. in the future without escrowing thereof. This was more than that which they sought by suspension of the differential, and it also assured them that their escrowed monies would not be forfeited as damages, such monies of nearby producers being "irretrievably" lost to the plaintiffs' class by virtue of their equitable action. In appreciation thereof, the defendant intervenors have sought to continue the escrowing of the 12 cents per cwt. that is taken from out of the pockets of the plaintiffs' class each month. The District Court denied on March 21, 1967, the motion of the defendant intervenors for leave to intervene, and they were only granted the right to intervene for the purpose of prosecuting an appeal from the order of this Court granting summary judgment because "it is not clear that those interests will receive the protection of appellate review", the Circuit Court noting in No. 20,931 that it has appeared to the satisfaction of the Court that "there is no reason to believe that the interests of the appellants were not adequately represented in the District Court proceedings". The present defendant intervenors had filed a motion for a stay of the judgment of this Court, and the Circuit Court stated as follows in its order (Exhibit "D" made part hereof) of July 5th:

> ". . . this court being further of the view that no such showing has been made as would entitle these appellants to an order staying the effectiveness of the District Court's judgment;

Now, upon consideration of the foregoing, the memoranda filed by the Commonwealth of Massachusetts and the State of Connecticut, respectively, as amicus curiae, the motion for stay filed by these appellants, the opposition thereto, and after oral argument, and on the record of proceedings in the District Court, judicial notice of which has been taken,

It is by the court ORDERED:

(1) The motion for stay of the effectiveness of the District Court's order is denied;".

4. The defendant intervenors' counsel secured a copy of the foregoing Order of the Circuit Court in the early afternoon on July 5th, date of the Order, and advised counsel for the plaintiffs' class of said order the next morning and that he was going to appear that morning as a preliminary matter before the motion's judge concerning continuation of the escrowing of the monies originating from plaintiffs' pockets, the defendant intervenors now referring to the escrowed payments as the "net" differentials. Plaintiffs' counsel advised that he had not received a copy of said Order, knew nothing about it, and had other obligations that prevented him from appearing in motion's court that morning, requesting that he be given an opportunity to read the Order and that defendant intervenors' counsel wait until the following morning to take any action. Such request was refused, and plaintiffs' counsel was not thereafter advised by defendant intervenors that the motion's judge had not heard them that date or that they would reappear for such relief the following morning before the motion's clerk as a preliminary matter, plaintiffs' counsel being informed by defendant intervenors that Judge McGarraghy might come back from vacation to hear the motion. Plaintiffs' counsel nevertheless appeared in motion's court the following day when he observed the defendant intervenors' counsel ready to proceed in said Court. It was under these circumstances and for reasons known to defendant intervenors that plaintiffs' counsel "consented" to the temporary order entered by the motion's judge on July 7th. Counsel did not consent for the purpose of allowing defendant intervenors

to claim that the same constituted an acknowledgement of consent for the future, and it was also counsel's understanding that Judge McGarraghy was to return on August 1st instead of August 16th, the crucial date being the 12th in respect to the escrowing of the payments. Neither the defendant intervenors or their counsel can urge equitable considerations upon the Court as a basis for granting the requested relief, for these entire proceedings reflect a lack of equity on their part which violates every true concept of the term.

5. The defendant intervenors also claim that they are making arguments in the appellate court which were not made in the District Court because of their lack of participation herein, but the record reflects that they and their counsel were involved in the proceedings in one form or another from the commencement of the action. Further, the plaintiffs' counsel wrote to counsel for defendant intervenors on March 15, 1967, (Exhibit "A-1", made a part hereof) upon receipt of notice from the District Court that their application for leave to intervene as defendants had been denied, stating therein:

> "It would be appreciated if you would advise me as soon as possible concerning whether you desire to file a brief as amicus curiae in the proceedings in behalf of your clients."

Even after the Circuit Court had denied the motion of defendant intervenors for summary reversal of the District Court's order denying intervention, plaintiffs' counsel wrote another letter on May 8th (Exhibit "A-2" made a part hereof) to opposing counsel asking if defendant intervenors would then like to file a brief amicus curiae concerning the plaintiffs' motion for summary judgment, having also filed a formal Consent thereto herein with a Designation of all of the pertinent page records of the administrative hearing record that related to testimony concerning the nearby differential. The defendant intervenors' counsel and that of the Government claimed at that time that the administrative record was not available, which inaccurate statement was repeated on the hearing for summary judgment, and they now state that they will present arguments concerning evidence in the administrative record

that was not urged upon this Court, as well as other allegedly new arguments. It is apparent from the record herein that both the defendant and the defendant intervenors had every opportunity to present every possible argument to this Court, (Exhibit "B", letter of April 20, 1967, to defendant counsel made part hereof) the plaintiffs' motion for summary judgment having been filed herein on February 24th, approximately three months before the hearing thereon. They are thus precluded from such arguments that might have been advanced herein, and also from any equitable relief because of the misrepresentations made as a basis for such request.

6. There is little likelihood of the defendant intervenors' prevailing on appeal, and this has been accepted as a practical matter by all the involved organizations and associations connected with the milkshed, price forecasts even carrying a revised amount (increased) because of the present litigation, the outcome being an accepted fact in virtually all quarters. The defendant intervenors have filed their brief on appeal in which they attempt to justify the nearby differential as a "conglomerate" differential, being unable to find a statutory basis in the enumerated adjustments and actually attempting an amendment of the Act. The nearby differential has been declared unauthorized and void by this Court, and both the Government and present counsel for defendant intervenors argued in the *Blair* case that the nearby differential involved in *Blair* and in this case were identical, the briefs being filed as exhibits herein to the plaintiffs' motion for summary judgment. Equitable considerations and the related doctrine of estoppel would hardly allow them to reverse their position to inconsistently claim that they are now distinct in every respect. In this connection, the defendant intervenors have designated only a fraction of the record necessary for a review by the appellate court, and they have forced the plaintiffs to undergo the financial burden of their appeal. They have refused to print clearly relevant pleadings, except in a separate part of the joint appendix, refused to print cross-examination of the testimony of their witnesses unless plaintiffs paid for the same and only agreed to print it in sequence after plaintiffs' filed an appro-

priate motion with the Circuit Court. Thereafter, defendant intervenors wrote to plaintiffs' counsel stating that they would print at their expense all designations of the administrative record, the same being their main reliance on appeal. After plaintiffs' counsel filed a motion to withdraw his aforesaid motion, he was then informed by counsel for defendant intervenors that plaintiffs would have to have important parts of their designated administrative record testimony printed at plaintiffs' expense. These tactics hardly befit one seeking equitable relief.

7. The climax of the argument of the defendant intervenors made to this Court for equitable relief is that they are claiming that the escrowed funds should be paid to them even if the Circuit Court agrees that the nearby differential is illegal, this argument being made on "equitable" grounds that they have been paid such differential payments by plaintiffs' class "for 30 years", even though the Massachusetts-Rhode Island milk order was not promulgated until late 1964. This argument is the essence of inequity, especially since they and the defendant have urged all through these proceedings, upon which plaintiffs have relied and acted, that the escrowing of the monies extracted from plaintiffs class and the preliminary injunction afford "protection" to plaintiffs' class. The defendant intervenors want the escrowed monies belonging to the plaintiffs even if the differential is illegal, and the plaintiffs ask "Where is the equity on the part of defendant intervenors or the Government in any part of these proceedings?" They have received more than that to which they are entitled, but they mistake the equitable considerations that have motivated the plaintiffs for an endless imposition upon them that aggravates the injury the plaintiffs continue to sustain because of the initial and continuing inequitable conduct of a few producers who would fatten on their fellow dairymen's injury. The District Court refused to recognize that defendant intervenors represented the class of nearby producers, for it would be unjustly stigmatizing the great majority of such producers to say that these few individuals represented the thinking of the same, in that only a small minority in

every field are desirous of injuring their fellow man. Additionally, the nearby producers receive differential payments of direct delivery and transportation in significant amount over and above the price received by non-nearby producers. The nearby producer can also receive the nearby differential payments from handlers if their milk has any additional value over that of the non-nearby producers, since the price set by the Order is a minimum price, and this is their claim for the nearby differential—that their milk has additional value to the handler. If so, it is evident that they can sustain no true irreparable injury, for such handlers can pay them twice the amount of the nearby differential if their claim is true.

It is evident that no valid basis exists for continuing the escrowing of the plaintiffs' monies or perpetuating the irreparable injury to them, and it is also clear that the defendant intervenors are not entitled to urge such request for equitable relief upon this Court, their own action herein disentitling them to even make such claim therefor. In view of the fact that the plaintiffs prevailed in the District Court, it is apparent that the defendant intervenors should be required to give such bond as would protect the plaintiffs' class during the remainder of this proceeding, in that plaintiffs' class are unable to utilize the escrowed funds that are urgently needed by them to even stay in business in some instances. In view of the inequitable request of defendant intervenors, the plaintiffs class hereby request that the modified preliminary injunction be modified so as to again require the escrowing of the monies previously originating from the nearby producers and that plaintiffs' class be allowed to file claims against the total amount of the same for recovery of past damages if they ultimately prevail herein, or that the requested bond extend in like amount to such sums which have been or otherwise would have been deposited in escrow except for such modification of the preliminary injunction and the release of nearby producers monies from escrow or future escrowing, and that the motion of defendant intervenors' be denied in all respects.

[Subscription Omitted in Printing]

[Filed Oct. 13, 1967]

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS

September 5, 1967

[1] The above-entitled cause came on for hearing before The Honorable JOSEPH C. MC GARRAGHY, Judge of the United States District Court for the District of Columbia at 10:30 A.M.

Appearances:

In behalf of the Plaintiffs:

CHARLES P. RYAN, ESQ.

In behalf of the Defendant:

IRVIN GOLDBLOOM, ESQ., Special Attorney,
U.S. Department of Justice

In behalf of the Defendant-Intervenors:

LAWRENCE HOLLMAN, ESQ.

[3] PROCEEDINGS

THE DEPUTY CLERK: Allen versus Freeman, Civil Action 3379-66.

Civil motion to be argued by Mr. Ryan.

THE COURT: As I understand it there are two motions that have been filed, one by the plaintiff and one by the defendant. Is that correct?

Who filed the first one?

MR. RYAN: I did.

THE COURT: You want to be heard?

MR. RYAN: Yes.

May it please the Court, there are two motions presently pending before the Court, one which was filed by the Plaintiffs and that was entitled a motion to preserve the effectiveness of this Court's Judgment.

On June 15, 1967, the Court did enter an Order granting summary judgment to the plaintiffs and declaring the nearby differential provision of the Massachusetts-Rhode Island Milk Order to be unauthorized and void under the Statute under which it was purported to be promulgated by the Secretary.

Also, at the same time, in that Order enjoined the Secre-

tary from enforcing that particular differential [4] under the same or any other name or designation of that Milk Order or any future milk order.

Now, subsequent to that time and while this Order was in effect and while there was no stay, this Court incidentally denied the defendant's motion for a stay at the time of entering the order and then subsequently the Court of Appeals also denied the motion for a stay that was filed by the defendant-intervenors in the Court of Appeals, Frederick T. Zuber, et al. So, subsequent to that time, the Secretary caused to be issued a recommended decision in which he states that the particular farm location differential provisions under the Massachusetts-Rhode Island Order should be continued.

Now, this was subsequent to this Court's Order declaring that differential unauthorized and void. So, a question arises in our minds specially in view of the type of proceedings that take place in these administrative hearings whereby we are not represented and in view of the fact that this Court has previously also held that the Secretary was not entitled to a stay of these proceedings pending the alleged exhaustion of the administrative remedies. We are concerned that this is an attempt to perpetuate this differential contrary to this Court's Order and we will sustain additional irreparable injury [5] because the Secretary's intent is clear and to us it flies in the face of this Court's Order.

And we are concerned also that he purports to enlarge the marketing area which would extend the injury, and possibly give him grounds for saying, although in our view speciously that this is a new differential and, of course, the Order of this Court precludes this particular type differential under the same or any other designation, any other order.

Now, we are also concerned because in this recommended decision that was published in the Federal Register on July 6, 1967, the Secretary also purports to rectify his previous lack of findings.

He re-opens by himself without any notice, without any opportunity for a hearing or anything else. He simply re-opens a hearing record that took place 30 years ago in 1936,

1937, and he substitutes findings made at this time for findings that were made in 1937.

We think that this is highly unusual procedure and, of course, it doesn't accord with due process or any formal amendatory procedures that he is obligated to follow and also we think it is an impossibility to promulgate these new findings under such circumstances.

[6] We think that this Court's Order was clear and we would like some explanation from the Secretary and his representatives concerning the purpose of the recommended decision in view of this Court's Order.

Thank you, Your Honor.

RESPONSE IN BEHALF OF THE DEPARTMENT OF AGRICULTURE, BY IRWIN GOLDBLOOM, ESQ., DEPARTMENT OF JUSTICE

MR. GOLDBLOOM: I am Irwin Goldbloom, Department of Justice, representing the Defendant. May it please the Court, Your Honor. I am frank to state I am somewhat at a loss to understand the whole basis and purpose of the pending motion.

THE COURT: May I be frank, too? I am at a loss to understand why this was taken by the Department of Agriculture while this proceedings is pending in the Courts. It seems to be contrary to the ruling of this Court and in defiance of a ruling of this Court.

MR. GOLDBLOOM: With all deference and respect, Your Honor, I must–

THE COURT: I can't read it any other way.

MR. GOLDBLOOM: The ruling is a recommended decision.

THE COURT: A recommended decision which would go contrary to the ruling of this Court, would it not?

[7] MR. GOLDBLOOM: The recommended decision is in response to a proposal made by a farmer to delete the provision.

THE COURT: Wouldn't it be contrary to the ruling of this Court in the case of Allen against Freeman?

MR. GOLDBLOOM: No, Your Honor, it would not be.

THE COURT: It would not be contrary to it, and not inconsistent with the ruling now pending in the Court of Appeals?

MR. GOLDBLOOM: Unless it is demonstrated that the Secretary has violated the Court's Order by effectuating–

THE COURT: Doesn't the recommended ruling carry out a violation if it goes into effect?

MR. GOLDBLOOM: No, it does not.

THE COURT: I think so.

MR. GOLDBLOOM: Because the Secretary is fully aware of this Court's instruction.

THE COURT: I understand he is but he ignores it.

MR. GOLDBLOOM: As I read this, this is simply a discussion which is required under the rules of practice.

THE COURT: Why don't you let the case go to the Court of Appeals and be decided on by the Court of Appeals on the record which was made in this Court, and on which this Court [8] ruled instead of trying to change the record in the course of litigation?

MR. GOLDBLOOM: Your Honor, I respectfully suggest we are not attempting to change the record and to the extent that there is any statement that did not appear at the time of the Court's ruling, it is clear and open what the Secretary is saying.

THE COURT: I agree it is clear and open, but I think it is inconsistent with the Court's ruling.

MR. GOLDBLOOM: Well, the Secretary has taken no action whatsoever which would in any way undermine or fly in the face of the Court's Order.

THE COURT: What would happen–let's assume the Court of Appeals shall affirm the ruling of this Court. What would be the status of the case then?

MR. GOLDBLOOM: The Secretary would be permanently enjoined from effectuating.

THE COURT: Wouldn't he be enjoined from what he now proposes to do in this?

MR. GOLDBLOOM: He proposes to do nothing affirmative, Your Honor.

He simply denied the proposal to delete the nearby differential which has nothing whatsoever to do with the law suit.

[9] As we understand the case, the proposal was simply to delete the differential. The plaintiffs in this case have succeeded in obtaining that differential by an injunction of the Court.

THE COURT: Why was it necessary for the Secretary to make these findings?

MR. GOLDBLOOM: This is his discussion under the Rules of Practice.

THE COURT: It is his discussion in which he finds fault —takes issue—with the ruling of this Court. Isn't that a fact?

MR. GOLDBLOOM: Well, the statements speak for themselves.

THE COURT: I think they do, too.

MR. GOLDBLOOM: I don't believe there is any purpose to take issue in any way which would undermine the Court's Order. There is a clear recognition by the Secretary that he is enjoined and in no way—as the provision—as the Secretary, himself, has said, we do not, of course, by our present findings in the matter intend to ignore or circumvent in any way the recent decision of the District Court in the Allen case.

In the present circumstances and pending final disposition of the Allen case, and such appellate decision that may be taken in furtherance of our authority under the [10] Act, we are constrained to state our full views in this matter.

This statement is made in response to a proposal made quite sometime ago to delete—

THE COURT: Isn't this the same proceedings that was pending at the time this matter was before the Court in the case, for the Court to remand the case to the Secretary for further proceedings, and the Court refused to do so?

MR. GOLDBLOOM: That is so. The Government proposed that the Court not rule on the matter.

THE COURT: That is right.

MR. GOLDBLOOM: Until the Secretary had ruled.

THE COURT: That is right. But the Court said it would not do it—that—The Court said it would rule.

So, therefore, the Secretary went right ahead and did what the Court said he shouldn't do.

MR. GOLDBLOOM: I didn't read the Court's decision as restricting the Secretary from concluding the administrative proceedings.

I might point out to the Court that the matters before the Secretary contained some 65 or so proposals and the discussion of various proposals under the Massachusetts-Rhode Island [11] Marketing Order covers some 22, 23 pages of discussion in the Federal Register, the Secretary covering many many other topics and provisions of the Order other than the nearby differential.

The Secretary has the responsibility to conclude these rulemaking proceedings and all that is involved here is a recommended decision. It gives the parties, those who are interested, an opportunity to submit their exceptions to this ruling and as it turns out, the exceptions, the time for filing has already elapsed, but numerous exceptions have been filed; the matter is still pending for referendum, and there is no vote as of this time.

As I would read the Plaintiff's motion, it would be to say to the Secretary: You are forever enjoined from conducting administrative proceedings here; but I would like to point out the Secretary has not done anything affirmative.

THE COURT: I think what it means is you are enjoined from conducting administrative proceedings which are inconsistent with the ruling of this Court.

If the Court of Appeals should reverse this Court, of course, it would restore it to the status quo, but if the Court of Appeals should affirm, that is the law of the case.

I don't understand the Secretary has a right to [12] defy this Court.

MR. GOLDBLOOM: I don't believe the Secretary has in any way defied any Order of the Court.

The Court requires him not to enforce the provision held invalid and the Secretary has not enforced that provision consistent with this Court's Order and subsequent Court Orders.

THE COURT: Isn't the Secretary proceeding on the

assumption this Court's ruling is incorrect, and the validity of the Regulation?

MR. GOLDBLOOM: I believe the Secretary's statement is proceeding on that assumption, but in no way has he taken any action.

THE COURT: He hasn't taken any action; but it is preliminary to the action; it is a step in the action.

MR. GOLDBLOOM: I fail to see how the Secretary can take any action in the face of the Court's instruction.

THE COURT: I agree with that.

MR GOLDBLOOM: And, I submit to the Court, the Secretary under no set of circumstances intends to avoid or act in any way in defiance to the Court's injunction.

THE COURT: Do I understand you to say to the Court, the Secretary does not propose to take any action in this matter until final disposition of the case in the Court [13] of Appeals or whatever appellate proceedings might be taken? It might go up to the Supreme Court. I don't know.

MR. GOLDBLOOM: I am not certain I understand the Court's question.

THE COURT: The findings which the Secretary has made, which are published in the Federal register, I understand you to say is a preliminary step to a further step to be taken by the Secretary. This is one step in the administrative procedure?

MR. GOLDBLOOM: That is correct, Your Honor.

THE COURT: Which would ultimately result in a ruling by the Secretary which is inconsistent with the ruling of this Court in the Allen case, isn't that a fair statement?

MR. GOLDBLOOM: If the Secretary would put into effect a marketing Order which he failed to delete, the proposal, it would only be an act in defiance if he thereupon set his own Order above the dignity of this Court's Order, and proceeded to act in defiance of the Court's Order.

I do not believe that there is any basis upon which the Secretary will act in defiance of the Court's Order.

THE COURT: Do I understand you to concede? Correct me, if I am wrong; I could be, obviously. You say the steps

which have now been taken by—have been taken by the Secretary, are preliminary to an issuance of the Order [14] inconsistent with the ruling of this Court; is that a correct statement?

MR. GOLDBLOOM: That is correct, Your Honor.

THE COURT: Don't you think I should stop it?

MR. GOLDBLOOM: You shouldn't stop it, Your Honor, until the Secretary has acted in some way which is directly inconsistent.

THE COURT: He is now acting in a preliminary way to defy this Court's order which is now an Order of the Court.

MR. GOLDBLOOM: With due deference, Your Honor, the Secretary—

THE COURT: Do you concede that?

MR. GOLDBLOOM: But what this involves is a denial of the Secretary's—for want of something better—his right of freedom of speech to discuss what the issues are in an administrative proceeding. The Secretary does—under no circumstances, intends to defy the Court's Order.

THE COURT: It all depends on what we mean by defy. You, apparently, have a different concept of "defy" than I do. You think a defiance would not arise until the Secretary in fact issued an Order which ignored and was contrary to the ruling of this Court.

[15] I am inclined to take the view that preliminary steps are also in defiance of this Court if their ultimate object is the issuance of an order which is inconsistent with this Court's ruling.

MR. GOLDBLOOM: I do not believe that the Secretary would issue an order.

THE COURT: But you do agree that the Secretary has taken steps now leading to the issuance of an order which would be contrary to the ruling of this Court; is that a correct statement?

MR. GOLDBLOOM: If I may explain myself in terms of—

THE COURT: I am sorry. I shouldn't be interrupting you. You go right ahead.

MR. GOLDBLOOM: I simply would like to explain myself. The Secretary, if he should issue an order as result of these

administrative proceedings would clearly upon the issuance of such an order recognize the injunction of this Court as barring him from proceeding to enforce or effectuate any provision relating to the nearby differential. To that extent it would clearly not be inconsistent or defiant of the Court's Order.

The Secretary would not issue an Order which would not recognize the outstanding effectiveness of this Court's [16] injunction so that I don't—if I committed the Secretary to that course of action, which the Court described as acting in defiance of the Court's Order, let me retract it. The Secretary will not issue an order as result of this administrative proceeding which would be in defiance of the Court's Order—that is, the Court's injunction. (correcting)

All it has done here is a discussion on the basis of the record before the Secretary, in this administrative proceeding. The Secretary—if this should go to a final decision after a referendum of the affected dairy farmers—

THE COURT: Do you mean that during the pendency of this litigation in the appellate courts that you would go through a referendum?

MR. GOLDBLOOM: There are numerous other provisions in this Massachusetts—Rhode Island Marketing Order. There are some 65 or so—and they relate to many many features of the Order.

As we have pointed out, the administrative matter has been pending before the Secretary for some time and naturally there are things that need to be corrected or amended in the course of the administrative proceedings. If this referendum should go forward, it wouldn't involve the effectiveness of this Court's Order. It would involve all these other provisions which the Secretary discusses in the course of his recommended decision.

[17] THE COURT: You mean the Court's Order is going to be submitted to a referendum?

MR. GOLDBLOOM: No, Your Honor. I do not mean that. What I am saying to the Court is: The secretary will not act in a final decision as a result of these administrative proceedings which in any way will undermine the Court's Order or be inconsistent with the Court's Order. He cannot do it obvious-

ly since he is under an injunction and he cannot unilaterally circumvent the Court's Order and I do not believe there is any intention on the part of the Secretary to do that. The Secretary has an obligation to administer this marketing order and to take care of the matters that are pending before him during these administrative proceedings. But, I am certain that the Secretary will not as a final matter act in any way which will be inconsistent with the Court's ruling.

He cannot superimpose the final Order over this Court's injunction, and he will not.

THE COURT: What I can't understand: If I concede that and I am sure you are speaking in good faith—how can you say the Secretary has a right to take all these preliminary steps which lead to a substitution of the Secretary's ruling for that of the Court?

MR. LIEBERT: May I speak? I am George G. Liebert. I represent the Office of the General Counsel. I'd like to [18] clarify one point.

Your Honor, the way the Departmentof Agriculture feels about this matter is that the Secretary had an obligation to conclude and make findings on the basis of a record which was about a year old, involved many proposals. You have said that this step taken was a preliminary matter indicating an intention to conclude it in the form of an Order.

We do not so consider it. We believe that this is a matter in which the Secretary has said: This is the way I dispose of the proposals which were before me.

THE COURT: Including—

MR. LIEBERT: (interrupting) Including one which was to delete the provision from the Order. He simply said I find no evidence on this record, not before the Court, on this record, and that is what he has to do by statute—to make his findings on the record. I find nothing in this record which would cause me to delete. Me to delete. However, I am aware of the fact that the District Court did enjoin this and until that matter is disposed of, I have said what my position is with respect to this record. That is all. It was not preliminary to enter an order in opposition to this Court's ruling.

Not at all. This is merely a conclusion of an administrative proceedings in a very orderly way.

In fact, I would go so far as to say that the [19] Secretary would be remiss if he hadn't stated his full views on the record.

THE COURT: It sounds like he was trying to get in an argument with the Court.

MR. LIEBERT: No, sir.

It was not his intention. I can say this because I am the one who suggested this was the best way to couch this matter with full deference to the Court's ruling but also with full understanding that the Secretary in the administrative proceedings had his own obligation which he undertook to fullfill on this record, and that is what he did do.

This is our view. It is not with any intention whatsoever–I think the issue is being clouded when it is indicated that the Secretary meant to defy the Court Order.

That isn't in the cards at all. He could not as a matter of law. We all know this; issue an order in opposition to the injunction, but he has to conclude his own administrative proceeding. He has a primary jurisdiction in this matter.

THE COURT: Let's go along, and agree with all that you say. Let's assume that the Court's Order becomes final as result of the appellate proceedings. What is the position of the Secretary now with respect to the subject matter of the [20] Court's Order?

MR. LIEBERT: To delete this provision from the Order, of course.

THE COURT: You do agree that this provision is now deleted by reason of this Court's Order, and will stay deleted so long as this Court's Order is in effect?

MR. LIEBERT: Except insofar, Your Honor–except insofar as this provision and the force and effect of it is in the status quo, money still accumulates in the escrow fund because–because if you in totality deleted this provision in the Order there would be deleted all the accumulation in the fund. So, there will be a partial deletion. We have a failure or a refusal on the part of the Secretary, tantamount–in following

the Court's Order—not to pay out any of these monies; but if a deletion were in effect no money is going to accumulate at all.

THE COURT: Only to the extent that the money is going to accumulate on the escrow agreement—

MR. LIEBERT: Yes.

THE COURT: (continuing) Beyond that, that is the full extent of what is being proposed now?

MR. LIEBERT: Yes. The Secretary doesn't— (not finishing)

MR. RYAN: Your Honor?

[21] THE COURT: Mr. Ryan, do you have anything you want to say in light of this discussion?

MR. RYAN: Yes. First of all, I'd like to make clear that I think these administrative proceedings have been nursed along with the view that they will still be able to say before the Court of Appeals, which they are still saying in the briefs filed in that Court, that these proceedings are still pending.

Actually, the market administrators bulletin shows that these proceedings should have been concluded in January. But once this suit was filed they have been extended and extended.

Not only that, Your Honor, I might mention in that connection, my clients do not have representation really in these proceedings because of a fact that a large number of them belong to organizations like the New England Milk Producers Association, the Dairymen's League—The representatives of those two organizations attempted to intervene in these proceedings. The same attorneys here for the defendant represent those organizations. Now, if they represent us in those administrative proceedings if they vote for us, I submit that we do not have any representation and that the prolongation of these proceedings is just meant to cause us further irreparable injury.

Not only that, Your Honor, but I think that the [22] recommended decision is clearly an affront to this Court.

It goes not solely to the administrative record which was before the Secretary which I might also mention was before this Court, but they go into the Green Valley case, they go

into the Blair case, they state that the Court entered an Order–

THE COURT: They write a brief.

MR RYAN: That is correct, Your Honor.

Allegedly, a class action. They are almost totally in error in virtually all of these paragraphs.

THE COURT: What do you want the Court to do?

MR RYAN: I think the Secretary should hold his hand, Your Honor, in deference to this Court, let alone in respect for the Order of this Court, and that it should delete these provisions from the decision, and not take any further affirmative action pending the resolvement of the issue before the Court of Appeals.

THE COURT: Are you prejudiced at all by these–Federal Register publication?

MR. RYAN: I think I am to the extent where they have tried to issue new findings, to substitute for those which they previously did not make.

THE COURT: They are not the findings before this [23] Court?

MR. RYAN: That is correct, Your Honor, but what I am concerned with is: If they attempt to say that this is–if a new order is issued, that we have to go through this litigation again, through some particular administrative procedure.

That is why I have asked them to come in and to tell the Court what they have in mind.

THE COURT: They pretty well explained what they have in mind.

MR. RYAN: But I think we could be prejudiced by this decision because it does set forth factors or findings that were not before this Court but which they might claim as a new order. In other words, this is the Massachusetts-Rhode Island Order. They also purport to rename this order, to the Massachusetts-Rhode Island-New Hampshire Order, and they may make the contention that this is a separate differential provision under that situation.

I am concerned that we might be forced to undergo additional litigation, Your Honor.

I think they should hold their hand, under the circumstances.

THE COURT: Do you want to say anything further? Either one of you or anyone else?

[24] MR. GOLDMAN: All I would add on the question of prejudice. I fail to see how the plaintiffs are in any way prejudiced by anything the secretary has said in this recommended decision.

MR. LIEBERT: I would like to address the court on one matter on which I think the Court has been misinformed.

THE COURT: If I have been misinformed? I have read the papers. No one has said anything to me; it is my interpretation of the papers.

MR. LIEBERT: Your Honor, I was only going to suggest that the counsel advised the Court there was no way in the world in which his clients could be represented in an administrative hearing before the Secretary. This is incorrect.

The proposal to delete the differential was made by one man—his name was Allen—to delete the proposal. He was supported by five or six individuals. No member of a cooperative undertook to do this.

THE COURT: Were they instigated or encouraged to do it by anyone else?

MR LIEBERT: I have no way of knowing.

THE COURT: It sometimes happens.

MR. LIEBERT: I have no way of knowing that. I only know that these individuals did come. The only point [25] on which I would address myself to the Court and cure was the fact that everybody in an administrative proceeding who has an interest can come in and be heard. Now these people were heard. Maybe not the particular individual clients of Mr. Ryan and Mr. Adams and the others who signed the original petition but certainly any individual in an administrative proceeding may come forward and be heard and on this particular issue on this record which is under discussion they were heard.

Thank you.

THE COURT: I must confess, I don't understand why the Secretary has gone ahead with making these findings which in

my judgment are contrary to the findings of this Court in this case, and there could be some motive which is not clear, which concerns me. Because we have these things from time to time with administrative agencies.

However, in the light of the representations made to the Court, I am of the opinion that no further action should be taken by the Court at this time in relation to the matter which Mr. Ryan has brought to the Court's attention.

Is that clear?

MR. GOLDBLOOM: Yes.

(Whereupon, at 10:45, the hearing on the motion was concluded.)

[Filed Sept. 15, 1967]

[Caption Omitted in Printing]

ORDER

This matter having come on before the Court on September 5, 1967, on plaintiffs' motion for preservation of effectiveness of the judgment and order of this Court, and the Court having considered the plaintiffs' motion and the defendant's opposition thereto, and counsel having been heard, and the Court being fully advised and having denied the motion upon the representations made by counsel for the defendant, it is this 15th day of September, 1967,

ORDERED that plaintiffs' motion be, and it is hereby denied.

/s/ Joseph C. McGarraghy
United States District Judge

[Filed Sept. 15, 1967]

[Caption Omitted in Printing]

ORDER

This Court, having entered a preliminary injunction on the 16th day of January, 1967, restraining and enjoining the defendant Secretary of Agriculture from enforcing the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, and requiring the defendant Secretary to take all necessary action to collect and place the nearby differential payments in an escrow fund pending further order of this Court,

and This Court having entered an order on the 17th day of March, 1967, on consent of the plaintiffs and defendant, modifying the said preliminary injunction to allow for the disbursement from said escrow fund of that portion thereof as was attributable to the marketing of milk of nearby producers and for the future payment to nearby producers of that portion of the nearby differential as is pro rata attributable to the marketing of their milk, the portion of the nearby differential payments emanating from non-nearby producers as attributable to their marketing of milk remaining in said escrow fund and being subject to future escrowing each month pending further order of this Court,

and this Court having on the 15th day of June, 1967, entered an order granting summary judgment in favor of plaintiffs and their class of non-nearby producers, (McGarraghy, J.),

and the Court of Appeals for the District of Columbia having on the 5th day of July, 1967, entered an order denying the defendant intervenors' motion for a stay of effectiveness of the order and judgment of this Court of June 15, 1967, but without prejudice to this Court's entry of such order as it may deem advisable concerning preservation of the status quo pending appeal, and a consent order having been entered by this Court (Waddy, J.) on the 7th day of July, 1967, temporarily preserving the status quo pending a full hearing on the question before Judge McGarraghy, and

Upon consideration of the motion for preservation of the status quo filed herein by the defendant intervenors on August 11, 1967, the Opposition of the plaintiffs thereto, as well as the points and authorities filed herein, and the memoranda of the States of Massachusetts, Connecticut and Vermont as *amicus curiae*, and after hearing argument of counsel for defendant intervenors and plaintiffs in open court, and counsel for the defendant having advised in open court that it has no interest in the contested funds or objection to the motion of the defendant intervenors, thereupon, upon consideration of all of the foregoing and it appearing to the Court that if the escrow fund was presently disbursed pro rata to non-nearby producers and they henceforth received a uniform price for their milk without deduction of the nearby differential and escrowing of the same, there would be no practical means of recovery of such monies in the event of reversal of this Court's order and judgment of June 15, 1967, and it further appearing to the Court that preservation of the status quo would simply require payment into the escrow fund as heretofore provided by the order of this Court of January 16, 1967, as modified by the consent order of this Court of March 17, 1967, pending a decision by the Court of Appeals on the appeal taken by defendant intervenors from the order of this Court of June 15, 1967,

WHEREFORE, it is by the Court this 15th day of September, 1967,

ORDERED, that the portion of the nearby farm location differential of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, attributable to the marketing of milk of non-nearby milk producers, and which under the June 15, 1967, Order of this Court would be paid to the plaintiffs and their class of non-nearby producers, shall continue to be deposited in the said escrow fund or account in the custody of this Court in accordance with the terms set forth in the preliminary injunction entered herein on January 16, 1967, as modified by the consent order entered herein on the 17th day of March, 1967, pending a decision by the United States Court of Appeals for the District of Columbia on the appeal taken by

defendant intervenors from the order of summary judgment of this Court of June 15, 1967, or the further order of the United States Court of Appeals, and it is further

ORDERED, that the Order and Judgment of this Court of June 15, 1967, shall remain effective in all respects except as to the escrowing of the aforesaid nearby differential to preserve the status quo.

/s/ Joseph C. McGarraghey
District Judge

September 15, 1967—Margin endorsements on both proposed orders for stay, one filed by Plaintiffs and the other by Zuber et al., were as follows: "This proposed order is disapproved."

[Filed July 10, 1967]

Notice of Appeal

Notice is hereby given this 10th day of July, 1967, that the Intervenors hereby appeal to the United States Court of Appeals for the District of Columbia from the Order entered herein on June 15, 1967 denominated "Order Granting Motion for Summary Judgment & Judgment for Declaratory and Injunctive Relief."

[Subscription omitted in printing]

[Filed August 14, 1967]

NOTICE OF APPEAL

Notice is hereby given this 14th day of August, 1967, that defendant Orville Freeman, Secretary of Agriculture, hereby appeals to the United States Court of Appeals for the District of Columbia from the order of this Court entered June 15, 1967, granting plaintiffs' motion for summary judgment and judgment for declaratory and injunctive relief, in favor of plaintiffs and against said defendant.

Appeal is also hereby taken from the order of this Court entered March 13, 1967 denying defendant's motion to hold proceedings in abeyance.

[Subscription Omitted in Printing]

EXHIBIT FILED BY APPELLEES AS AN ATTACHMENT TO THEIR MOTION FOR SUMMARY REVERSAL IN DOCKET NO. 21,308.

UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE
WASHINGTON

I hereby certify; pursuant to Title 28, United States Code, Section 1733, that each attached document is a true and correct copy of a document in my official custody as hereinafter described:

Copies of Exceptions to the Recommended Decision (32 F.R. 9902, July 6, 1967) in the proceeding entitled "Milk in the Massachusetts-Rhode Island-Connecticut Marketing Areas - Docket Nos. AO 14-A 38 and AO 305-A 12" filed by the following:

1. Leonard F. Korzun, Cuttingsville, Vermont [Vice-Chairman, Dairy Emergency Council, and Trustee of Farm Bureau]

2. David F. Dickinson, President, East Wallingford-Pittsford local N.E.M.P.A. 145 Members

3. Jesse D. Billings, 3rd, Milk Producer Delegate for Ruthland-Pittsford Vermont local Dairymen's league Coop.

4. Frank W. Hyde, Chairman, Vt. State Grange Agriculture Comm., Randolph Center, Vermont

5. R. Gilbert Buckley, Livermore Falls, Maine [Pres., Local]

6. B. W Stryker, President, Corinth, N.E.M.P.A., Corinth, Vermont

7. Harold M. Carson, Newbury, Vermont [Pres., Alliance of Northeast Dairymen]

8. Paul E. Durost, President, Island Falls, local N.E.M.P.A.

9. Peter Galbeani, President, Bradford local

10. Robert Townsend, President, Lyndonville [Local]

11. Harold Wentzell, Colebrook, New Hampshire local N.E.M.P.A.

12. Joseph Sheham, President, Manchester Augusta Maine local

13. Farrington L. Charles, President, Madison-Skowhegan N.E.M.P.A.

14. Philip H. Hoff, Governor, State of Vermont

15. Dwight F. Bessette, President, Middleburg, Vermont

16. Dean Jackson, President of Eastern Milk Prod. of New Haven, Vermont

17. Merlin T. Doyle, President, Chelsea, Vt. N.E.M.P.A.

18. Theron C. Benedict, President, Vergennes, Vt. Dairymen League

19. Francis Atwood, President, Bellows Falls local

20. Charles A. Goldsmith, President, Derry & Chester N.H. local N.E.M.P.A.

21. Dwight F. Bessette, Vergennes, Vermont [Pres., Middleburg Local]

22. George Andrew, Plainfield, Vt. [Marshfield & Plainfield, Vt., Local, N.E.M.P.A.]

23. Francis Branon, Secretary, Alliance of the Northeast Dairymen

24. Keith Wallace, President, Vermont State Farm Bureau, Inc.

25. David F. Dickinson, Chm. Dairy Emergency Council

26. Robert J. Branon, Commissioner of Agriculture, Vermont State Department of Agriculture [4,200 farmers]

27. Cover page and pages 10, 11 and 12 of Exceptions submitted by John C. York, General Manager, Eastern Milk Producers Cooperative Association, Inc.

28. Page 1 of Exceptions submitted by David C. Arms, Economist on behalf of 10 listed Cooperatives

29. Robert A. Magoon, Secretary, Vermont Federation of Sportmen's Clubs [7,000 members]

In testimony where of I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia, this 31st day of August, 1967.

/s/ Orville L. Freeman
Secretary

By /s/ Eugene R. Meyer
Hearing Clerk

168-A

JOINT EXCEPTION

TO RECOMMENDED DECISION ISSUED JUNE 27 WITH RESPECT TO NEARBY FARM LOCATION DIFFERENTIALS IN PROPOSED MASSACHUSETTS - RHODE ISLAND - NEW HAMPSHIRE FEDERAL MILK ORDER

(Material Issue No. 8)

[Rec'd Aug. 14, 1967;
U.S. Dep't of Agr. Office of the Secretary;
The Hearing Clerk]

IN BEHALF OF:

Cabot Farmers' Coop. Creamery, Inc.	Cabot, Vermont
Grand Isle County Coop. Creamery Assn., Inc.	Grand Isle, Vermont
Granite City Coop. Creamery Assn., Inc.	Barre, Vermont
Maine Dairymen's Association	Augusta, Maine
Milton Cooperative Dairy Corporation	Milton, Vermont
Northern Farms Cooperative, Inc.	Montpelier, Vermont
Richmond Cooperative Assn., Inc.	Richmond, Vermont
St. Albans Cooperative Creamery, Inc.	St. Albans, Vermont
United Farmers of New England, Inc.	Boston, Mass.
White River Valley Dairies, Inc.	Randolph, Vermont

The above cooperative associations representing producer members in northern New England and in New York jointly except to the recommended decision to retain and enlarge the discriminatory nearby farm location differential payment provisions in the proposed Massachusetts - Rhode Island - New Hampshire Federal Milk Order.

The farm location provisions are not in the public interest for they perpetuate two basic inequities not authorized under the Agricultural Marketing Agreement Act. These inequities are: (1) the transfer of pool monies otherwise accruing to all producers to select producers located closer to the marketing area, and (2) the establishment of artificially low values or prices for milk at distant country points thus serving as an effective deterrent to the entry of milk supplies that might otherwise compete for outlets.

STATE OF VERMONT
DEPARTMENT OF AGRICULTURE
MONTPELIER
05602

[Rec'd Aug. 11, 1967]

July 26, 1967

Hearing Clerk
United States Department of Agriculture
Washington, D. C. 20250

Statement of Vermont Department of Agriculture filed as exception to the Recommended Decision on Proposed Amendments to the Massachusetts-Rhode Island and Connecticut Federal Market Order

To base the decision on historical evidence to retain nearby differentials in the Massachusetts-Rhode Island Order is not valid. Previous to improved transportation and refrigeration, handlers were willing to pay a higher price for local milk, in order to insure an adequate supply of fresh milk. However, as improved transportation and refrigeration was developed, the handler no longer was willing to pay a higher price and began to import milk from distant farmers for his needs. This resulted in milk coops and associations finding it difficult to find a Class I market for local milk and so they requested a hearing for a Federal Milk Marketing Order, which eventually was established.

One of the functions of a Federal Milk Marketing Order is to establish a minimum price for milk by an approved economic formula. There is no valid reason, therefore, to manipulate this minimum price within the Order by taking money from one group of farmers and giving it to another group.

The 4200 dairy farmers supplying 50% of the milk to the Massachusetts-Rhode Island Order are concerned about the nearby differential to the extent that it could jeopardize an orderly market and an adequate supply, which is the objective of a Federal Milk Market Order.

The Vermont Department of Agriculture, therefore, requests that you reconsider your decision on nearby differentials.

/s/ Robert J. Branon
Commissioner of Agriculture
Vermont State Department of Agriculture

VERMONT STATE FARM BUREAU, INC.
24 Elm Street
MONTPELIER, VERMONT 05602

[Rec'd Aug. 14, 1967]

Aug. 9, 1967

Hearing Clerk
U.S. Department of Agriculture
Washington, D.C. 20250

Dear Sir:

We have received the notice of recommended decision on amendments to the Massachusetts-Rhode Island Milk Marketing Order as published in the Federal Register volume 32-Number 129 of Thursday July 6, 1967.

We are in accord with most of the proposed amendments presented there. However, we wish to file exception in connection with Number 8, farm location differentials. We believe that most of the justification for the original establishment of location differentials for nearby producers which were then existant, such as higher taxes, labor and other production costs, are no longer an important factor. In addition, "Normal supplies of milk for the Boston area" now include northern New England.

For these reasons we believe the location differentials should be discontinued, effective when other amendments contained in the recommendation decision go into effect.

Sincerely,

/s/ Keith Wallace,
President

KW:jl

[Rec'd Jul. 24, 1967]

Cuttingsville, Vermont 05738
July 16, 1967

The Hearing Clerk
United States Department of Agriculture
Washington, D. C., 20250

Dear Sir,

I wish to file exception to section 8 on farm location differentials under the hearing held for milk in the Mass.-R.I. and Conn. Marketing areas. I am a dairy farmer in Shrewsbury, Vt., shipping bulk milk to a United Farmers plant in Charlestown, Mass. My grandfather once shipped fluid milk via rail to Hood in Boston in 1924. Subsequently, the area farmers were dropped from this market.

In defense of retaining the nearby differentials you use the terms "customarily," "historically," "were preserved," et cetera. These seem to be your sole arguments. I feel they are archaic and out dated. The situation now differs: 1) A far larger percentage of the fluid milk comes from beyond the nearby zones than in 1937. 2) Most of the milk is now bulk tank, far easier to ship and cooled by the producers. 3) The federal orders set a *minimum* price dealers must pay; there is nothing to prevent a dealer from paying nearby farmers a premium. If dealers will not on their own, then how does your argument

stand that the far away producers need to subsidize the nearby ones? 4) In 1965 the highest percentage of farmers going out of business was in Vermont. 5) In 1966 it was the Vermont farmers who protested strongly enough for the USDA to hold hearings on milk pricing; not the nearby farmers who must have been getting enough. 6) In sending letters out to the Rutland County farmers we have received an overwhelming response in favor of eliminating the nearby differentials and a pledge of money from 25% of them to support the court case; we feel that a referendum would overwhelmingly ask for the elimination of nearby differentials. 7) This past month two farmers whom we know committed suicide, one from labor troubles, another from financial problems, both with 120+-head herds. 8) In late 1965, Vermont farmers' prices were so low that those under the Vermont Milk Control Board asked for and got a rise from 25¢ to 40¢ per hundredweight over the Boston 200 zone price. 9) Only two orders in the country have the nearby differential, both in the northeast. 10) Nearby differentials are open and direct discrimination. They pit one group of farmers against another, obscuring issues that are important to all dairy farmers. The philosophy of the present administration is to eliminate discrimination, by law or court order if necessary. 11) Many farmers claim ignorance of having heard of these differentials and would have otherwise testified against them. There is a complaint also that the hearings are held during the haying season and so far from the centers of milk production that the great number of farmers are deterred from attending these hearings.

I am writing for myself as an individual farmer, as Vice-chairman of the Dairy Emergency Council, representing farmers of all cooperatives in Rutland County, and I also speak as

a Trustee for the Farm Bureau of Vermont which has voted for the past three years to abolish the nearby differential.

Yours truly,

/s/ Leonard F. Korzun
Member, United Farmers
Director, Farm Bureau
Vice-chairman, Dairy Emergency Council
Local Director, Eastern Breeders Assoc.

VERMONT FEDERATION OF SPORTSMEN'S CLUBS, INC.

[Rec'd Aug. 15, 1967]

August 14, 1967

Hearing Clerk
U.S. Department of Agriculture
Washington, D.C. 20250

The Vermont Federation of Sportsmen's Clubs, which is the Vermont affiliate of the National Wildlife Federation and has over 7,000 members, wishes to submit the following exception to the recommended decision regarding proposal (8) farm location differentials, as printed in the Federal Register, Volume 32, Number 129, Part II, pages 9918-9921, Thursday, July 6, 1967, Washington, D.C.

We take exception to the recommended decision for three reasons:

1. Nearby farm location differentials have been declared illegal by decision of the U.S. District Court, District of Columbia.

2. As Sportsmen and Conservationists, we are deeply concerned about the steady loss of farms each year in Vermont. The Vermont farmer provides a wide variety of cover types which make excellent wildlife habitat. His land is generally

available to the public for hunting, fishing, and other recreation free of charge. Moreover, Vermont farm land contributes immeasurably to the scenic beauty of Vermont by lending variety to the Vermont landscape and providing open land which allows scenic vistas of the distant mountains, lakes, and forests.

The nearby farm location differential harms the Vermont farmer financially by subtracting approximately 12¢ per cwt. from the price of his milk. We believe that this practice should be discontinued, inasmuch as it is based on historical reasons which are no longer valid. There is nothing wrong with the farmer located near major cities receiving a higher price for his milk, but his price advantage should come from the dealer and not from the pockets of his fellow farmers from more distant areas. Therefore, as sportsmen and conservationists with a vital stake in the future of Vermont farmers, we believe that nearby farm location differentials should be discontinued permanently.

3. As consumers of dairy products, we are alarmed at the decline of dairy farming in Vermont. Although we presently have an abundance of dairy products, the exploding world population may well change this situation in the space of a very few years. It seems only prudent, therefore, that we try to keep our dairy farmers in business, for it is not easy to restore an abandoned, brush-grown dairy farm to full productivity in time to meet any emergency food shortages.

/s/ Robert A. Magoon, Secretary
Vermont Federation of Sportsmen's Clubs

(For the Executive Committee of the Vermont Federation of Sportsmen's Clubs)

STATE OF VERMONT
EXECUTIVE DEPARTMENT
MONTPELIER

[Rec'd Jul. 28, 1967]

July 25, 1967

Hearing Clerk
U.S. Department of Agriculture
Washington, D. C. 20250

Statement by Philip H. Hoff, Governor, State of Vermont, filed as Exception to the Recommended Decision on Proposed Amendments to the Massachusetts-Rhode Island and Connecticut Federal Marketing Orders.

Minimum Prices

Federal milk marketing orders are established in order to sustain an adequate supply. One of the methods by which this adequate supply is maintained is by establishing a minimum price to be paid to producers. This price is arrived at by using an economic formula devised for this purpose. Therefore, no Federal milk marketing order should contain provisions which result in producers in one geographic area subsidizing producers in another geographic area. This results in many producers receiving less than the minimum price as established by the economic formula.

We take exception to the recommended decisions on nearby differential on the ground that no provisions in a Federal order should result in decreasing the minimum price to be paid to one group of producers in order to increase the minimum to be paid to another group.

It is our contention that where farm prices to nearby area farmers were significantly higher during those years before Federal orders were in effect, these higher prices were justified because improvements in transportation, refrigeration and quality control had not progressed to the extent that milk

dealers and handlers could advantageously purchase all or part of their supply in the distant areas.

During the 1950's, improvements in transportation, refrigeration and other quality influencing factors had progressed to the extent that milk handlers realized that there was no advantage in securing local milk at existing prices. They therefore proceeded to curtail their local purchases and arranged to purchase their needs from distant farmers at lower prices. This situation resulted in a request for the establishment of a Federal milk market order. In that area dealers and handlers were dropping entire pick-up route units and leaving considerable milk homeless. Local producers associations and cooperatives finding it difficult to find a market for this milk requested a hearing for the adoption of a Federal order. As a result in 1958 the South East order was adopted.

The 4200 Vermont dairy farmers take exception to the contention that nearby differentials are justified from a historical standpoint.

/s/ Philip H. Hoff

cc: The Honorable George D. Aiken
The Honorable Winston L. Prouty
The Honorable Robert T. Stafford

[Rec'd Jul. 25, 1967]

Hearing Clerk
U.S. Department of Agriculture
Washington, D. C. 20250

The VERMONT STATE GRANGE submits the following statement and an exception to the recommended decision in respect to proposal (8) farm location differentials as printed in the Federal Register, Volume 32, Number 129, Part II, pages 9918-9921, Thursday, July 6, 1967, Washington, D.C.

Exception to decision to continue farm location differentials is taken on contention that Federal Milk Marketing Order pricing provisions are intended for the purpose of stabilizing market and to insure adequate supplies of pure and wholesome milk. Federal Milk Marketing Orders establish minimum prices and therefore should not contain provisions which result in producers in one geographic area subsidizing producers in another geographic area. We do submit that if additional value of nearby milk can be substantiated, additional payment over and above minimum federal order prices should be derived from dealers. The practice of making deductions from pool funds reduces the price received by those producers which are not in the nearby or immediate area. If the nearby and immediate milk does in fact have additional value this will be compensated for through voluntary higher prices.

Dated: July 24, 1967 Signed: Frank W. Hyde, Chairman
Vt. State Grange Agriculture Comm.
Randolph Center, Vermont

Vermont State Grange Agriculture Committee

Frank W. Hyde; Randolph Center, Vt.
Robert Cossingham; Norwich, Vt.
B. Frank Myott; Enosburg Falls, Vt.
Ralph Briggs; New Haven, Vt.
Wallace Russell; Barton, Vt.
G. Roland Lawrence; Albany, Vt.
[illegible] Gendron; 150 Northfield Street, Montpelier, Vt.

Frank W. Hyde, Chairman
Vt. State Grange Agriculture Comm.
Randolph Center, Vermont 05061

[Rec'd July 27, 1967]

Harkdale Farm,
Newbury, Vermont,
July 22, 1967.

Hearing Clerk
U.S. Department of Agriculture
Washington, D.C.

NOTICE OF EXCEPTIONS ON PROPOSED AMENDMENTS TO MASSACHUSETTS-RHODE ISLAND MILK MARKETING ORDERS

I am a dairy farmer operating a dairy farm in Newbury, Vermont, producing milk for the Massachusetts-Rhode Island Market.

I presented testimony at the hearing in Concord, New Hampshire in support of the elimination of "Near By Differentials", and I still believe that any legitimate reason for Near By Differentials when they were first instigated back in the 1930's have long since been out of line due to modern Highways, Tank Trucks, Bulk Tanks. I therefore take exception to your recommended decision.

Furthermore, the farms in the distant areas not receiving the Near By Differential are subject to the same health code and inspection as the farms receiving the Differential.

I therefore take further exception to your recommended decision for our milk is by law just as good as the milk from the near by farms.

I notice with interest, the reference made in the Recommended Decision to the Allen case. In this Russell Allen, et al. v. Orville Freeman action (Civil Action No. 3379-66) Near By Differentials have already been declared illegal by the U.S. District Court for the District of Columbia. I therefore, as a Vermont Dairy Farmer challenge the right of the Secretary to include in the Massachusetts-Rhode Island order a practice that has been declared illegal.

/s/ Harold M. Carson

[Rec'd Aug. 14, 1967]

Postmarked at Syracuse, N.Y.
on 8-11-67

TO THE
UNITED STATES DEPARTMENT OF AGRICULTURE
CONSUMER AND MARKETING SERVICE

Docket Nos. AO-14-A38
AO-305-A12

EXCEPTIONS

TO THE RECOMMENDED DECISION OF JUNE 27, 1967

With Respect To

MARKETING OF MILK

UNDER THE MASSACHUSETTS-RHODE ISLAND AND
CONNECTICUT FEDERAL ORDERS

August 11, 1967

Eastern Milk Producers
Cooperative Association Inc.
Kinne Road
Syracuse, New York 13214

* * *

FARM LOCATION DIFFERENTIALS

Eastern excepts to the recommended provisions for farm location differentials on legal grounds.

Eastern's exception is based upon the illegality of such provisions under the doctrine of *Blair v. Freeman* (370 F.2d 229, CCA DC 1966), as applied to the Massachusetts-Rhode Island Order in *Allen v. Freeman* (Civil Action No. 3379-66). Obviously the *Allen* case is at the present time the "law of the land"—that is, the transactions governed by the Massachusetts-Rhode Island Order.

The Recommended Decision is in error in relying on the *Green Valley* decision and it is contrary to the *Blair* and *Allen* case. Furthermore, there was no evidence at the current hearing to upset the basis of the *Allen* case. In other words, there was no testimony at the present hearing whatsoever that before the Boston Order was originally instituted in 1937 there was any farm location differentials "customarily applied by the handlers". Without such proof, the *Allen* case has to stand. The findings on page 9919, 2nd and 3rd column, are without evidentiary foundation, and governmental expertise as therein expressed cannot take the place of evidence as to the pre-1937 situation in the Boston marketing area.

What happened *after* 1937, when the original Boston Order adopted location differentials, is of no significance, any more than in the New York Order. Certainly business decisions have been influenced by the inclusion of location differentials in the Boston Order and successively in the secondary New England markets and in Connecticut; but under the Act, the Secretary is only permitted to approve adjustments "customarily applied by handlers", [608c(5) B(ii)(a)] – and this means customarily applied *before* the Order went into effect. Business decisions after the Order went into effect have no significance or validity in determining what differentials existed before the Order went into effect. This seems so obvious that it should not even be mentioned in the brief, but the Recommended Decision still seems to belabor the point that since the location differentials have been in the Order and business has thereafter relied on them, they should be kept in whether they are legal or not. This is clearly contrary to the decision in the *Blair* case, where such differentials were declared illegal even though business decisions had been made by many Order II handlers for many years in reliance of such differentials being in the Order, both before and after its extension to Jersey and upstate New York.

Nor is it proper for the Recommended Decision at page 9919, column 2 to attempt to justify a farm location differential as an adjustment for "the locations at which delivery

of such milk is made" as provided in Section 608c(5)(B)(ii)(c). The court in the *Blair* case specifically held such reasoning fallacious in any case, where, as here, the farm location differential is explicitly intended to give a nearby producer a greater share of the fluid milk market than he would obtain under marketwide pooling without such a differential.

Thus, strictly from the legal point of view, the continuance of the farm location differentials is unauthorized and contrary to the case law interpreting Section 608c(5)(B)(ii)(c)(ii) of the Act.

Respectfully submitted

EASTERN MILK PRODUCERS
COOPERATIVE ASSOCIATION, INC.

/s/ John C. York, General Manager

Robert H. Pelley
Economist

August 11, 1967

[Rec'd Aug. 9, 1967]

Hearing Clerk
United States Department
of Agriculture
Washington, D.C. 20250

Your Honor:

The Alliance of the Northeast Dairymen, Inc. hereby files exception to proposal No. 129 regarding continuance of the nearby differentials as contained in your recommended decision as published in Volume 32 of the Federal Register dated July 6, 1967.

We fully realize the purpose of our Federal Milk Marketing Order to be an act to establish an orderly system of market-

ing milk and guaranteeing a uniform minimum price to producers, in order to furnish an adequate supply of fresh wholesome milk to the consumer. The intent was, of course, to promote the welfare of the common good. Historically, at its inception, the nearby producers were supplying a nearly sufficient volume of Class I milk for this market. Distant milk was shipped via slow freight in cans rolled into railroad cars refrigerated with ice obtained from local ponds, rivers and creeks. Please compare this with present day methods.

The nearby differential was merely a "political gimmick" to entice the nearby producers, who had a ready market for their milk, to accept regulatory provisions to aid in the orderly marketing of all milk produced within the confines of order No. I. A "political gimmick" can hardly be called a legal provision.

Today most of the milk in our order No. I pool is supplied by so called distant producers, which is a misnomer.

This is where the milk must be obtained in the future, due to the expanse of urbanization. Even in these areas, abandonment of farms due to economic factors has brought about a reduction of approximately five per cent annually during the last ten years. The subsidization of the nearby producers has contributed immeasurably to this decline. We emphatically state, "This is not in the interest of the public welfare". The nearby differentials are discriminatory by nature, illegal by origin and detrimental to the dairy industry as a whole. We humbly urge you to use your good judgment and reconsider your recommended decision and abolish the nearby differentials so detrimental to those who must produce an adequate supply of pure wholesome milk. How long can we afford to keep the common welfare in jeopardy through discriminatory ordinances?

Respectfully submitted,

ALLIANCE OF THE
NORTHEAST DAIRYMEN

/s/ Francis Branon
Secretary.

[Rec'd Aug. 14, 1967]

Postmarked at Rutland, Vt.
on 8-10-67

TO HEARING CLERK
U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.

EXCEPTIONS TO RECOMMENDED DECISION

ON PROPOSED AMENDMENTS TO THE
MASSACHUSETTS-RHODE ISLAND
MILK MARKETING ORDERS

FROM DAIRY EMERGENCY COUNCIL
CENTER RUTLAND, VERMONT
JULY 20, 1967

The opposition to farm point pricing have argued that it would increase the spread between the prices of the Mass.-R.I. and the New York-New Jersey orders.

However, as a result of the hearing of April 14-15, 1967, held in Washington, D.C., the supply-demand mover in the order had a floor put under it and the Class I price was frozen until April 1, 1968.

Therefore, the change over to farm point pricing would not dilute the pool or harm producer prices.

The last item I would like to bring to the attention of the hearing clerk is that handlers use hauling charges or the lack of them as a means of paying premiums to producers.

The H. P. Hood Co. at Florence, Vermont charges in some cases a ten cent hauling charge and then gives their producers a thirteen cent hauling adjustment.

I contend this is not orderly marketing. Farm point pricing would stop this questionable practice.

If premiums are to be paid they should be paid over the minimum prices; not in under the minimum as is being done at present.

The Dairy Emergency Council, also, would like to be put on record as against farm location differentials in the Mass.-R.I. market.

These differentials are a clear case of discrimination against the distant producers and should be abolished.

/s/ David F. Dickinson
Chm.-Dairy Emergency Council

[Rec'd Aug. 1, 1967]

Hearing Clerk
U.S. Department of Agriculture
Washington, D.C. 20250

[illegible] Massachusetts, R.I., and Conn. Marketing Area

[illegible] provisions set forth in the Federal Register Vol. 32 [illegible] dated Thursday, July 6, 1967. The undersigned wish to file objections to Section 8 titled Farm Location differentials and located [illegible] of Federal Register Vol. 32 No. 129.

This exception is based on the following point. The hearings which elicited testimony relating to Farm Location Differentials were held the date June 20-July 1, 1966. Subsequent reopenings of the Mass., R.I. hearings did not include any testimony relevant to Farm Location Differentials.

During these hearings no new testimony was submitted which would justify the existence of the Farm Location Differential in this marketing order or any other order of the past.

The facts, findings, and history of Farm Location Differentials that are set forth on Pages 9918, 9919 and 9920 have all been presented to the U.S. District Court for the District of Columbia in a court case styled R. Allen, et al. versus Orville Freeman (Civil Action No. 3379-66).

On June 15, 1967, Judge Joseph McGarraghy of the aforementioned court signed and entered an order enjoining and restraining the Sec. of the Agr. from enforcing the Farm Location Diff. Provision of the Mass.-R.I. order.

Exception is taken to Farm Location Diff. on the grounds that recommending the continuation of the same constitutes a non-recognition of the preceding court order.

/s/ Dwight F. Bessette
Vergennes, Vermont
R.F.D. [ ] Box 24

[Rec'd Jul. 24, 1967]

Hearing Clerk,
U.S. Department of Agriculture,
Washington, D.C.

[illegible] exceptions on Proposed Amendments to the Mass.-R.I. Milk Marketing Orders

On behalf of the members of my local of N.E.M.P.A., I would like to file exceptions to the findings as stated in the recommended decision on proposed amendments to the Mass.-R.I. Milk Marketing Orders as stated in Volume 32-Number 129 of the Federal Register, dated July 6, 1967.

Specifically, I disagree, on behalf of my local of N.E.M.P.A. with the decision to maintain farm location differentials in the Mass.-R.I. market.

We contend the practice of deducting money from distant producers to pay a premium to nearby producers is discriminatory in nature and contrary to the intent of milk marketing orders.

It is hereby pointed out that only two federal marketing orders are making a practice of paying farm location differen-

tials. Both of these marketing orders now have court cases challenging the legality of paying such differentials.

Because the farm location differentials in the Mass.-R.I. market has been declared illegal by the U.S. District Court for the District of Columbia in the Russell Allen, et al. v. Orville Freeman action (Civil Action No. 3379-66), it would appear to still keep this provision in the Mass.-R.I. Order is an attempt to operate a Federal Milk Order that is in contradiction with the laws of our country. It does not seem prudent to operate a Federal Milk Order that has been declared illegal by the courts of our land.

The recommended findings cite arguments based on historical and customary practices; also, arguments based on facts pertaining to days when milk was shipped in cans.

Due to improvements in transportation, improvements in highways and the shift to bulk tanks, it would seem these arguments do not apply any longer.

We, also, take exception to our milk marketing orders being developed on custom or history. If this course is to be followed, we wouldn't ever have any changes in our Federal Milk Orders.

We, therefore, ask the Secretary of Agriculture to heed the wishes of the majority of the producers in the Mass.-R.I. market, who are the distant producers, and eliminate farm location differentials.

The nearby producers still will be receiving a price approximately fifty cents more than producers in the 21st zone.

Name: David F. Dickinson - President
Local: East Wallingford-Pittsford Local of N.E.M.P.A.
145 members

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,141

FREDERICK T. ZUBER, et al., Appellants,

v.

RUSSELL ALLEN, et al., Appellees.

No. 21,308

ORVILLE FREEMAN, SECRETARY OF AGRICULTURE, Appellant,

v.

RUSSELL ALLEN, et al., Appellees.

Appeals from the United States District Court for the District of Columbia

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Decided September 23, 1968

Mr. Lawrence D. Hollman, with whom *Mr. Carlyle C. Ring, Jr.*, was on the brief, for appellants in No. 21,141.

Mr. Walter H. Fleischer, Attorney, Department of Justice, with whom *Assistant Attorney General Edwin L. Weisl, Jr.*, *Messrs. David G. Bress*, United States Attorney, and *Alan S. Rosenthal*, Attorney, Department of Justice, were on the brief, for appellant in No. 21,308. *Mr. Frank Q. Nebeker*, Assistant United States Attorney, also entered an appearance for appellant in No. 21,308.

Mr. Charles Patrick Ryan for appellees.

Mr. Edward J. Ryan filed a brief on behalf of the State of Vermont, as *amicus curiae* in No. 21,141. *Mr. Charles P. Ryan* also entered an appearance for the State of Vermont as *amicus curiae* in No. 21,141.

Mr. Franklin M. Schultz filed a brief on behalf of the State of Connecticut, as *amicus curiae* in No. 21,141.

Mr. James R. Worsley, Jr., filed a brief on behalf of the Commonwealth of Massachusetts as *amicus curiae* in No. 21,141.

Before BURGER, WRIGHT and McGOWAN, *Circuit Judges.*

McGOWAN, *Circuit Judge:* These are appeals by the Secretary of Agriculture and a group of dairy farmers from a judgment of the District Court declaring illegal and enjoining further enforcement of the "farm location differential" provision[1] in the 1964 federal milk marketing order for the Massachusetts-Rhode Island area. We recently invalidated a like provision of the 1957 New York-New Jersey milk marketing order on grounds of its incompatibility with the Agricultural Marketing Agreement Act of 1937.[2] *Blair v. Freeman*, 125 U.S.App.D.C. 207, 370 F.2d 229 (1966). Since we find that the farm location differential of the Massachusetts-Rhode Island order is no less irreconcilable with the statute, we affirm the judgment and order of the District Court.

I

The rationale and mechanics of federal regulation of the marketing of milk and other dairy products have been fully described in *Blair* and elsewhere.[3] Briefly, the marketing order is designed to eliminate the destructive competition which grew out of the surplus conditions which characterized the milk industry before federal regulation. The device

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[1] 7 C.F.R. § 1001.72 (1968).

[2] 7 U.S.C. §§ 601-24 (1964), *as amended*, (Supp. I, 1965).

[3] *See* Lehigh Valley Cooperative Farmers, Inc. v. United States, 370 U.S. 76 (1962); H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588 (1939); United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939); Grant v. Benson, 97 U.S.App.D.C. 191, 229 F.2d 765 (1955), *cert. denied*, 350 U.S. 1015 (1956); Green Valley Creamery, Inc. v. United States, 108 F.2d 342 (1st Cir. 1939).

chosen to this end is a uniform, "blended" price to be paid by handlers to each producer in the marketing area, regardless of whether his milk is ultimately disposed of by the handler at the high Class I price for fluid use, or at the lower Class II price paid for milk to be used in the manufacture of various milk products (butter, cheese, ice cream, and so on). An equalization pool, called the "producer settlement fund," is administered by the agent of the Secretary of Agriculture to maintain the blended price; and handlers make payments to or withdrawals from the pool in the amounts by which the use value of milk which they handle exceeds or is less than the blended price.

The Act specifies several limited exceptions which the marketing order may make to the requirement that each producer receive a uniform price. Thus, Section 8(c)(5) permits the inclusion in the order of provisions

(B) Providing:

* * *

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject . . . only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made . . . .

Purportedly acting pursuant to the authority of this section, the Secretary included in the 1964 Massachusetts-Rhode Island order several differentials which operate to vary the payments to producers. These are (1) a "butterfat differential," based on the quality of the farmer's milk;[4] (2) "zone differentials," which vary inversely with the distance from Boston of the handler's plant to which the producer delivers his milk;[5] and (3) the "farm location differentials,"

[4] 7 C.F.R. § 1001.71 (1968).

[5] 7 C.F.R. § 1001.62 (1968).

which are paid to producers whose farms are located near the principal consumption centers. This last form of differential, commonly known as the "nearby differential," is forty-six cents per hundredweight for farmers located in certain designated towns and twenty-three cents per hundredweight for those in more distant towns.

The plaintiffs, 168 dairy farmers who are ineligible for any farm location differential, brought this action against the Secretary of Agriculture seeking a halt to these allegedly discriminatory and unauthorized payments.[6] They are aggrieved in that the differential is paid out of the equalization pool, rather than the handler's own pocket, and consequently reduces the blended price received by all producers. The District Court granted the plaintiffs' motion for a preliminary injunction which provided for the escrowing of the challenged differential, and thereafter, relying wholly on our decision in *Blair v. Freeman*, granted their motion for summary judgment. The escrowing, though later amended to release amounts attributable to nearby producers, was continued pending a decision by this court. When it appeared that the Secretary might not appeal,[7] we granted Zuber and seven other nearby farmers, whose motion to intervene had been denied by the District Court, leave to intervene for the sole purpose of protecting their rights by appeal. The Secretary subsequently perfected an appeal, which we heard together with that of Zuber.

Appellants have pressed upon us several distinct positions. They argue, first, that the farm location differential is valid because it is founded not upon the factor of fluid milk utili-

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[6]The suit was filed a few weeks after our decision in *Blair*. In that case we made clear the wholly prospective nature of our decision, stating that it was "not intended to afford any basis for recovery by appellants or their class based on past payments." 370 F.2d at 240. We reaffirm that approach here.

[7]This prospect was represented as residing in the fact that the Government had decided not to seek review in the Supreme Court of our decision in *Blair*.

zation condemned in *Blair* but on other considerations which are authorized by the Act. Secondly, they contend that, whatever might be the fate of another farm location differential under Section 8(c)(5), this particular provision was explicitly ratified and validated both by Congress in 1937 and by the United States Court of Appeals for the First Circuit in 1939. Thirdly, appellants assert that, if the legality of the provision is not clear, neither is its illegality; and that the case should be remanded to the Secretary to afford him an opportunity to elucidate the legal and factual premises of the nearby differential, or to determine whether, if the differential must fall, the marketing order should be continued, with or without other changes. Finally, it is argued that, even if the District Court is affirmed, considerations of equity dictate that its judgment be wholly prospective from the date of our decision, and that the escrowed monies should be distributed to the nearby farmers who have relied on the farm location differential for so many years. We deal with these points in order.

II

As we held in *Blair*:

> [T]he Act forbids consideration of the use to which the milk of a particular producer or class of producers is put, historically or potentially, in adjusting the uniform minimum price to be paid to such producers.[8]

In adopting the New York-New Jersey order in 1957, the Secretary was explicit in his reliance upon this outlawed consideration.[9] He is certainly less so in his justification of the 1964 Massachusetts-Rhode Island order:

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[8] 370 F.2d at 237.

[9] The differential had been designed, he said:

> to give the nearby producer a somewhat greater share of the high-priced [fluid] milk than he would obtain through market-wide pooling without such a differential . . . .

and

> to reflect the fact that under competitive conditions milk produced in this area has a traditional outlet as fluid milk . . . .

22 Fed. Reg. 4213-14 (1957).

> Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.
>
> . . . .
>
> . . . [W]e believe there are adequate reasons on this record for continuing the farm location differentials at their present rates.[10]

But we do not think it can be said, as appellants now do, that this explanation does not reflect any reliance whatsoever upon the prohibited factor of fluid use patterns. To say, of the order under review, that milk produced in locations close to principal consumption centers has enjoyed "customarily somewhat higher values" above transportation costs, and that the differential is provided to reflect "these historical price relationships by location," may be only a less direct way of saying, as in the case of the New York-New Jersey order, that the differential was designed "to reflect the fact that under competitive conditions" nearby producers got a higher price because they had a bigger share of the fluid use market. If examination is made of the "record" to which the Secretary adverted in his 1964 statement—the various New England marketing orders which preceded the 1964 order and the administrative records on which they were based—it is revealed inexorably that, as in the case of New York-New Jersey, those "historical price relationships by location" were the fluid use advantages which the Act expressly condemns.

The 1964 order consolidated the former federal orders regulating the handling of milk in four separate marketing areas: Greater Boston, Worcester, Springfield, and Southeastern New England. The oldest and most prominent of

[10] 29 Fed. Reg. 11205, 11213-14 (1964).

these was the Greater Boston marketing order. Under federal "licenses" pursuant to the 1933 Agricultural Adjustment Act,[11] milk in the Boston area was marketed, as it had sometimes been by cooperative associations before federal regulation, through base-rating plans. In 1934 the market administrator

> allotted preferential bases to nearby producers to give effect to the historically higher prices they had received in the market. A study was made of the eight years 1926 to 1934 to obtain the proper differential between nearby and distant producers' returns from the sale of milk. It was determined that all producers where milk was *delivered directly to plants located within 35 miles* of the State House in Boston should have bases equal to 85 percent. . . . [as compared with 61 percent for all other producers].[12]

Because many nearby producers refused to comply with the license, and "as a concession to win the cooperation of the Massachusetts Milk Control Board in enforcing, or trying to enforce, the terms of the federal license,"[13] in 1935 cooperative associations agreed to allow producers whose farms were within forty miles of the State House bases of 100 per cent. This forty mile radius later bacame official under Greater Boston Order No. 4

This Order No. 4, promulgated in 1936 after the 1935 amendments to the Act, retained the base-rating system but abandoned the preferential bases for nearby producers. In their place it was provided that producers whose farms were located within forty miles of the State House and *who delivered to plants within the same area* be paid the full Class I price for all milk not in excess of their bases. Other farmers received only the blended price for their bases. Distant producers could, however, receive an additional twenty-one

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[11] 48 Stat. 31 (1933).

[12] Barnhardt, Federal Regulation of Milk Handling in Boston 95 (1947) (emphasis added).

[13] *Id.* at 231.

cents by delivering to a handler within the forty mile radius–a "country station" differential which (unlike the situation today) was not also available to the nearby producer. The latter differential was found by the Secretary to be a "reasonable allowance for the extra handling costs incurred by handlers operating country station plants." As to the former, the Secretary stated that

> the payment of class I prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, *due to the greater availability of their milk for class I use.* . . . (emphasis added)

The order did not expand upon this ground for the preferred treatment of nearby producers. It is a finding which appears to be derived directly from the testimony at the hearing of the representative of the U. S. Department of Agriculture. In explaining the proposed order, he said this about the differential in question:

> Now, I presume that you know some reason for that special provision located in that zone. I am not sure that I made such a statement of that as we here in this brief, and so I think I might make it at this time, and then perhaps there will be further questions.
>
> With respect to this particular provision, it should be noted that a producer whose farm is located near the market is in a position to supply Class I milk for use at all times, at less cost and distances, and if necessary he can, after each twice-a-day milking, put his milk on his own truck and deliver it to a handler or to consumers. Forty miles, however, is approximately a limit of the use of such facility in handling milk.

Evenness of production was certainly not assigned as the reason, presumably because this quality was already compensated by base-rating itself. Higher local production costs had been mentioned at the hearings in support of the special treatment, but this ground was evidently rejected by the Secretary. Since nearby producers were not also to receive the "country station" differential, their preference must have been attributable in large part to transportation and

handling advantages. This surmise is supported not only by the Secretary's use of the word "availability" but also by the following argument in the Department of Agriculture's Economic Brief in 1936:

> It should be noted that a producer whose farm is located near the market is in a position to supply milk for Class I use to the market more easily at all times than those at a greater distance. Much less time is required for the movement of the milk and a greater variety of transportation facilities are available to such a producer. If necessary, he can, after each twice-a-day milking and within two hours deliver it to a handler or even to consumers. . . . Moreover, those producers whose farms are located beyond the forty-mile line who so desire may deliver their milk to handlers within the forty-mile line, in which event they are to be paid the blended price, plus [21] cents. . . .

The savings in transportation and handling expenses were not, of course, the whole story. The Agriculture Department's testimony and brief identify another element which was also heavily emphasized at the hearings, namely, the nearby producers' opportunities for direct access to the consumer. This fact was cited at the hearings as the explanation for traditionally higher prices to nearby producers ("he can sell it to the dealer or become a dealer himself, and go direct to the [consumer], and you cannot stop him") and as a potential "menace to the enforcement of the agreement."

In sum, the Secretary did not indicate that he had accorded nearby producers a preferred position because their ever-available milk supply was itself more valuable to the handlers. His action, rather, was based on the nearby producers' "economic position," a position which had enabled them to command higher prices from handlers before regulation and which enabled them to coerce this concession in the marketing order. The reason for this "economic position" was, as the Secretary recognized, "availability *for Class I* use." We are unable to distinguish this

factor from the consideration of historical fluid use patterns condemned in *Blair*.

After passage of the 1937 Agricultural Marketing Agreement Act, Order No. 4 was amended to do away with base-rating. The nearby producer's preferred status was preserved, however, by the payment of farm and delivery location differentials. For the first time, the condition of nearby delivery was dropped from the farm location differential, and the farm location and delivery location differentials were paid cumulatively. The Secretary found only:

> [t]hat in view of changes in economic conditions since the date of the original findings, the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for milk so delivered, *without the use of a base-rating plan, but with the inclusion of special location differentials*, is a fair and reasonable method of distributing to producers the proceeds of sales of milk to handlers.[14]

The farm location differential was designed to reproduce as closely as possible the nearby farmer's preferred position under base-rating. Thus, the differential was (and still is) payable only to the extent that it did not increase the producer's payment above the Class I price.[15] As the Agriculture Department argued in its 1937 Economic Brief:

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[14] 2 Fed. Reg. 1331 (1937) (emphasis supplied).

[15] This feature of the order is similar to a provision of the New York-New Jersey order which we found in *Blair* to indicate the connection between the differential and the prohibited consideration of fluid milk use. We there said:

> . . . that payments vary (inversely) with the extent of fluid milk utilization [in the entire market]. The differential is sensitively attuned to the supposed special place of the nearby producer in the fluid milk market, and is taken away when fluid milk utilization is so high marketwide that he merits no premium based on that special place.

370 F.2d at 237-38. A like interaction between the amount of the differential and marketwide fluid milk utilization is achieved by the provision of the Massachusetts-Rhode Island order that if "the addition of 46 cents gives a result greater than the Class I price . . . there

> It is thought that the proposed plan, which gives consideration to those producers located nearby the market who are predominantly even and who as a group have very uniform deliveries, and which returns a price higher than the average to the other even producers, accomplishes the purpose for which the rating plan in Order No. 4 was intended.

Evenness of production, which was awarded on an individual basis under base-rating, was an alleged advantage of nearby farmers frequently cited by proponents of the differential during the hearings as explaining their historically higher prices. The Market Administrator's explanation is typical:

> The idea is, without regulation over a period of years producers whose farms are near the market, due to the fact that their milk is accessible to small dealers, and their milk is rather even throughout the year, have been able to obtain a price greater than the country station charges. So that, if we set up a plan which did not give them the same advantage which they would have without regulation it would be unfair to them. . . . It is the desire of the Administration to maintain the relative positions and to set that figure at a point which will do that.

This assertion about seasonality was somewhat undermined by the Department's admission that only two-thirds of the nearby producers could be classified as even, and that "even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors." The principal relevance of evenness was not that it constituted an element of value in the sense of dependability to the handler, but that nearby producers, who as a group contributed less to the surplus in the market, should not share the burden of that surplus by receiving only the blended price. This resort to seasonabil-

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shall be added [only] a rate which will produce that price." Since the blend price itself rises with increased fluid utilization, the amount of the differential necessary to give the nearby farmer the Class I (fluid) price varies inversely with marketwide fluid milk use.

ity, then, was not so much in explanation of historically higher prices but rather in recognition of the fact that the nearby farmers' evenly produced milk had been sold primarily at Class I prices, *i.e.*, for fluid use.[16]

Aside from references to evenness of production and the unfairness to the nearby farmer of disturbing his traditionally preferred market position, the evidence revolved mostly around what would happen if nearby farmers were not favored. The New England Milk Producers Association swore they would "oppose the license with every means in their power," and the witness referred to in footnote 16 made the pregnant observation that "there is always a row in the market unless [the nearby producers] are compensated in some way." One source of their power was also recognized: "We are all within retailing distance of the market and we are potential producer-dealers." This potentiality also underlay the observations in the Department's brief and elsewhere that "their milk is accessible to small dealers." This reference to availability was limited to small dealers as it had not been in the Secretary's finding in the 1936 Order, presumably because only large handlers could afford to bring in their milk from distant farms. That nearby farmers had a captive market, however, does not alone explain the higher price, without the additional fact that the farmers or handlers could dispose of the milk at Class I prices. Economist Ellsworth Bell's brief to the Secretary concisely described this economic advantage:

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[16]This is evident from the 1937 testimony of the president of the Nearby Producers Association, asking for a nearby differential of at least one cent per quart over the blended price:

> Now, we feel that to be protected in our special place in the market requires two things. We must be protected against seasonal surplus. Our production is even and has always been regulated closely to the requirements of our distributors. Some of them asked distributors, will ask for more or less milk as they want it. [sic] In the second place, we must have somewhere near our differential–our consumer differential over the 200-mile zone, and get that much . . . .

> Being adjacent to markets the [nearby] dairymen command a natural sales advantage whereby it is taken first at the fluid price. . . . [Historical price difference] exists due to peculiar advantages existing for disposal and sale of milk at the higher market price.

In 1949 the Secretary first promulgated orders for the Springfield and Worcester markets, both of which contained nearby farm location differentials. Those in favor of the differentials had given testimony similar to that which preceded the Boston orders, and had argued for uniformity of treatment with the Boston market. In approving the differentials, the Secretary adverted to "the customary market practice of paying somewhat higher prices to producers located near the sales area." These historically higher prices were explained as follows:

> This difference cannot be attributed to transportation cost alone. The many opportunities for dairymen to market their own milk directly influence the price which they demand for their product.[17]

Those direct marketing opportunities were, of course, for fluid use at Class I prices.

In 1951 the Secretary held hearings on a proposal to eliminate the nearby differential in the Boston order. Opponents of the differential argued that it constituted a trade barrier; that evenness of production, if compensable at all, should be recognized on an individual basis; that the validity of the differential should be reexamined in the light of contemporary economic conditions; and that if nearby milk has any extra intrinsic value it should be paid for by the handlers rather than by the pool. Proponents of the differential brought out all the old arguments, with somewhat greater emphasis this time on the disruptive market effects of eliminating the differential, and on the unfairness to nearby farmers for whom the nearby differential had become capitalized into greater land values. A major pillar of their argument was the unabashed assertion that in terms of "his-

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[17] 14 Fed. Reg. 7085, 7089 (1949); 14 Fed. Reg. 7097, 7102 (1949).

torical price relationships . . . producers located near the market were able to sell a larger proportion of their milk at Class I." The representative of the Massachusetts Milk Control Board, for example, testified that the differential was not discriminatory but rather had been

> adopted by way of partial compensation to nearby producers for the losses which they suffered when the equalization provisions deprived them of those natural advantages which prior to federal regulation always enabled them to sell at [sic] a relatively higher percentage of their production of Class I milk.

The Secretary concluded that "no change should be made at this time" because the opponents had "presented no material facts different from those considered in establishing specified location differentials as a part of the order provisions."[18]

In the 1958 southeastern New England order, one of those now consolidated into the 1964 Massachusetts-Rhode Island order, the Secretary for the first time gave a detailed economic justification for the nearby differential, which he described as "identical with that employed in adjacent Federal order markets," a characterization which includes the New York-New Jersey order invalidated by us in *Blair*:

> Historically, dairy farmers in the States of Massachusetts, Rhode Island, and Connecticut, because of their location with reference to the large population concentrations of New England have disposed of a substantially larger percentage of their production for fluid uses than have dairy farmers in the upcountry area. Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. Under the marketwide pooling system herein proposed and without some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk on the milkshed rather than according to the utilization of his milk. Under a regulated market, however,

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[18] 16 Fed. Reg. 9250, 9255 (1951).

he obtains the benefit of an established Class I price which may be higher than in the absence of regulation and has assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources. The distant producer also benefits from an established Class I price, and by the fact that he gains a larger share of the fluid market than is likely without market-wide equalization.

The use of a nearby differential will return to nearby producers a somewhat greater share of the Class I price than they would otherwise obtain through marketwide pooling. Moreover such a differential will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization.[19]

This rationale—which is clearly reflected in the 1964 order's language about "historical price relationships by location"—is indistinguishable from that advanced the year before in support of the 1957 New York-New Jersey order condemned by this court in *Blair v. Freeman*.[20]

The testimony at the hearings preceding the 1964 order served mainly to reinforce the Secretary's reliance on historical fluid use patterns as the primary justification for the

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[19] 23 Fed. Reg. 8238 (1958).

[20] The following year an identical provision was incorporated in the Connecticut order. It was proposed that this order be consolidated in the 1964 Massachusetts-Rhode Island order. It was not, but there is no indication that the Secretary viewed the nearby differential in Connecticut as in any way different from those under other Federal marketing orders:

> The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes. Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated markets.

24 Fed. Reg. 1049, 1063 (1959).

nearby differential. Most of the witnesses in favor of retaining the differential either ignored, or rejected as irrelevant, the question of whether it had ever been authorized under the Act. Their testimony dwelt upon the absence of adverse economic effects of the differential, and the dire consequences which would flow from its elimination. When their attention was directed to the issue of the differential's original justification, some reiterated the testimony of 1937 to the effect that the differentials recognized the evenness of production of nearby milk and its accessibility to small dealers; that the nearby farmers enjoyed a favorable bargaining position because of their ability to become producer-dealers; and that the differential was a necessary compromise to win the support of the nearby farmers and Massachusetts Milk Control Board for the federal order.

Almost to a man, however, the witnesses at the hearing testified—and no one denied—that the principal reason for the differential was to preserve for nearby producers their traditionally high percentage of the fluid use market. One witness even argued as follows for an increase in the nearby differential:

> We don't feel that these market pools were set up to make it possible for distant milk to take the Class I sales that rightfully belong to nearby farmers away from them. Again I think you have to consider the use value of the milk in determining the prices to the producers.

And a committee report specially prepared for the Department of Agriculture in 1962 was read into the record. While nearby milk was claimed to have various advantages, the report concluded that:

> the major purpose of nearby differentials apparently has been to compensate nearby producers for sharing market Class I sales with more distant producers in a marketwide pool.

In view of the concurrence of all concerned—including on occasion the Secretary himself—that the differential was a recognition of historical use values, we find it impossible to

conclude that the Secretary did not rely on this illegal consideration in approving the 1964 order as well as all of its predecessors. Although in patent conflict with the blended price regulatory scheme propounded by Congress, it was apparently thought that the resulting distortion was a price necessary to be paid in order to get sufficient agreement to support a marketing order, and that it was better to pay that price than to have no order at all.

III

Section 4 of the 1937 Agricultural Adjustment Act provided:

> Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.[21]

Appellants argue that, since nearby differentials appeared in the Greater Boston order before 1937, Section 4 immunizes the farm location differential from invalidation under another section of the Act.[22] We find this contention unpersuasive for several reasons.

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[21] 50 Stat. 249 (1937).

[22] Appellants argue alternatively (1) that nearby differentials, even if inconsistent with Section 8(c)(5), were legalized by Section 4; or (2) that Section 4 constituted a legislative determination that every feature of extant federal licenses or orders before 1937 fell under one or more of the enabling provisions of the Act—in particular, that the nearby differential was a market or location differential within Section 8(c)(5). In support of this latter construction, appellants point to language in the Committee Reports underlying the 1935 amendments to the effect that "these terms [of Section 8(c)(5)] follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act [of 1933] and the

First, it does not appear that a farm location differential of the kind now under attack ever appeared in a greater Boston license or order before 1937. There were differentials based on *delivery* location, and for a time farm location was one condition along with delivery location, but none seems to have been based on farm location alone. Moreover, the differential was never one payable over and above the transportation differential available to distant producers who delivered to a nearby zone.[23]

Second, Section 4 itself ratifies only those provisions and acts which were "done under the Agricultural Adjustment Act." This qualification negates any inference that Congress intended to sanction orders which were illegal under other sections of the Act. And this construction is consistent with what was clearly the sole legislative purpose underlying Section 4, namely, to prevent technical abatements which arguably might result from reenactment of the 1933 Act. In *United States v. Butler*, 297 U.S. 1 (1936), the Supreme Court had invalidated certain of the production control provisions of the 1933 Act; and several lower courts, construing these provisions as not severable, thought that the marketing agreement and order sections must also fall. Section 1 of the 1937 Act specifically reenacted the latter provisions of the Act in order to avoid that result.[24] Congress feared, however, that such reenactment might itself be construed as suggesting that, pending its accomplishment, the Act, and all actions taken by the Secretary under its aegis, had been illegal. Hence Section 4 of the 1937 Act.[25]

provisions of licenses issued pursuant to the present [Act]. . . ." H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 9 (1935).

[23] See the descriptions of the licenses and orders, pp. 7-8, 10-11 *supra*.

[24] 50 Stat. 246 (1937).

[25] The House Report stated:

> Section 4 . . . negatives any implication that [the bill's] effect is to invalidate or cast doubt on action heretofore taken under the agreements and orders provisions. The section also expressly ratifies, legalizes, and confirms such action.

H.R. Rep. No. 468, 75th Cong., 1st Sess. 4 (1937).

Appellants further assert that the legality of the farm location differential was established in 1939 by the United States Court of Appeals for the First Circuit in *Green Valley Creamery, Inc. v. United States*, 108 F.2d 342 (1st Cir. 1939). That case began as an action by the United States and the Secretary of Agriculture seeking a marketing injunction requiring the defendants, a group of milk *handlers*, to comply with Order No. 4 regulating milk marketing in the greater Boston area. One of the defenses was that the farm location differential was not authorized by Section 8(c)(5). After holding that *handlers* had no standing to raise this defense, the court volunteered the view that the differential could be justified under the Act either as a delivery location differential or a "market differential customarily applied."[26]

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[26]The court's rationale was as follows:

> There was evidence before the Secretary to the effect that similar differentials in favor of nearby farms had existed in the Boston market for many years. Various factors were mentioned as accounting for this, including their greater accessibility to the market, and their greater dependability as sources of supply, because, as experience showed, the nearby farms had a more uniform level of production throughout the year. These producers were also potential dealers, who might establish their own milk routes in competition with handlers in the Boston market, if prices were not acceptable. Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted in the Order so as not to disturb the status quo in this respect. Milk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market; and thus, paragraphs 3 and 4 of Section 4, Article VIII, may be said to prescribe differentials having relation to locations at which deliveries are made. This argument need not be labored, however, for the differentials can readily be sustained under Section 8(c)(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called "location differentials" in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market.

108 F.2d at 346.

We took note of the *Green Valley* opinion in *Blair*, where it was also pressed upon us as dispositive; and at that time we expressed our disagreement with the First Circuit's analysis.[27] In any event, the opinion in that case could not control the outcome here. In the first place, only one of the orders which was consolidated into the Massachusetts-Rhode Island order in 1964 was under attack in *Green Valley*. Moreover, the defendants in that case were all handlers, and there was no representative of the class of non-nearby producers before the court. Indeed, as we said in *Blair*, the approval of the differential was a *dictum*, since "the court's holding was that the handlers lacked standing to challenge the disposition of the producer settlement fund."[28] We must conclude, therefore, that neither Congress nor the courts have validated the farm location differential of the Massachusetts-Rhode Island order.

IV

Appellants insist that, even if the Secretary had in the past relied upon historical fluid use patterns, there are other legitimate legal and factual grounds for the farm location differential. Therefore, they urge, the court should, before striking the provision from the order, in effect remand the case to the Secretary for an opportunity to offer a more explicit justification for the differential. We are not impressed with this suggestion since we do not think that a court should, in the face of what it finds to be a clear and continuingly burdensome statutory violation, albeit one of long standing, defer a declaration of its illegality. We are especially not disposed to do so where there appears to be no serious possibility of finding warrant in the statute for a preference based solely on farm location.

We need not speculate as to what the Secretary would do upon such a remand, for he has already, since our decision in *Blair* and the judgment of the District Court in this case,

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[27] 370 F.2d at 238.

[28] *Id.* at 238, n. 34.

issued a recommended decision on the farm location differential in the Massachusetts-Rhode Island order. He there concluded after further hearings on the subject that the nearby differential "should be continued." He noted that nearby farmers had received higher prices "prior to the advent of federal regulation," that this advantage had been preserved in the base-rating plans of the federal licenses and 1936 Boston order, and that it had been carried over into the nearby differential of the 1937 order. The Secretary quoted from the 1937 record to the effect that the historically higher price was:

> due to the fact that their production is relatively even, and that their milk is accessible to small dealers . . . . If we should take away from these producers a differential that they have been able to get without Government regulation, they would have a legitimate objection that we are placing them at a comparative disadvantage. . . .[29]

The fact of historically higher prices is, of course, not alone sufficient. The reason for that difference must not, under the Act, have been related to sales advantages for fluid use. To avoid this pitfall, the Secretary assigned two other explanations for the high prices: availability and evenness of production. The former is not a legitimate factor. To the extent that it reflects the nearby producers' ability to become distributors directly to the consumer, it is no more than an aspect of the high fluid utilization advantage. To the extent that availability means dependability and ease of access, it is, as we held in *Blair*,[30] and as the Secretary himself recognized in the New York-New Jersey order,

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[29] 32 Fed. Reg. 9902, 9919 (1967)

[30] If this history has any current significance, if the milk has greater "value" to the handler for reasons other than quality and location of delivery, it may be a reason for the producer to receive out of the handler's own pocket a premium above the minimum price, but this would not be a justification permitted by the law for a diversion from [distant farmers] of their equal share of the blended uniform minimum price adjusted only for the statutory differentials.

370 F.2d at 238-39.

"related to the extra value of such milk to the handler who buys it rather than to producers generally and [is], therefore, . . . payable by handlers rather than out of the pool."[31] Nor would evenness of production appear to support a differential based on farm location. While nearby production may as a general matter be more even, there have been wide individual variations in seasonality throughout the milkshed. Moreover, as the Secretary stated in his New York-New Jersey decision,[32] uniform supply should be compensated on an individual basis. The Act makes provision for base-rating,[33] and it appears to be the only sanctioned method by which to stimulate and compensate even production by individual farmers.

None of the differentials permitted by the Act contemplate in terms preferential treatment on the basis of farm location.[34] A dual legal justification for the nearby differential, was, however, offered in the 1967 recommended decision:

> Clearly . . . these greater returns . . . were, in the language of the statute "market differentials customarily applied by the handlers." . . . Inasmuch as these greater returns for milk were directly related to geographical source, it was considered that these differentials were also adjustments based on "location" . . . within the meaning and context of [the Act].[35]

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[31] 22 Fed. Reg. 4194, 4213 (1957).

[32] *Id.*

[33] 7 U.S.C. § 608c(5)(B) (Supp. 1967).

[34] While the Secretary relies only on the provisions for market and location differentials, the other appellants have attempted to justify the nearby differential as a "volume" or "production" differential. The Committee Reports, however, show those exceptions to be clearly inapt. H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 9-10 (1935).

[35] 32 Fed. Reg. 9202, 9919 (1967).

But the only "location" differential permitted by the Act is one for "the location at which delivery" of the milk is made to the handler. Plainly, this exception was designed to recognize differences in transportation costs only, and does not encompass a preference based solely on farm location.[36]

Nor is farm location comprehended within the provision for "market . . . differentials customarily applied by the handlers." The Committee Reports in respect of the 1935 Act are explicit that "the market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant."[37] This adjustment, of which the "country station" differential of the 1936 greater Boston order was an example,[38] recognized the savings in handling costs when milk in fluid form is delivered to the city rather than first to a country plant. Provision is now made for this differential in the Massachusetts-Rhode Island order as a fixed portion of the zone differential.[39] As we held in *Blair*,

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[36]It may be that in authorizing a location differential in 1935, Congress intended to preserve the preferences enjoyed by nearby farmers under pre-1935 federal licenses and under voluntary agreements before any federal regulation. Those preferences, it appears, were phrased in terms of location of *delivery* (or delivery plus farm location), and it was generally true at that time, as the First Circuit noted in *Green Valley* (see n. 26 *supra*), that delivery and farm locations coincided fairly closely. It is probably safe to guess that not until bulk tank trucking thereafter made it economically feasible for distant farmers to deliver in the city did the nearby farmers, for self-protection, insist that the nearby differential be based solely on farm location.

[37]H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 10 (1935).

[38]See p. 7 *supra*.

[39] The purpose of establishing zone differentials is to achieve a high degree of uniformity in prices to all handlers f.o.b. the market for milk which is received from producers at plants located at various distances from the principal consumption area. To achieve this purpose, the zone differentials must closely

> it is plain that this type of allowance turns not on the location of the producer's farms but on the nature of the market to which they deliver their milk. The "market differential" rationale is plainly not a tenable basis for the nearby differential.[40]

On August 2, 1968, the United States District Court for the Northern District of New York elected to treat a nearby differential of the kind here in issue as a "market differential." *Cranston v. Freeman*, ___ F.Supp. ___. It recognized that the result it reached was directly in conflict with our decision in *Blair*, but it went on to say that while it "concurs with the Court of Appeals for the District of Columbia that the uniform price requirement was designed to eliminate ruinous competition for the fluid milk market, it cannot concur in [that Court's] conclusion that the requirement prohibits recognition of the historic fact that farmers located in particular areas near the market were accorded a greater share of that market." In other words, although Congress authorized a price pooling arrangement in order to eliminate revenue disparities among producers due to varying access to the fluid milk market, those who enjoyed that advantage before pooling must continue to have it because a larger percentage of their production customarily goes into fluid milk use. This is, of course, precisely what the Secretary gave as his primary reason for including the nearby differential in the Connecticut marketing order involved in *Cranston*:

> Provision should be made also for the payment of a market differential to producers in the nearby supply area. The monies for the payment of these differentials will be obtained by a deduction from the total value of all milk before completing the computation of the market-wide uniform price.
>
> . . . .
>
> Milk received from the nearby area has long represented the major part of the total Connecticut supply.

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reflect costs generally incurred in receiving milk at country plants and moving such milk to city plants.

29 Fed. Reg. 11205, 11210 (1964).

[40] 370 F.2d at 238.

The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes. Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern of pricing has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated market. *The differentials adopted will reflect more representative values with respect to the milk of both nearby and distant producers since the nearby producer will share in the higher-priced Class I market to an extent somewhat greater than otherwise would be the case under market-wide pooling.* (emphasis added) 24 Fed. Reg. 1049, 1063 (1959).

The *Cranston* court does not, therefore, sustain the nearby differential on some reason other than that relied upon by the Secretary in propounding it. It, rather, embraces fully the Secretary's persistent assumption that Congress did not really mean what it said about end-use not being allowable as a factor in fixing the amount received for milk by the producer.[40.1] The *Cranston* court's acceptance of the "market differential" rationale thus flies in the face of the congressional purpose explicit in the statute, as well as the

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[40.1] The *Cranston* court purports to find some comfort in the 1939 decisions of the Supreme Court in *Hood* and *Rock Royal*, note 3 *supra*. As to the former, however, *Cranston* concedes that the Supreme Court "omitted any specific discussion of the farm location differentials" which had been challenged in the District Court—an omission of which Judge Magruder said in *Green Valley:*

> These points were raised in the District Court in the Hood and Whiting Milk cases but were not pressed before the Supreme Court. Hence, they are still open for consideration here.

108 F.2d 342, 344 (1939).

Rock Royal did not involve producers, but only handlers and therefore a different provision of the statute. Moreover, the differential payments there involved depended upon the location of the plant to which delivery was made, and not the location of the delivering farmer.

flat language of the Senate and House Committee Reports defining "market differential." *See supra* p. 23.

Even if the farm location differentials cannot be saved, appellants' argument continues, the case should be remanded to the Secretary so that he can determine whether other amendments are necessary and whether the order, without a nearby differential, effectuates the declared policy of the Act.[41] Appellants rely in this regard upon cases such as *Addison v. Holly Hill Fruit Products*, 322 U.S. 607 (1944), and *FPC v. Idaho Power Co.*, 344 U.S. 17 (1952).

Those decisions do enunciate the principle that a court cannot always assume that an agency, had it been aware of the limits of its authority, would have promulgated an order differing only in the absence of the provision judicially declared unlawful. That principle, however, does not obtain here. The 1964 order contains an explicit severability clause, clearly indicating that all parties contemplated that judicial invalidation of some provisions would not upset the remainder. Moreover, unlike the provisions involved in *Addison* and *Idaho Power*, the nearby differential is discrete. There is nothing to suggest that elimination of it irretrievably impairs the Secretary's power and purpose to administer the significant regulatory scheme embodied in the remaining provisions of the order. He has simply been told to discontinue illegal payments under the order. Since any discrimination attributable to farm location

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[41] The nearby farmers also argue that, since the nearby differential is a key provision of the order, its invalidation effectively invalidates the entire order until the Secretary has readopted it *and* it has been approved in a referendum by two-thirds of the producers in the market. The Secretary, however, rejects this construction, relying on the following severability provision in the order:

> If any provision . . . is held invalid, the application of . . . the remaining provisions . . . shall not be affected thereby.

7 C.F.R. § 1001.96 (1968).

would appear to be invalid, there is no reason to afford him a chance to disburse them under a different name.[42]

V.

Although we affirm the judgment of the District Court, we must deal with the distant producers' claim of equitable entitlement in respect of the escrow fund.[43] The complaint was filed on December 27, 1966, and the escrowing commenced with the preliminary injunction of January 16, 1967. Final judgment was entered by the District Court on June 15, 1967. In the exercise of our duty, as a court of equity, to "tailor . . . relief with a critical and balanced view of the ramifications of [the] decision,"[44] we have decided that the monies escrowed before June 15, 1967 should be disbursed to the nearby farmers and that the distant producers are entitled to amounts thereafter collected.

In support of their claim, the nearby producers point out that the nearby differential was in operation for almost 30 years before it was challenged in court and that the

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[42]The injunction is prospective only; the Secretary and the producers can do what they wish with the order hereafter. Unlike the situation in *Idaho Power*, the District Court's injunction did not constitute a command that the Secretary continue the order without the illegal provision. And, since there will be no retroactive recovery in this case, the injunction, as compared with the decision of the circuit court in *Addison*, has no impact on rights arising from events which occurred before the date of the court's judgment.

[43]We do not think the case need be remanded—as all appellants urge—for either the Secretary or the District Court to determine in the first instance the equitable distribution of the escrow fund. Further delay is unnecessary, the facts are not in dispute, and neither possesses a peculiarly informed discretion on this question to which this court should defer.

[44]370 F.2d at 239.

nearby farmers have relied upon it over that period in making economic decisions and investments.[45] In particular, they allege reliance upon the First Circuit's decision in

[45] Both the Secretary and the nearby farmers had relied heavily on this line of argument in the 1964 and 1967 decisions and the 1964 hearings. Thus, the principal reason advanced for continuation of the nearby differentials was that they were "deeply embedded" in the New England milk marketing structure; to remove them would be grossly unfair to nearby producers who had relied upon them in voting for the order originally and in negotiating loans and making capital commitments. The nearby differentials had, it was asserted, become capitalized into land values; and if the differentials were to be abandoned or reduced, then it should be accomplished very gradually. Moreover, some witnesses predicted that if the differentials were removed, nearby producers would overproduce to make up for lost revenues, or even worse, they would be forced out of business by high local production costs—an event which must be forestalled in order to preserve an adequate supply of nearby milk and therefore greater economy for the urban consumer. Others hypothesized that nearby producers, deprived of their price advantage under the federal order, would go into business as producer-dealers, thereby removing many Class I sales from the pool and lowering the blended price. Such a development would also force out of business the small dealers who cannot economically import distant milk and who rely on nearby sources, this in turn would contribute to the undesirable trend toward monopolization in the distribution of milk. Finally, the Secretary was warned of the catastrophic inter-market dislocations which would accompany elimination of the nearby differentials. Such a step would attract vast supplies of milk from the surrounding areas, flooding the New England markets and eventually depressing the price. The Secretary was clearly much impressed with this line of testimony. In his 1967 recommended decision he noted that "the business decisions of nearby producers have been influenced over the years by the higher returns," and that the differential would "promote orderly marketing of milk in the Boston area, and prevent disruption in the normal supplies of milk for the Boston area and thus tend to effectuate the declared purposes and policies of the Act." 32 Fed. Reg. 9902, 9919 (1967).

We are not insensitive to the Secretary's efforts to preserve the public interest in the vastly complex regulation of milk marketing. As we said in *Blair*, however, "this may be a reason for the legislature to enlarge the Secretary's powers, but not for the court to overlook the limited nature of the authority hitherto conferred by Congress." 370 F.2d at 239.

Green Valley.[46] Because it was, in language at least, an explicit judicial approval of the farm location differential, they suggest that the payments should not be terminated until the differential has finally been determined invalid by a court of at least equal rank in the federal judiciary.

We recognized in *Blair* that the plaintiffs' long acquiescence in the differential and their years of enjoyment of a blended price and stable marketing conditions in the milkshed were significant factors bearing upon their entitlement to equitable relief. In view of these factors, the nearby farmers could legitimately have expected to receive, and the distant farmers to pay, the differential until it has been held invalid, after full opportunity for the presentation of views on both sides, by a court. We think this is a fair view of the equities; and, since a preliminary injunction does not constitute a final judgment on the merits, appellant producers should receive the amounts escrowed between January 16 and June 15, 1967.

We are not persuaded that the endorsement of the nearby differential in *Green Valley* further alters the equities between the parties. The nearby producers' reliance on that opinion is amply recognized by preserving their preference until it has been finally invalidated by a responsible court having jurisdiction to do so. Their expectations cannot seriously be said to encompass a decision to that effect by a Court of Appeals but not by a District Court.

The judgment appealed from is affirmed and the case remanded to the District Court for further proceedings consistent herewith.

It is so ordered.

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[46] In his 1967 recommended decision, the Secretary noted that he too had relied on *Green Valley:*

> It was subsequent to, and substantially in reliance upon, this decision that farm location differential provisions were considered to be legal and proper for inclusion in other New England orders.

32 Fed. Reg. 9902, 9920 (1967).

[Filed Sept. 23, 1968]

[Caption Omitted in Printing]

JUDGMENT

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION THEREOF, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is affirmed, and these cases are hereby remanded to the District Court for further proceedings consistent with the opinion of this court.

Per Curiam

For the Court:

Nathan J. Paulson,

Clerk

Dated: September 23, 1968

[Filed Oct. 15, 1968]

[Caption Omitted in Printing]

RESPONSE TO APPELLANTS' OPPOSITION TO APPELLEES' BILL OF COSTS

The appellees respectfully say as follows in response to the appellants' Response (Opposition) to the appellees' bill of costs:

1. The appellees regret the necessity for this Response to an unnecessary Opposition to the appellees' bill of costs. They believe that counsel should attempt to resolve such matters in good faith, and they are of the respectful opinion that minutiae of this nature should not burden the Court, the Clerk, or themselves.

2. The appellees note that appellants were denied intervention by the district court and that this Court denied their

motion for summary reversal of such denial of intervention. The appellants were only allowed to enter this case for the purpose of taking an appeal, in that it did not appear that the defendant Freeman was going to appeal the lower court's judgment. Under such circumstances, it would appear that appellants take the record as they find it, particularly when they were given repeated opportunities to bring any defenses, objections, or other matters to the attention of the district court as *amicus curiae* in the case. Additionally, defendant Freeman never really objected below to any of the material to which these appellants object, nor did appellant *Freeman* object to the inclusion of such material into the Joint Appendix that he utilized in No. 21,308, consolidated herewith, *without contributing anything to the cost thereof.* Under these circumstances, it is respectfully submitted that neither appellant has standing or ground for opposing the appellees bill of costs. If these appellants have any quarrel, it is properly with the appellant *Freeman* and not with the appellees.

3. The appellees believe that it is particularly indefensible for these appellants to burden the appellees, the Clerk, and the Court with a proposal for the apportionment of costs of the appendix that is patently improper and unbecoming of counsel, in that appellants state as follows in paragraph (e) on pages 3 and 4 of their Opposition:

> "(e) If the costs of printing the 100 pages is *assumed* to be roughly proportionate to the total cost of printing the Joint Appendix, then Appellees should bear in any event the cost of printing the 100 pages in the amount of $985.60 (100/323 x $3,183.47 = $985.60). The taxing of the remaining costs of printing the Joint Appendix should await disposition by the Supreme Court of Appellants' petition for certiorari."

It is clear that appellants seek to evade printing costs by means of an improper assumption and through the above inventive "computation". The 100 pages to which the appellants refer (p. 223-323) is almost all straight printing and virtually devoid of tabular and like material that was extensively designated by the appellants. (*Pages 199-206 of the appendix is a*

good example). Appellants' printer charges $6.90 per page, but the appellants seek to charge appellees $9.86 per page and to force the appellees to bear the cost of covers, tabular material, etc., that is the responsibility of appellants. This proposal is deemed unworthy of the time of appellees, the Clerk, and the Court, and it bears great resemblance to the tactic of appellant Freeman in No. 21308 wherein he delayed his appeal and utilized the joint appendix filed herein.

4. The letters on file disclose that appellees refused to print cross-examination with the direct testimony of witnesses in the joint appendix and insisted that such direct testimony and cross-examination be printed in separate appendixes. After appellees brought this to the attention of the Court, the appellants then agreed to print such matter in logical sequence and to pay for the printing of the administrative records. They subsequently reneged on this promise after the printing was completed in order to avoid payment therefor, and the reason given for such disavowal was so patently inaccurate that it cast a further adverse reflection on appellants. This resulted in appellants' printer billing the appellees for material that the appellants had agreed to print at their expense.

5. Additionally, the printing of most of the 100 pages to which the appellants refer was rendered necessary in order to prevent misstatements to this Court by both appellants, and an examination of the appendix evidences this obvious fact. For instance, pages 236-244 set out major admissions contained in the Secretary's brief filed in the *Blair* case, including references to the milk order provision involved in this case. Such brief, filed as an exhibit below, also acknowledged that the Secretary had always interpreted or regarded a "market" differential as being identical with that defined in the Congressional reports that were quoted by the Secretary in said brief, although both appellants disaffirmed such "long-standing contemporaneous construction" of the provision of the Act in this case.

Page 263 sets forth a "Designation" of the pertinent pages of the promulgation hearing record relating to the nearby dif-

ferential. Appellants cited many matters in this Court that they refused to bring before the lower court through a brief *amicus curiae*, and the said designation of the pages of the administrative record was made to preclude the appellants from claiming in this Court that they had no real opportunity to file such brief below because of lack of the administrative record designation. Pages 273-74 of the appendix sets forth a letter to appellants' counsel advising that appellees consent to the filing of such a brief, and page 272 sets forth a letter in which appellees inquired as to whether appellant Freeman regarded any other administrative hearing record as necessary in the district court for decision of the case. (Both appellants later maintained in this Court that all of the necessary hearing records were not before the district court.)

The said letter also referred to the filing of a part of the Economic Brief of the USDA in the district court, and the 1937 brief related to the Government's conception of proper equalization and marketwide pooling of milk. This relevant material was accepted without objection, and it is included in the appendix at pages 318-23 thereof.

The summaries of the early administrative hearing records are entirely factual, rather than argumentative, and no objection was ever made to their filing in the district court. Moreover, their accuracy was underscored by the fact that the defendant's attorneys refused to file such early administrative records after being served with such summaries and after the certification of such administrative records by the Secretary. This latter fact is shown by the affidavit on pages 306 of the Appendix that the administrative records were certified and delivered to government counsel by the Office of the Hearing Clerk, USDA. The said 100 pages of the Appendix also lists an Opposition to a motion (pp. 244-62) that evidences the inconsistency of the defendant's position in seeking to hold the proceedings in abeyance after he had advised months before that he was ready for final hearing. The matters therein were directly relevant to the very arguments made by both appellants concerning "primary jurisdiction", administrative reme-

dies, etc., and the defendant's motion to which such Opposition relates is also set forth on pages 48-50 of the Joint Appendix—the appellants not objecting to this designation or others in the other part of the Appendix at this time. The memoranda or points and authorities to which appellants object is found in two paragraphs on pages 263-64 of the Appendix, consisting of excerpts from the *defendants* points and authorities and which sets forth relevant factual data rather than argument. In view of the fact that the appellants were contesting the basis for the lower court's action, the appellees designated their Reply to the defendant's Opposition to a proposed Order granting summary judgment. The only other matter contained in pages 221-323 of the Appendix is the *defendant's* Opposition to the motion for preliminary injunction, the plaintiffs' Motion for Summary Judgment and Statement of Material Facts As To Which There Is No Genuine Issue, and the plaintiffs' points and authorities supporting the aforesaid motion. Such points and authorities cover but three pages of the appendix, and the appellees are willing to sustain the cost of this printing for the reason that such material was furnished to the printer in error. It pertains to the *Blair* case, and this fact is evident from a reading of such material and the unnatural manner in which it ends.

It should be noted that the record certified by the appellant *Freeman* contained numerous briefs or memoranda filed at the administrative hearings, and both appellants and the Court refer to such matter. The necessity and relevancy of all of the material printed at pages 221-323 of the appendix is apparent from a reading of the briefs of both appellants, in that virtually all of the matters designated by appellees are referred to in such briefs. (The early Boston milk orders, the entry of summary judgment in the lower court on the basis of *Blair*, the entry of the preliminary injunction and orders regarding escrow of the differential payments, and other matters are all referred to in appellants' briefs. Not one factual error was pointed out at any time in respect to the summaries of the administrative records relating to the nearby differential, and the appellants' complaint is that such summaries precluded an

inaccurate presentation of the contents of such administrative records and resulted in the appellant Freeman's decision not to file such certified record under those circumstances. Appellants then cited briefs in other cases in a totally inaccurate manner in an attempt establish their contentions that could no longer be presented through the administrative records that appellant Freeman certified but did not file.) The appellees respectfully submit that the relevant criterion in respect to the printing of any material in the appendix is whether it is necessary or helpful to a correct determination of the appeal, and both appellants fail to mention this factor for obvious reasons.

6. The appellees respectfully say that the appellants are totally in error in requesting that costs not be taxed against them until disposition of the intended application for certiorari, and Rule 39(d), F.R. App. Proc., states as follows:

> "The clerk *shall* prepare and certify an itemized statement of costs taxed in the court of appeals *for insertion* in the mandate."

Whether the mandate is actually stayed is a separate question, and the possible application for a writ of certiorari is not ground for qualification of the Rule or for delay in the taxing of costs. The Rules are statutory in nature and unlike the local court rules where discretion is often utilized in applying the same.

The appellees again say that they regret that the Court and the Clerk, as well as themselves, are unnecessarily burdened with this type of matter, particularly after the Court's exhaustive treatment of the appeal and its attempt to effectuate an equitable disposition thereof that would preclude additional litigation.

Wherefore, appellees respectfully request that they be accorded their costs through immediate taxation of the same against the appellants and in conformity with the amounts that they were forced to incur for the expenses of the appellants' appeals.

[Subscription Omitted in Printing]

[Filed Dec. 2, 1968]

[Caption omitted in printing]

ORDER

On consideration of Appellees' bills of costs filed in the above-entitled cases and of the responsive pleadings filed with respect thereto, it is

ORDERED by the Court that Appellees' bills of costs are approved.

Per Curiam

[Filed Dec. 2, 1968]

[Caption Omitted in Printing]

ORDER

On consideration of Appellants' motions to stay transmittal of this Court's mandate and to continue the escrow arrangements in the above-entitled cases, and of the responsive pleadings filed with respect thereto, it is

ORDERED by the Court that the Clerk is directed to stay the transmittal of the opinion and certified copy of this Court's judgment for the period of time permitted by law for the filing of a petition for writ of certiorari and it is

FURTHER ORDERED by the Court that Appellants' motions to continue the escrow arrangements in the above-entitled cases until either the Solicitor General determines that certiorari will not be sought by the Secretary of Agriculture, or if certiorari is sought, until disposition of the cases by the Supreme Court are granted.

Per Curiam

Supreme Court of the United States

No. ---------- , *October Term, 19* 68

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE,

Petitioner,

vs.

RUSSELL ALLEN, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 20, 1969.

/s/ Earl Warren
Chief Justice of the United States.

Dated this 14th day of December, 19 68.

Grant of writ of certiorari issued on April 7, 1969

The petitions for writs of certiorari are granted. The cases are consolidated and a total of two hours is allotted for oral argument. Mr. Justice Marshall took no part in the consideration or decision of these petitions.

EXCERPTS FROM THE ADMINISTRATIVE RECORD CERTIFIED AND FILED WITH THE DISTRICT COURT ON MARCH 20, 1963

Portions of 1935 Hearings and 1936 Order

Order Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area

Issued by the Secretary of Agriculture February 7, 1936
Effective 12:01 a. m., E. S. T.,
February 9, 1936

• • • • • • • • • • •

Whereas, the Secretary finds, upon the evidence introduced at the aforementioned hearings:

1. That in 1934, 90.8 per cent of the total volume of milk sold in the Greater Boston, Massachusetts, Marketing Area, originated in states other than Massachusetts and entered into the current of interstate commerce; that the milk originating in the State of Massachusetts is inextricably intermingled with that milk which is in the current of interstate commerce, and in such a manner that it is impossible to regulate that milk originating in states other than Massachusetts without regulating that milk which originates in the State of Massachusetts and which enters the current of interstate commerce; and that the handling of milk in the Greater Boston, Massachusetts, Marketing Area is in the current of interstate commerce, or directly burdens, obstructs or affects interstate commerce.

2. That the classification of milk into two classes follows a custom of long-standing in the market and is an economically justifiable method of classifying milk;

3. That the prices received by producers for milk sold in the marketing area were, for a long time prior to said hearings, at a level that gave such milk a purchasing power with respect to articles that producers buy considerably below the purchasing power in the base period; that the prices established in this order will, over a period of time,

tend to give such milk a purchasing power with respect to articles that producers buy equivalent to the purchasing power of such milk in the base period; that the establishment of such prices does not have for its purpose the maintenance of prices to producers above the level which is declared in the act to be the policy of Congress to establish; that the differential in prices to associations of producers, and producers, is justified as a reasonable allowance for services actually performed by associations of producers; that the differential in price between milk delivered from producers' farms to handlers' plants located not more than forty miles from the State House in Boston and to plants located more than forty miles from the State House in Boston is a reasonable allowance for the extra handling costs incurred by handlers operating country station plants; and that the method provided for determining the class II price is a method which bears a reasonable relationship to the price of cream in the above market;

4. That the determination of uniform prices to producers and the payment of such prices through a market-wide equalization pool founded upon a base-rating plan is a fair and reasonable method of distributing to producers the proceeds of sales to handlers; that the country station, transportation, butter fat and other differentials are proper differentials to be used in calculating such prices; that the payment of class I prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, due to the greater availability of their milk for class I use; and that the method of calculating the bases of all producers is a fair and reasonable method;

• • • • • • • • • • •

Article IV—Minimum Prices

Section 1. *Class I Prices to Associations of Producers.*—Each handler shall pay any association of producers for Class I milk containing 3.7 percent butterfat, subject to the butterfat dif-

ferential set forth in section 3 of article VIII, not less than the following prices:

1. $3.42 per hundredweight for such milk delivered from the plant of such association to such handler's plant located not more than forty (40) miles from the State House in Boston; and

2. $3.37 per hundredweight for such milk delivered from the plant of such association to such handler at a railroad delivery point not more than forty (40) miles from the State House in Boston.

Sec. 2. *Class I Prices to Producers.*—Each handler shall pay producers, in the manner set forth in article VIII, for Class I milk delivered by them, not less than the following prices:

1. $3.30 per hundredweight for such milk delivered from producers' farms to such handler's plant located not more than forty (40) miles from the State House in Boston;

2. $3.09 per hundredweight for such milk delivered from producers' farms to such handler's plant located more than forty (40) miles from the State House in Boston, less an amount per hundredweight equal to the freight from the railroad shipping point for such handler's plant to such handler's railroad delivery point in the Marketing Area. Such freight shall be calculated according to applicable rail tariffs for the transportation in carload lots of milk in forty-quart cans and each such can shall be considered to contain 85 pounds of milk.

Sec. 3. *Class II Prices.*—Each handler shall pay producers, in the manner set forth in article VIII, for Class II milk not less than the following prices per hundredweight:

1. In the case of such milk delivered to a handler's plant located not more than forty (40) miles from the State House in Boston, a price which the Market Adminstrator shall calculate as follows: Divide by 33 the weighted average price per 40-quart can of bottling quality cream in the Boston market as reported by the United States Department of Agriculture for the delivery period during which such milk is delivered,

multiply the result by 3.7, add 10 cents and subtract 23 cents; and

2. In the case of such milk delivered to a handler's plant located more than forty (40) miles from the State House in Boston, the price calculated by the Market Adminstrator, pursuant to paragraph 1 of this section, minus six (6) cents.

Sec. 4. *Sales Outside the Marketing Area.*—The price to be paid by each handler to associations of producers or to producers, in the manner set forth in article VIII, for milk utilized as Class I milk outside the Marketing Area, shall be the price applicable pursuant to sections 1 and 2 of this article adjusted by (a) the difference between such applicable price and the price ascertained by the Market Administrator as the prevailing price paid by processors for milk of equivalent use in the market where such Class I milk is utilized and (b) the difference between the freight allowance, if any, set forth in paragraph 2 of section 2 of this article and an amount equal to the carload freight rate approved by the Interstate Commerce Commission for movement of milk in 40-quart cans from the shipping point for the plant where such Class I milk is received from producers to the railroad delivery point serving the market where such Class I milk is sold; provided, that (1) if the market where such Class I milk is utilized is less than ten (10) miles from the plant where such Class I milk is received from producers, the railroad shipping point for such plant shall be presumed to be the railroad delivery point serving such market, and (2) if the market where such Class I milk is utilized is located in Barnstable, Plymouth, Norfolk, Dukes and Nantucket counties, Massachusetts, such handler's railroad delivery point in the Marketing Area shall be considered to be the railroad delivery point serving such market.

Sec. 5. *Publication of Class II Price.*—On or before the fifth day after the end of each delivery period, the Market Administrator shall publicly announce the Class II price in effect for such delivery period.

* * *

Article VII—Determination of Uniform Prices to Producers

Section 1. *Computation of Value of Milk for Each Handler.*—For each delivery period the Market Administrator shall compute, subject to the provisions of article VI, the value of milk sold or used by each handler, which was not purchased from other handlers, by (a) multiplying the quantity of such milk in each class by the price applicable pursuant to sections 2, 3 and 4 of article IV and (b) adding together the resulting value of each class.

Sec. 2. *Computation and Announcement of Uniform Prices.*—The Market Adminstrator shall compute and announce the uniform prices per hundredweight of milk delivered during each delivery period in the following manner:

1. Combine into one total the respective values of milk, computed pursuant to section 1 of this article, for each handler, who made the report as required by section 1 of article V for such delivery period and who made the payments required by article VIII for milk received during the delivery period next preceding but one;

2. Add the total net amount of the differentials applicable pursuant to section 4 of article VIII;

3. Subtract the total amount to be paid to producers pursuant to paragraphs 2, 3, and 4 of section 1 of article VIII;

4. Divide by the total quantity of milk which is included in these computations and which is not in excess of the total of the respective bases of producers whose farms are located more than forty (40) miles from the State House in Boston;

5. Subtract not less than four cents (4¢) nor more than five cents (5¢) for the purpose of retaining a cash balance in connection with the payments set forth in paragraph 5 of section 1 of article VIII;

6. Add an amount which will distribute, pursuant to section 3 of this article, any cash balance available; and

7. On or before the 12th day after the end of each delivery period mail to all handlers and publicly announce (a) such of

these computations as do not disclose information confidential pursuant to section 8d of the Act, (b) the blended price per hundredweight which is the result of these computations and (c) the Class II price.

Sec. 3. *Distribution of Cash Balance.*—For each delivery period, the Market Administrator shall distribute, by an appropriate addition pursuant to section 2 of this article, the cash balance, if any, in his hands arising out of payments from handlers (to meet obligations arising out of paragraph 5 of section 1 of article VIII) during the delivery period next preceding but one.

Sec. 4. *Base Rating.*—The base of each producer shall be a quantity of milk for each delivery period calculated in the following manner: Multiply the figure determined pursuant to the applicable paragraph of section 5 or section 6 of this article by the number of days on which such producer delivered milk during such delivery period.

Sec. 5. *Bases through March 31, 1937.*—For calculating, pursuant to section 4 of this article, bases to be in effect up to and including March 31, 1937, the Market Adminstrator shall determine with respect to milk, or the milk equivalent of cream, delivered in bulk to processors from the farm operated by such producer:

1. In the case of each producer for whom the necessary information is submitted to the Market Administrator with respect to, and from whose farm some milk or cream was delivered in bulk to processors in, each month of one or more of the calendar years 1933, 1934 and the year ending September 30, 1935, that figure which is highest of the following six (6) calculations, or such of these six (6) calculations as are possible from available information: the average delivery per day during the quarter in which the average delivery per day was lowest of the four quarters, respectively, in the calendar year 1933, the calendar year 1934 and the year ending September 30, 1935; or 75 percent of the average delivery per day, respectively, during the calendar year 1933, the calendar year 1934 and the year ending September 30, 1935.

2. In the case of each producer for whom complete information with respect to none of the calendar years 1933, 1934, or the year ending September 30, 1935, is submitted to the Market Administrator, or from whose farm, according to such information, no milk or cream was delivered in bulk to processors in one or more months in each of the calendar years 1933, 1934, and the year ending September 30, 1935, until a satisfactory record of deliveries of milk in twelve consecutive months subsequent to October 1934 becomes available to the Market Administrator, that figure which is 75 percent of the average delivery per day during the consecutive months subsequent to October 1934 and immediately prior to the date hereof, for which a record of milk deliveries is available to the Market Administrator; and, when a satisfactory record of deliveries of milk for twelve consecutive months following October 1934 becomes available to the Market Administrator, that figure which is higher of the two following calculations: 75 percent of the average delivery per day throughout such twelve consecutive months and the average delivery per day during the three consecutive months of such twelve months in which the average delivery per day was lowest.

3. In the case of each producer who did not regularly sell milk for a period of thirty (30) days prior to the effective date hereof to a handler or to persons within the Marketing Area, that figure which is equal to the same percentage of his average delivery per day during the period when he receives the Class II price pursuant to paragraph 4 of section 1 of article VIII as is the relationship between (a) the total deliveries of all producers not in excess of their respective bases during such period and (b) the total deliveries of all producers.

4. In the case of a producer who, as a tenant or landlord, moves his entire herd from one farm to another farm: the higher of the two figures from which have been calculated, pursuant to section 4 of this article, respectively, (a) the base in effect for the farm from which the herd is moved and (b) the base in effect for the farm to which the herd is moved.

Sec. 6. *Bases after March 31, 1937.*—In calculating, pursuant to section 4 of this article, bases to be in effect after March 31, 1937, the Market Administrator shall determine with respect to milk delivered in bulk to handlers from the farm operated by such producer:

1. In the case of bases which are to be in effect during the period from April 1, 1937 to March 31, 1938, that figure which is the higher of (a) the average delivery per day during the three months of the calendar year 1936 in which deliveries of milk were lowest and (b) sixty (60) percent of the average delivery per day throughout the calendar year 1936; and

2. In the cases of bases which are to be in effect for the year beginning April 1, 1938, and for each year thereafter beginning April 1, that figure which is the higher of (a) the average delivery per day during the three months of the next preceding calendar year in which deliveries were lowest and (b) forty (40) percent of the average delivery per day throughout such calendar year.

Sec. 7. *Recommendations.*—Prior to January 1, 1937, the Market Adminstrator shall recommend to the Secretary amendments to this article which will provide for an equitable method of base rating with respect to those producers for whom, due to fortuitous circumstances or otherwise, the provisions of section 6 of this article would result in bases inequitable as compared with the bases of other producers.

Article VIII—Payments for Milk

Section 1. *Time and Method of Payment.*—On or before the 25th day after the end of each delivery period, each handler shall make payments, subject to the butterfat differential set forth in section 3 of this article, for the total value of milk received during such delivery period as required to be computed pursuant to section 1 of article VII, as follows:

1. To producers, except as set forth in paragraph 2 of this section, at the blended price per hundredweight computed pursuant to section 2 of article VII, subject to the differentials set forth in paragraphs 1 and 2 of section 4 of this arti-

cle, for that quantity of milk delivered by each producer not in excess of the base of such producer;

2. To any producer, whose farm is located within forty (40) miles of the State House in Boston and who delivers milk to such handler at a plant located within forty (40) miles of the State House in Boston, at $3.30 per hundredweight for that quantity of milk delivered by such producer not in excess of the base of such producer;

3. To producers, at the Class II price, subject to the differential set forth in paragraph 3 of section 4 of this article, for that quantity of milk delivered by each producer in excess of his base;

4. To any producer, who did not regularly sell milk for a period of thirty (30) days prior to the effective date hereof to a handler or to persons within the Marketing Area, at the Class II price, subject to the differential set forth in paragraph 3 of section 4 of this article, for all the milk delivered by such producer during the period beginning with the first regular delivery of such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month;

5. To producers, through the Market Adminstrator, by paying to or receiving from the Market Adminstrator, as the case may be, the amount by which the payments made pursuant to paragraphs 1, 2, 3, and 4 of this section are less than, or exceed, the value of milk as required to be com[illegible]ted for such handler pursuant to section 1 of article VII, as shown in a statement rendered by the Market Administrator on or before the 20th day after the end of such delivery period.

Sec. 2. *Errors in Payments.*—Errors in making any of the payments prescribed in this article shall be corrected not later than the date for making payments next following the determination of such errors.

Sec. 3. *Butterfat Differential.*—If any producer has delivered to any handler during any delivery period milk having an average butterfat content other than 3.7 percent, such handler

shall, in making the payments prescribed by paragraphs 1, 2, 3, and 4 of section 1 of this article to such producer, add for each one-tenth of one percent of average butterfat content above 3.7 percent or deduct for each one-tenth of one percent of average butterfat content below 3.7 percent an amount per hundredweight which shall be calculated by the Market Administrator as follows: Divide by 33 the weighted average price per 40-quart can of bottling quality cream in the Boston market, as reported by the United States Department of Agriculture for the delivery period during which such milk is delivered, subtract 8 cents and divide the result by 10.

Sec. 4. *Country Station Differentials.*—The payments to be made to producers by handlers pursuant to paragraphs 1, 3, and 4 of section 1 of this article shall be subject to differentials as follows:

1. With respect to that quantity of milk which is not in excess of his base, delivered by a producer to a handler's plant located more than forty (40) miles from the State House in Boston, there shall be deducted an amount per hundredweight equal to the freight (considering 85 pounds of milk per can), according to the tariff currently approved by the Interstate Commerce Commission for the transportation, in carload lots of milk in 40-quart cans, to Boston from the zone of location of the handler's plant.

2. With respect to the quantity of milk which is not in excess of his base, delivered by a producer, whose farm is located more than forty (40) miles from the State House in Boston, to a handler's plant located not more than forty (40) miles from the State House in Boston, there shall be added 21 cents per hundredweight.

3. With respect to the quantity of milk delivered by a producer, which is in excess of his base, at the plant of a handler located more than forty (40) miles from the State House in Boston, there shall be deducted six (6) cents per hundredweight.

Sec. 5. *Other Differentials.*—In making the payments to producers set forth in paragraphs 1, 2, 3, and 4 of section

1 of this article, handlers may make deductions as follows:

1. With respect to all milk delivered by producers to the plant of a handler which is located more than forty (40) miles from the State House in Boston and which is located more than two (2) miles from a railroad shipping point, an amount not greater than 10 cents per hundredweight; provided, that such deduction has been approved and made public by the Market Administrator prior to the time of payment.

2. With respect to milk delivered by producers to a handler's plant which is located more than fourteen (14) miles, but not more than forty (40) miles, from the State House in Boston, an amount equal to 10 cents per hundredweight of Class I milk actually sold or distributed in the Marketing Area from such plant, such total amount to be deducted pro rata on all that milk not in excess of the respective bases of such producers.

Portions of Hearings held December 10-12, 1935

TESTIMONY OF PAUL MILLER
DAIRY SECTION, AAA

* * *

[18] In the Boston market (the Greater Boston marketing area) widely varying systems of pro-rating to producers the proceeds of sales to handlers have prevailed. Some associations pay [19] producers a composite price for all milk, several pro-rate to producers the proceeds of sales to handlers on a base-rating plan, but the method of establishing bases varies between associations. This situation has caused a highly unsatisfactory relationship between producers and associations of producers. A plan that will place all producers on a comparable basis is highly desirable. The plan that is incorporated in the proposed marketing agreement and proposed order has the great advantage that it purports to place all producers under a uniform plan. Also, the large number of options from which the producer may select his base is sufficient to assure

that each producer will be in a position to select the base that will be to his advantage in view of his type of farm organization and operation. On the other hand, this plan will, for the time being, result in total bases being considerably in excess of total fluid milk sales in the market. Thus, total bases will be so large that they will be equivalent to fluid milk sales during the season of short production, as should be the case. However, it is necessary to follow this procedure at first in order to place all producers on a comparable basis. The other features of the plan involve the readjustment of bases in time so that total bases will be brought more in line with fluid milk sales. Stated differently, the market will progress steadily from one that is operating on what in some months will be approximately [20] a composite price basis to one that is operating under a sound base-rating plan of pro-rating to producers the proceeds of sales to handlers.

* * *

[131-132] MR. MILLER: I will attempt to make just a brief statement that may clear up the general features of the plan, by reading the statement in the proposed agreement. Just let me make a statement about the proposed plan of rating. It provides six options for determining the base of a particular producer. With respect to 1933, 1934 or 1935, the base is determined by taking either 75 per cent of the average, yearly production for any one of those three years, whichever is highest, or by taking the average daily production for the low quarter of any one of those years, whichever is highest. I don't suppose that is very clear; shall I explain it further? That is, the production for the first year, and then the idea is to bring it gradually on a more uniform basis by reducing the options in the second year. That is, from April 1, 1937, to March 31, 1938, the proposal is that the base shall be that figure, which is higher of the following two calculations with respect to the deliveries of milk in bulk to handlers from the farm of such producer; (a) the average delivery of milk per day during the three calendar months of the calendar year 1936 in which deliveries of milk were lowest; and (b) 60 per cent of the average delivery of milk per day throughout the calendar year 1936.

[133] You see there are still two options but each is based upon the production of the calendar year 1936. Then in the following year another step is taken that brings the rating of every farmer onto a more uniform basis. You see, as long as there are several options, the rating is not very uniform.

So, the final step is as follows:

For the year beginning April 1, 1938, and for each year thereafter beginning April 1, that figure which is higher of the two following calculations with respect to the deliveries of milk in bulk to handlers from the farm of such producer; (a) the average delivery of milk per day during the three months of the next preceding calendar year in which deliveries were lowest; and (b) 40 per cent of the average delivery of milk per day throughout the next preceding calendar year.

Our estimations are that either of those options in determining the base, amounts to more or less the same thing. So that the production for the final year brings the determination of the base, in general, onto a quite uniform procedure.

You see, the idea of the whole thing is to work out and finally get on to a uniform rating plan that applies generally throughout the milk shed. As I stated this morning, in presenting our brief, at the present time many different systems obtain. There are rating plans in effect under which farmers are paid, and many farmers in other groups, at the [134] present time, receive payment for milk on what is called a composite price basis, that is, no rating. It is true that there is a rating plan in the market by which the proceeds are allotted among different groups, but each of these groups takes proceeds allotted to it by the farmer plan, and distributes it in its own way, and the result is that it is very difficult for your farmers to determine whether you, as an individual and a member of one group, are paid equitably in comparison with some other farmer as a member of some other group, because your bases of payments are somewhat, and often very different.

So it seems as if, as we proceed in our efforts to work out a general marketing scheme in the market, we should give a lot of attention to some plan that will at least gradually bring

this procedure of dividing up the Class 1 market among producers on a uniform plan.

Now perhaps I should explain, as well as I can, the situation as provided in the proposed agreement with respect to the so-called Massachusetts contingent of the milk shed. Under the proposed plan, Massachusetts producers receive their bases and determine their bases in exactly the same manner as other producers throughout the shed, that is, the procedure, each one of these years, apprise the same to them as to the producers in Vermont and the other states. The only difference is this, as has been pointed out, and which is quite [135] material, that not the Massachusetts producers only, but all producers within the 40 miles of the State House at Boston, receive for base milk, not the blended price, but what amounts to the Class 1 price. While they earn their basis and determine their basis in the same way, base milk is priced differently as far as they are concerned to all producers located in that zone.

Now, I presume that you know some reason for that special provision located in that zone. I am not sure that I made such a statement of that as we here in this brief, and so I think I might make it at this time, and then perhaps there will be further questions.

With respect to this particular provision, it should be noted that a producer whose farm is located near the market is in a position to supply Class 1 milk for use at all times, at less cost and distances, and if necessary he can, after each twice-a-day milking, put his milk on his own truck and deliver it to a handler or to consumers. Forty miles, however, is approximately a limit of the use of such facility in handling milk.

In addition, the area for supplying milk to the Boston area shows a rather definite gap between farms located within 40 miles of the State House and those which deliver milk to plants located in the 41-60 mile zone.

Producers beyond the 40-mile line may, if desired, deliver [136] milk to the farmers within the 40-mile line, in which event they are to be paid the 40 cents plus the 26 cents, as discussed in the differential in Section 4.

Now, does that clear up a little bit this provision?

MR. C. F. WHITE: One statement that you made, "nearby producers can better deliver to the market than those far away". I would like to ask this question: Do they do it?

MR. MILLER: I don't believe I am very well prepared to answer that question.

MR. WHITE: Then, why give that as a reason?

MR. MILLER: I suppose that they must be in a position to do so, and undoubtedly do so.

MR. WHITE: Isn't it true that the real reason—we might as well bring it out here—that these farmers in the 40-mile zone are given preference, is so as to get the Massachusetts Board to work with you?

MR MILLER: No, sir; no, sir; I do not think we need to bring that in. It is not that consideration. It is for the purpose of getting the Massachusetts producers and other nearby producers to work, not with us, necessarily, but with you. The problem is to find some kind of scheme that you can all accept and work out together. And we have heard a good deal from the nearby producers in regard to their position. I think that our first very tentative proposal did not provide anything of this sort, and it seemed to be so different [137] from the scheme or situation that now exists, that I think that one thing that is perhaps being overlooked is this fact, that as you work onto this basing plan, this particular price charge perhaps would disappear. As the plan works out, base milk presumably will be brought into better adjustment to sales. The only reason now why base milk does not bring Class 1 prices is that there is so much base milk, that much of it has to be sold as Class 2.

MR. WALKER: My question had to do with the present proposed rating. It was a matter of information. Doesn't this proposed base rating increase the rated milk rather than decrease it?

MR. MILLER: Yes, sir, for the first year, it does, so much so that we state in the brief that the price, notwithstanding the rated plan, amounts to, in some months, practically a composite price, and the reason for it is that it seems to be desirable and necessary to give farmers who have worked under a

base rating plan or who have done so for only a short period, a chance to get onto such a plan. It has been argued that if we adopt a plan similar to the plan that it is contemplated that this will develop into at the end of the third year, if we started off with that, many farmers would undoubtedly complain that they have not had an opportunity to adjust their production in such a way as to maximize their base to the percentage of their milk that * * *

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TESTIMONY OF W. A. BRONSON
NEW ENGLAND MILK PRODUCERS ASSOC.

[65] RELATION OF ESTABLISHED DELIVERY BASES TO FLUID MILK AND CREAM SALES.

The delivery bases established under this provision would be of sufficient volume to take care of the fluid milk requirements of the market and in addition the fluid cream requirements. It also would take care of the peak requirements for fluid milk which come during certain seasons of the year.

MR. BLANDI: Approximately how many producers do you represent, Mr Bronson?

MR. BRONSON: I think the information available in the Milk Market Adminstrator's office will show that, of the volume of milk that is being handled in the Boston pool, the New England Dairies runs from 70 to 75 per cent of the milk.

MR. BLANDI: And in producers actually how many?

MR. BRONSON: In the Boston pool, as such, probably upward of 12,000 producers.

MR. BLANDI: How long have you held your present position?

MR. BRONSON: I have been with the New England Milk Producers Association, as statistician, since 1920.

MR BLANDI: In your experience, would you say that the base-rating plan, as we have designed it in this proposed marketing agreement and order, tends to curtail production [66] in any way?

MR. BRONSON: No, sir; in fact, the figures show that production under the base-rating plan operated this past year, production was considerably ahead of the three previous years, by a considerable volume.

MR. BLANDI: Then, as far as you know, there is nothing in the proposed agreement and order that would tend to dictate to the producer what he shall or shall not produce?

MR. BRONSON: No, sir.

MR. BLANDI: That is all.

MR. LeBLANC: Mr. Chairman, may I ask a question?

PRESIDING OFFICER MATHER: Yes.

MR. LeBLANC: Mr. Bronson, can you tell us what is the real cost of production for 100 pounds of milk, now?

MR. BRONSON: I think the cost is very much greater than the price being received for the milk. As to each individual cost, it varies with each individual producer. I know that the cost of production for milk in our New England territory is considerably higher than the price received.

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120 **Testimony of Howard Selby, Mgr. United Farmers Creamery**

There is a particular feature about this proposed marketing agreement that I want to call attention to. It has not been mentioned here today, in spite of the fact that the agreement apparently has been thoroughly covered, and that relates to the Massachusetts situation. If I
121 interpret this agreement correctly, and my Board of Directors has studied it, and they understand it, it means that the producers located in the Greater Boston area having a radius of 40 miles around, will be exempt from the necessity of equalizing their production. They will be given the base rating on the 75 per cent plan in accordance with the rest of us, but they will receive for their base volume of Class 1 milk, an undiluted and unblended price.

I find so many men who have been engaged in the industry for a long time who do not seem to take into account just what that means. We spoke of the price of Class 1 milk being advanced 23 cents, today, but we do not understand that that may mean only 5 or 7 or 8 cents a hundredweight in the total production. It is proposed in this agreement, as it is now drawn, that the Massachusetts farmer shall not suffer any blended price. The blended price means on the basis of only about 42 per cent of all the excess milk being settled for on a surplus basis.

I figured yesterday that if United Farmers was to enjoy that same opportunity and protection, it would result in a sum of $160,000.00 for 1935 or close to $100.00 per farmer, which would be an attractive net profit for each particular man to enjoy that privilege. It is often brought out in testimony and statements that the Massachusetts farmer should be protected in such manner because
122 of the increased cost of production near to the City of Boston. If that is the case, then, let us produce the milk in northern Vermont and ship it into Boston at the lower cost that we are capable of producing the product in this area. There is relief given to the producers in Massachusetts where they do not pay a station charge.

So, all in all, there is a substantial benefit accruing to them. If the price of milk advanced 35 cents a hundredweight on Class 1, we know their price would advance to the extent of 75 per cent of their production, that is, to these men, meaning that they would get 27 cents a hundredweight more for their composite milk as compared with this 9 to 12 cents that we would get in this section of Vermont, or operating in other parts of the milk shed.

The contention is made that that is such a small factor in Massachusetts that we can afford to wink at it.

I would state here that Massachusetts production has been only 9.2 per cent of the milk in the Boston market, and yet one or two years ago Massachusetts was producing

about 8 per cent of the milk in the Boston market, and today it is producing approximately 14 per cent. Perhaps that 14 per cent is overstated, but at any rate we know there has been a substantial increase. We know that the farmers in Vermont have established a basis and have sold some of their surplus cattle which they own, to the
123 Massachusetts farmers, with the result that the Massachusetts farmer, if located near to Boston, turns that milk into the market in competition with you, and gets the benefit of Class 1 prices, under this plan, and crowds the rate with just so much surplus milk into your blended price, and gives you just so much less returns than promised under the license plan. It may be said that that is provided for, in that that exists only one year and, after that, it will go to a basis of 60 per cent, and then 40 per cent. But we have no guarantees that there will be no further revisions of this agreement, but we do have the assurance that if that added charge comes to the producers in that area, it is most reasonable to suppose that they will go in for further interest in their production, and if we should come to the end of the marketing agreement after 12 or 18 months, there would be just that much more to contend with at that time.

We feel that no plan should give any preference to any one section over another.

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TESTIMONY OF ERNEST A. BANCROFT
PRESIDENT, NEW ENGLAND DAIRIES

[282] As to the matter of nearby producers, that is another difficult problem, and we have to be broadminded when we look at it because we, in northern New England, know our own problems and those, near the market, know their own problems, and perhaps we do not get each other's viewpoint, but as I look at it under this proposed marketing agreement the producer that is within a radius of 40 miles of the State House is given, perhaps you might consider it, a preferred position. But

I think he has got a preferred position, anyway you wish to look at it, and you cannot take it away from him, because you do not have to transport the milk to the State House. You are in a thickly populated area, anyway, around there, and he can sell it to the dealer or become a dealer himself, and go direct to the producer, and you cannot stop him. That is something that the location gives to him. I imagine that if most of you men were in that position, you would say that you had a preferred position, and were going to keep it.

There are two things that you can do; one is to concede that he has a preferred position, and, second, get together with him and let him have that position so that you can have a marketing agreement, or else, fight it out with him. If you go right down with the price of milk, and stay there long enough, you would probably eliminate the nearby producers *** [283] many casualties in doing it. That is a price you cannot afford to pay and the only thing to do, then, is to agree that he is probably right, too; if you will take what he is ready to give you, that is the only way you can get the price that I know you mean all want and have all got to have if you will have any degree of prosperity or maintain a decent standard of living.

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TESTIMONY OF G. D. BAILEY
PRODUCER & DIRECTOR BETHEL CREAMERY

[179] Another thing that interested me, that I heard yesterday, is that in regard to the Massachuetts producer in the 40-mile zone. I have not been able to learn from anyone that those producers in the 40-mile zone are going to produce milk enough within that limit. That does not worry me half as much as the producers in Vermont not coming along with us. These men who are down near the market—you perhaps can not say it is their market any more than ours, because they can not produce enough. However, if we antagonize them enough to keep this thing up, it is possible for them to get

legislation through in their state to cause a lot of harm to the Vermont producers. That 40-mile zone—I think, if anybody is familiar with the conditions, there, there is a limit to what they are able to produce in that territory, and it will not become attractive enough for any man to go into it very extensively.

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TESTIMONY OF WILLIAM C. WALKER
FARMER AND ATTORNEY,
CABOT FARM CO-OP.

[207] Now, the next subject that I want to speak of is the matter which I brought up yesterday of the subsidizing of the Massachusetts farmer. I know, when I speak of that, I am perhaps running on kind of thin ice, and perhaps I should not say anything about it, but I believe that you gentlemen should know just how we farmers up here feel about it, and then you can act as you deem fit.

In the first place, I do not believe they have a prior right to that market, for Massachusetts, or any other. Certainly if I established a shoe business here in [208] St. Johnsbury, I would be laughed at if I told the people of St. Johnsbury that they must buy all their shoes from me or pay me a better price than for some shoe that came from Lynn, Masschusetts.

It was stated yesterday by one of the gentlemen, I believe it was one of the gentlemen here at the table, that one reason why they expected that they ought to have a better place than we farmers up country, was the fact that they could deliver their milk more promptly, and have it in better shape, and I asked the question whether it was done. I did that for this reason, and I want you gentlemen to pay close attention to what was done by one dealer down there. Now I won't say that this was a common practice but, in this case, there was a dealer within the 40-mile zone of Boston who had about 80 cans of local milk. This local milk, he took into his plant, separated it, had cream at a very low price and sold his skim milk which cost him nothing, which gave him a profit of

about $50 a day. This milk, you understand, he sold as No. 2 milk and received back from the pool the difference between the No. 2 price and the No. 1 price that he paid the farmers for it. The money that came from this pool, or into this pool, was taken from the farmers up country, given to that dealer within the 40-mile zone to pay his farmers for milk that he sold for No. 2 milk.

* * *

[210] MR. WALKER: Well, he should enjoy the difference in the freight, but when the milk is there, how can he get a better price than we can, here?

MR. BLANDI: It does not cost him as much to get his milk there.

MR. WALKER: What we are kicking about is paying him more for his milk than we are going to get.

A VOICE IN THE AUDIENCE: How much more?

MR. BLANDI: Off the record.

(A discussion followed, off the record.)

MR. TATOR: Without interrupting your talk, may I say that, so far as Bill Walker and I are concerned, he and I have never had an argument, because Bill always shoots straight. My purpose in asking him one or two questions is not to question his honesty; I have always found him absolutely 100 per cent straight.

On this matter, we have to confess to you that there is no one who has any accurate figure computed on just how much more those Massachusetts producers should receive for their milk. I do know that, by being close to the market, they have been able to sell their milk on a flat price and [211] our best estimate is that, for eighty or ninety per cent of their milk, they have received a flat price that is better than you could expect a shipper in Vermont to get. Lots of small dealers want to be paid that way. You cannot educate them to change over. We are instituting an investigation into how much more, over a period of a year, those fellows have been able to get by being right on their doorstep.

Whether you believe it or not, there is a factor of that kind operating in this section, and you cannot go against it with-

out having the entire absorption from that end. Whether this license, as drawn, gives them too much money, is disturbing me, just as much as you. The only thing I can say is that if it is found that it has cost them more than it should have, there is no reason why it cannot be changed. It is different from what they have demanded. They have demanded, through their representative, that every drop of milk they make should be paid for at the Class 1 price.

We do not recognize state lines, but if we were to take the position presented to us, the Massachusetts position, that you are really a tariff problem, we would set up a tariff barrier and say that you cannot sell us lemons from Italy, or some other place.

Now, these people want a better price down there. [212] The Government has not recognized that. Whether these men who put in this license have put in too high a price, I do not know, but I can assure you men that we will find out what the facts are and attempt to see that it is right.

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TESTIMONY OF MR. SHEPARD
FEDERATED DAIRY ASSOCIATION

[357] MR. SHEPHARD: I want to place this organization on record as favoring the establishing of the marketing agreement in this Boston area, and wish to support in particular the increase of price of 35 cents per hundred pounds which has been asked for as an amendment to this license. I believe that this is absolutely necessary for the dairy farmers of New England to carry on and continue to pay their bills. I believe that even with this addition we will not have reached that parity which was supposed to have been brought about under the Act.

I will say that this Association is in favor of the base rating plan. Also, we are in favor of the equalization plan.

I will say in support of the feature which gives preference to the Massachusetts producers within this 40-mile zone, that

it is absolutely necessary and essential that they shall have this preference, not only for the reasons which have been stated, that they have always had a certain preference in this market, but values of feed stuffs, etc., all point to the fact there is a higher cost of production within this nearby metropolitan area in the 40-mile district than there is some distance out.

* * *

[362] MR. THOMPSON: Then if, as a legal necessity, in order to prevent discrimination by this action in this market in imposing an order your milk must come in without preference, you are opposed to it, are you?

MR. SHEPARD: Yes, and I might add that I believe it is my own opinion that the Federal Government cannot enforce regulations or impose regulations upon those Massachusetts producers, but it is also my opinion that in fairness to these producers out of the State, that the Massachusetts producers must be * * *

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ECONOMIC BRIEF WITH RESPECT TO THE PROPOSED MARKETING AGREEMENT AND PROPOSED ORDER FOR THE GREATER BOSTON MARKETING AREA

by

P. L. Miller,
Principal Agricultural Economist,
Dairy Section

and

O. M. Reed,
Senior Agricultural Economist,
Dairy Section.

Paper No. 1, Series on Marketing Agreements and Orders, Dairy Section, Agricultural Adjustment Administration, United States Department of Agriculture. December 2, 1935.

Economic Brief of Department of Agriculture, Dated December 2, 1935

Paragraph 1, therefore, provides that each producer shall be paid, for milk delivered not in excess of his base, the blended price subject to differentials on account of transportation and butterfat, except that those producers whose farms are located within 40 miles of the State House in Boston are to be paid the Class I price for their bases, as set forth in paragraph 2. Paragraph 3 prescribes that each producer shall be paid the Class II price for that milk delivered by him, which is in excess of his base. These three paragraphs combine three adjustments to a uniform price, which are authorized to be incorporated in an order: namely, adjustments on account of production over a representative period of time and an adjustment on account of the location of the farm of the producer. A literally uniform price would be a straight blend of the entire classification value of the milk delivered by all producers to handlers. By means of the computations already discussed and the payment of the Class II price for excess milk, producers thus receive an amount over such a uniform price for that milk represented by their bases and an amount less than such a uniform price for the milk delivered in excess of base, plus the difference between such a uniform price and the Class I price in the case of farms located within forty miles of the State House in Boston. It should be noted that a producer whose farm is located near the market is in position to supply milk for Class I use to the market more easily at all times than those at a greater distance.

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Portions of Order for Greater Boston Marketing Area, issued July 30, 1937 (2 Fed.Reg. 1588)

Order of the Secretary of Agriculture Issued Pursuant to the Agricultural Marketing Agreement Act of 1937. Approved June 3, 1937 (Public 137, 75th Congress) Amending Order No. 4 Regulating the Handling in Interstate or Foreign Commerce, and Such Handling as Directly Burdens, Obstructs, or Affects Interstate or Foreign Commerce, of Milk in the Greater Boston, Massachusetts, Marketing Area

Whereas pursuant to Public No. 10, 73d Congress, as amended, the Secretary of Agriculture, hereinafter called the Secretary, on January 18, 1936, tentatively approved a marketing agreement regulating the handling of milk in the Greater Boston, Massachusetts, Marketing Area; and

Whereas, on February 7, 1936, the Secretary issued Order No. 4 regulating the handling of milk in the Greater Boston, Massachusetts, Marketing Area, said order being effective 12:01 a.m. eastern standard time, February 9, 1936, and

Whereas, the Secretary, having reason to believe that an amendment should be made to said tentatively approved marketing agreement and to said order, gave, on the 24th day of June 1937, notice of a hearing to be held on the 30th day of June 1937 at St. Johnsbury, Vermont, on the 1st day of July 1937 at Boston, Massachusetts, and on the 2nd day of July 1937 at Augusta, Maine, on a proposed amendment to said tentatively approved marketing agreement and said order, and at said times and places conducted a public hearing at which all interested parties were afforded an opportunity to be heard on the proposed amendment to said tentatively approved marketing agreement and to said order; and

Whereas, after such hearing and after the approval by the Secretary, in accordance with the powers and functions vested in him by the Agricultural Marketing Agreement Act of 1937, which reenacted and further amended Public No. 10, 73rd Congress, as amended, said Agricultural Marketing Agreement Act

being hereinafter referred to as the act on the 10th day of July 1937, of an amendment to said tentatively approved marketing agreement, handlers of more than 50 per centum of the volume of milk covered by such order, as amended, which is marketed within the Greater Boston, Massachusetts, Marketing Area, refused or failed to sign such tentatively approved marketing agreement, as amended, relating to milk; and

Whereas, the Secretary determined on the 27th day of July 1937, said determination being approved by the President of the United States on the 27th day of July 1937, that said refusal or failure tends to prevent the effectuation of the declared policy of said act, and that the issuance of this amendment to said order is the only practical means, pursuant to such policy, of advancing the interests of producers of milk in said area, and is approved or favored by over 70 per centum of the producers who, during the month of May 1937, said month being determined by the Secretary to be a representative period, have been engaged in the production of milk for sale in the Greater Boston, Massachusetts, Marketing Area, and who voted in a referendum conducted by the Secretary of Agriculture on July 17, 1937; and

Whereas, the Secretary finds upon the evidence introduced at the hearing upon such proposed amendment, said findings being in addition to the findings made upon the evidence introduced at the hearing on said order, said original findings being herewith ratified and affirmed by the Secretary save only as such findings are in conflict with the findings hereinafter set forth:

1. That the minimum prices fixed by this amendment are reasonable and justified by the economic data submitted at the aforementioned hearings; that the prices fixed by this amendment will, over a period of time, tend to give milk sold in the marketing area a purchasing power with respect to articles that producers buy equivalent to the purchasing power of such milk in the base period; that the fixing of such prices does not have for its purpose the maintenance of prices to

producers above the levels which were declared in the act to be the policy of Congress to establish; that the method provided for fixing the Class II price is a method which bears a direct and reasonable relationship to the price of cream in the above market;

2. That in view of changes in economic conditions since the date of the original findings, the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for milk so delivered, without the use of a base-rating plan, but with the inclusion of special location differentials, is a fair and reasonable method of distributing to producers the proceeds of sales of milk to handlers;

3. That in view of State laws covering the giving of security by handlers, the giving of security to the Market Administrator for payments to be made by each handler is no longer necessary in order to insure the payment to producers of the minimum prices fixed in the order;

4. That all the remaining provisions of this amendment are necessary to effectuate the other provisions of the order, as amended;

5. That the order, as amended, regulates the handling of milk in the same manner as and is applicable only to handlers specified in the tentatively approved marketing agreement, as amended, upon which hearings have been held; and

6. That the issuance of the amendment to the order and all of the terms and conditions of the order, as amended, will tend to effectuate the declared policy of the act.

Now, therefore, the Secretary of Agriculture, pursuant to the authority vested in him by the Agricultural Marketing Agreement Act of 1937, which reenacted and further amended Public, No. 10, 73rd Congress, as amended, hereby orders that Order No. 4 regulating the handling of milk in the Greater Boston, Massachusetts, Marketing Area, issued by the Secretary on February 7, 1936, be and it is hereby amended as follows:

* * *

D. Delete section 1, 2, and 3 of article IV and insert in lieu thereof the following:

Section 1. *Class I Prices to Associations of Producers.*– Each handler shall pay any association of producers for Class I milk, containing 3.7 percent butterfat not less than the following prices.

1. $3.31 per hundredweight for such milk delivered from the plant of such association to such handlers plant located not more than 40 miles from the State House in Boston;

2. $3.26 per hundredweight for such milk delivered from the plant of such association to such handler at a railroad delivery point not more than 40 miles from the State House in Boston; and

3. If such milk is delivered containing butterfat more or less than 3.7 per cent such handler shall add or subtract as the case may be, a differential for each one-tenth of one percent above or below 3.7 percent, which differential is the result of dividing by 330 the cream price used in paragraph 1 of section 3 of this article.

Sec. 2. *Class I Prices to Producers.*–Each handler shall pay producers, in the manner set forth in article VIII, for Class I milk delivered by them, not less than the following prices:

1. $3.19 per hundredweight for such milk delivered from producers' farms to such handler's plant located not more than 40 miles from the State House in Boston.

2. $3.01 per hundredweight for such milk delivered from producers' farms to such handler's plant located more than 40 miles from the State House in Boston, less an amount per hundredweight equal to the freight from the railroad shipping point for such handler's plant to such handler's railroad delivery point in the Marketing Area. Such freight shall be calculated according to applicable rail tariffs for the transportation in carload lots of milk in 40-quart cans and each such can shall be considered to contain 85 pounds of milk;

3. For the purpose of this section the milk which was sold or distributed during each delivery period, by each handler, as

Class I milk shall be presumed to have been that milk which was received at such handler's plant located not more than 40 miles from the State House in Boston (a) directly from producers' farms and (b) from the nearest plants located more than 40 miles from the State House in Boston.

Sec. 3. *Class II Prices.*—Each handler shall pay producers, in the manner set forth in article VIII, for Class II milk not less than the following prices per hundredweight:

1. In the case of such milk delivered to a handler's plant located not more than 40 miles from the State House in Boston, a price which the Market Administrator shall calculate as follows: Divide by 33 the weighted average price per 40-quart can of bottling quality cream in the Boston market, as reported by the United States Department of Agriculture for the delivery period during which such milk is delivered, multiply the result by 3.7, and 2.125 times the average of the weekly quotations per pound of domestic 20-30 mesh, caseing in bags delivered in carload lots at New York, as published by the Oil Paint and Drug Reporter during such delivery period, and subtract 42 cents; and

2. In the case of such milk delivered to a handler's plant located more than 40 miles from the State House in Boston, the price calculated by the Market Administrator, pursuant to paragraph 1 of this section, minus 6 cents.

* * *

G. Delete article VII and insert in lieu thereof the following:

Article VII. Determination of Uniform Prices to Producers

Section 1. *Computation of Value of Milk for Each Handler.*—For each delivery period the Market Administrator shall compute, subject to the provisions of article VI, the value of milk sold or used by each handler, which was not purchased from other handlers by (a) multiplying the quantity of such milk in each class by the price applicable pursuant to sections 2, 3 and 4 of article IV and (b) adding together the resulting value of each class.

Sec. 2. *Computation and Announcement of Uniform Prices.*—The Market Administrator shall compute and announce the uniform prices per hundredweight of milk delivered during each delivery period in the following manner:

1. Combine into one total the respective values of milk, computed pursuant to section 1 of this article, for each handler who made the report as required by section 1 of article V for such delivery period and who made the payments required by article VIII for milk received during the delivery period next preceding but one;

2. Add the total net amount of the differentials applicable pursuant to section 4 of article VIII;

3. Subtract the total amount to be paid to producers pursuant to paragraph 2 of section 1 of article VIII;

4. Divide by the total quantity of milk which is included in these computations, except that milk required to be paid for pursuant to paragraph 2 of section 1 of article VIII;

5. Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in connection with the payments set forth in paragraph 3 of section 1 of article VIII;

6. Add an amount which will promote, pursuant to section 3 of this article, any cash balance available; and

7. On or before the 12th day after the end of each delivery period mail to all handlers and publicly announce (a) such of these computations as do not disclose information confidential pursuant to the act, (b) the blended price per hundredweight which is the result of these computations, and (c) the Class II price.

Sec. 3. *Proration of Cash Balance.*—For each delivery period the Market Administrator shall prorate, by an appropriate addition pursuant to section 2 of this article, the cash balance, if any, in his hands from payments made by handlers for milk received during the delivery period next preceding but one, to meet obligations arising out of paragraph 3 of section 1 of article VIII.

H. Delete articles VIII and IX and insert in lieu thereof the following:

Article VIII Payments for Milk

Section 1. *Time and Method of Payment.*—On or before the 25th day after the end of each delivery period each handler shall make payment, subject to the butterfat differential set forth in section 3 of this article, for the total value of milk received during such delivery period as required to be computed pursuant to section 1 of article VII, as follows:

1. To each producer, except as set forth in paragraph 2 of this section, at the blended price per hundredweight computed pursuant to section 2 of article VII, subject to the differentials set forth in section 4 of this article, for the quantity of milk delivered by such producer.

2. To any producer, who did not regularly sell milk for a period of 30 days prior to the effective date hereof to a handler or to persons within the Marketing Area, at the Class II price, in effect for the plant at which such producer delivered milk, for all the milk delivered by such producer during the period beginning with the first regular delivery of such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month;

3. To producers, through the Market Administrator, by paying to or receiving from the Market Administrator, as the case may be, the amount by which the payments made pursuant to paragraphs 1 and 2 of this section are less than or exceed the value of milk as required to be computed for such handler pursuant to section 1 of article VII, as shown in a statement rendered by the Market Administrator on or before the 20th day after the end of such delivery period.

Sec. 2. *Errors in Payment.*—Errors in making any of the payments prescribed in this article shall be corrected not later than the date for making payments next following the determination of such errors.

Sec. 3. *Butterfat Differential.*—If any producer has delivered to any handler during any delivery period milk having an

average butterfat content other than 3.7 percent, such handler shall, in making the payments prescribed by paragraphs 1 and 2 of section 1 of this article to such producer, add for each one-tenth of one percent of average butterfat content above 3.7 percent or deduct for each one-tenth of one percent of average butterfat content below 3.7 percent, an amount per hundredweight which shall be calculated by the Market Administrator as follows: Divide by 33 the weighted average price per 40-quart can of bottling quality cream in the Boston market as reported by the United States Department of Agriculture for the delivery period during which such milk is delivered, subtract .8 cents, and divide the result by 10.

Sec. 4. *Location Differentials.*—The payments to be made to producers by handlers pursuant to paragraph 1 of section 1 of this article shall be subject to differentials as follows:

1. With respect to milk delivered by a producer to a handler's plant located more than 40 miles from the State House in Boston, there shall be deducted an amount per hundredweight equal to the freight (considering 85 pounds of milk per can), according to the tariff currently approved by the Interstate Commerce Commission for the transportation, in carload lots of milk in 40-quart cans, to Boston from the zone of location of the handler's plant.

2. With respect to milk delivered by a producer to a handler's plant located not more than 40 miles from the State House in Boston, there shall be added 18 cents per hundredweight.

3. With respect to milk delivered by a producer whose farm is located more than 40 miles, but not more than 80 miles, from the State House in Boston, there shall be added 23 cents per hundredweight.

4. With respect to milk delivered by a producer whose whose farm is located not more than 40 miles from the State House in Boston, there shall be added 46 cents per hundredweight unless such addition gives a result greater than $3.19, in which event there shall be added an amount which will give a result of $3.19.

Sec. 5. *Other Differentials.*—In making the payments to producers set forth in paragraphs 1 and 2 of section 1 of this article, handlers may make deductions as follows:

1. With respect to all milk delivered by producers to the plant of a handler which is located more than 40 miles from the State House in Boston and which is located more than two miles from a railroad shipping point an amount not greater than 10 cents per hundredweight provided, that such deduction has been approved and made public by the Market Administrator prior to the time of payment.

2. With respect to milk delivered by producers to a handdler's plant which is located more than 14 miles, but not more than 40 miles, from the State House in Boston, an amount equal to 10 cents per hundredweight of Class I milk actually sold or distributed in the Marketing Area from such plant, such total amount to be deducted pro rata on all milk delivered by such producers.

3. With respect to milk delivered by producers to any handler's plant from which the average daily shipment of Class I milk during any delivery period is less than 21,500 pounds, an aggregate amount, prorated among producers delivering milk to such plant equal to the difference between the freight to the marketing area at the carload rate and at the less than carload rate for the Class I milk shipped during such delivery period.

* * *

Portions of the Hearings held June 30, July 1-2, 1937, Docket No. A51, O-51

TESTIMONY OF MR. APLIN FOR THE MARKET ADMINISTRATOR

[128] THE WITNESS: With respect to Three under Article VIII, reading: "With respect to milk delivered by a producer whose farm is located more than forty miles but not more than eighty miles from the State House in Boston, there shall be added eighteen cents per hundredweight." Now, I would like to inquire why we arrived at this 80-mile distance, why it isn't laid out into other districts of about sixty or 100 miles, or just why this particular article describing within a limit of 80 miles from Boston?

[129] MR. APLIN: The question is, why is the provision made that producers on farms less than 80 miles from the State House in Boston and more than 40 miles should receive an additional 18 cents per hundredweight in the price? And, while I am answering that I might as well point out that producers living within 40 miles receive an additional 36 cents instead of 18 cents. Now, the history of the market shows that without any Government regulation producers on farms located within those distances over a period of years have been able to receive that much more for their milk. That is due to the fact that their production is relatively even, and their milk is accessible to small dealers. If we should take away from from those producers a differential that they have been able to get without Government regulation they would have a legitimate objection that we are placing them at a comparative disadvantage as compared with producers more distant from the market.

We hope to have introduced at the hearing in Boston tomorrow evidence of the prices that have been received by these nearby producers in the past as compared with producers 200 miles from the market, and we propose, if necessary, to change the amount of these differentials so as to give nearby producers the same relative position that they have had over a period of years without any regulation.

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[229] MR. APLIN: Part G is on Page 5 of this mimeographed sheet and is a proposed new provision. It is proposed to rewrite Articles 8 and 9, and this is the way it is proposed to write it. This covers the payments for milk to producers. It provides that on or before the 25th day after the end of each delivery period each handler shall make payment as follows: First that he shall pay to each producer, except new producers, the blended price per hundredweight that has been computed subject to the differentials that are set forth later in this same article; that he shall pay to any producers who did not regularly sell milk for a period of 30 days prior to the effective date of the order the Class 2 price for all his milk for the remainder of the month in which he started deliveries and two more full calendar months; and, finally, that he shall pay to producers, through the Market Administrator, by paying to or receiving from the Administrator, as the case may be, the amount by which the payments due his producers are less than or exceeds the value of his milk.

[230] Now, that is the paragraph that provides for payments to and from the equalization pool; if the amount which the dealer is required to pay his producers is less than the value of the milk as it is charged to him under the class prices then he pays the difference to the pool. If the value of the milk due to his producers is greater than the amount charged to him he receives the difference from the pool. Of course those payments from the pool approximately would balance each other.

Now, Section 2 provides that if any errors are made in payments they shall be corrected the next period after the error is discovered.

Section 3 provides for a butterfat differential which is the same as it has been. It is based on the cream market.

Section 4, over on page 6, provides for location differentials. This section, the last two paragraphs particularly in this section are new. Now, the price which is arrived at from the calculation of the pool is a blended price for all milk f.o.b. the market with country station allowances deducted. Now, Paragraph 1 here provides that there shall be deducted from that blended

price in the case of milk delivered to a plant more than 40 miles from the State House an amount equal to the carlot freight rate from that plant to Boston, so that that deduction would be different for each freight zone, and the price would be smaller by the amount of difference in freight from each zone as we go out from the market. Now, Paragraph 2 provides that in the case of milk delivered from a producer to a plant located [231] within forty miles of the State House there should be added 18 cents per hundredweight. That is added for the reason that in the case of country stations there is allowed the dealers on Class I milk 20 cents a hundredweight as a country station charge, and we are allowing for containers in which to ship the milk three cents in the case of milk received at city plants, instead of having a 20 cent and a three cent deduction, which would be 23 cents. There is a receiving station allowance of only five cents. The difference is 18 cents per hundredweight. We add back in here 18 cents to the producer whose milk does not pass through a country station. That would be added to the price to any producer whose milk was delivered to a plant here within 40 miles of the State House, regardless of where the producer's farm is located. That would be added because his milk doesn't go through a country station, therefore, he shouldn't pay any charge for operating country stations. The paragraphs 3 and 4 relate to the differentials added to the price on account of the location of the farmer's farm.

Paragraph 3 there provides that in the case of milk delivered by a producer whose farm is more than 40 miles but not more than 80 miles from the State House in Boston there should be added 18 cents per hundredweight, and paragraph 4 provides that in the case of milk from a producer whose farm is not located more than 40 miles from the State House there should be added 36 cents per hundredweight. Those figures are only tentative. They are based on what information [232] we now have as to the difference in the price received by the nearby handlers over a period of years as compared to prices received by producers at country stations. We expect evidence to be introduced here today to show whether or not

that is the proper differential; that is, whether 36 and 18 cents is a correct amount. The idea is, without regulation over a period of years producers whose farms are near the market, due to the fact that their milk is accessible to small dealers, and their milk is rather even throughout the year, have been able to obtain a price greater than the country station price, and the difference is more than the difference between the freight and the country station charges. So that, if we set up a plan which did not give them the same advantage which they would have without regulation it would be unfair to them. On the other hand, if we gave them more than they had without regulation we would be giving it to them at the expense of other producers. It is the desire of the Administration to maintain the relative positions and to set that figure at a point which will do that.

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[353]MR. APLIN: Paragraph G starts near the top of Page 5 of the mimeographed sheet. That proposed amendment would rewrite Article VIII, which has to do with the method of paying producers. As amended the order would provide that on or before the 25th day after the end of each delivery period each handler should make payments to producers as follows: To each producer, except new producers, the blended price which has been computed under the previous Article, subject to the differentials which are set forth later in this article. It also provides in paragraph two that any producers who did not regularly sell milk for a period of thirty days prior to the effective date of this order shall receive the Class 2 price for his milk until the end of two more full months.

In paragraph 3 it provides that the dealer shall pay to the producer through the market administrator by paying to or receiving from the market administrator the amount by which the payments to his producers are less than or exceed the value of his milk. That is the paragraph that provides for the dealers making payments to the administration pool or receiving payments from the pool. Any dealer who was required to pay his producers less than the value [354] of the milk ship-

ped to him at the price set up in this Order would pay the difference into the equalization pool, and any distributor who was required to pay his producers more money than the value of his milk would receive the difference from the equalization pool.

Section 2 of this Article provides that any errors in making payments shall be corrected not later than the date for making payments next following the determination of such errors.

Section 3 at the bottom of page 5 provides for the butterfat differential to be added to or deducted from the price to producers whose milk is more than 3.7 or less than 3.7. That butterfat differential proposed is the same as the one which was in effect last year under the Order. It is based on the value of cream in Boston. The butterfat would change from period to period as the value of cream changed.

Section 4 provides for certain location differentials. The first paragraph provides for a differential according to the location of the dealer's plant at which the milk is delivered. It provides that there shall be deducted from the blended price at the market an amount equal to the carlot freight rate to Boston from the zone in which is located the plant where the producer has delivered his milk. That would mean that the blended price would be slightly less in each zone as the distance from the market increased, and the difference in price from one zone to the next would be the difference in the carlot freight rate.

Paragraph 2 provides that in the case of milk delivered [355] from a producer to a dealer's plant not more than 40 miles from the State House in Boston there should be added 18 cents per hundredweight. That is added there because the price which is computed as a blended price is the price with country station allowance deducted; and if milk is delivered by a producer to a plant within 40 miles from Boston there is allowed to be deducted only five cents per hundredweight.

Therefore, the difference of 18 cents is added to the price to producers who deliver their milk directly to the market, and that would apply to any milk delivered to a plant within 40 miles of Boston, regardless of where the producer's farm is located.

Paragraphs 3 and 4 of that Section provide for differentials according to the location of the producer's farm. Paragraph 3 provides that in the case of milk delivered by a producer whose farm is located more than 40 miles but not more than 80 miles from the State House in Boston, there shall be added 18 cents per hundredweight. Paragraph 4 provides that in the case of milk delivered by a producer whose farm is located not more than 40 miles from the State House in Boston there shall be added 36 cents per hundredweight. Those two differentials of 18 cents and 36 cents are paid to the producer on account of the location of his farm near the market, and the exact amount of those differentials as set up here is tentative.

We received considerable evidence at Boston yesterday as to the average price which had been received over a period of years by producers near the market as compared with the average price [356] received by producers who delivered to plants 200 miles from the market. The intention was to set up these differentials at such an amount as would allow producers near the market to maintain the same relative position compared with producers distant from the market that they have held over a period of years without any Government regulation. If it is shown, as it has been, that producers whose farms are near the market have received without regulation consistently over a period of ten years or longer a difference in price which cannot be entirely accounted for by the freight rate or the country station allowance, we would be placing those producers in a relatively poorer position as compared with distant producers if we set up a plan which did not give them the same relative price On the other hand, if we should give them a differential so large as to put them in a relatively better position than they had been without Government regulation it would be unsatisfactory because that extra price could be paid to them only at the expense of other producers. So, the intent was to keep them in a relative position and to give them a differential which will enable them to do that.

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TESTIMONY OF W. A. BRONSON
NEW ENGLAND MILK PRODUCERS ASSOCIATION

[266] The proposed pending amendments to Order No. 4, Article VIII, Section 4, paragraph 2, provide for an 18 cents per hundredweight differential on milk which is delivered directly to a city plant, without passing through a country plant. This item is correct since the difference between the direct city price and the country station price is 18 cents per hundredweight, difference $3.19 and $3.01. This difference is accounted for by differences in costs between direct delivered milk to the city plant and delivery to a country plant with additional costs of receiving before shipment to the market and costs of containers for shipment.

Paragraph 4 of this same section calls for an additional location differential of 36 cents per hundredweight for milk from farms located inside the 40 mile zone. This additional differential is justified by nearness to the market and that in the past producers delivering to distributors at the market have received differentials in line with those proposed in this amended order.

Over a four year period of time, 1927 through 1930, producers delivering to Deerfoot Farms averaged to receive $1.16 per hundredweight more for all milk delivered at Southboro than producers averaged in the 191-200 mile zone for all milk.

Over a ten year period of time, 1923 through 1932, producers delivering to the J. B. Prescott Company at Bedford, Mass., averaged to receive $1.04 per hundredweight, than producers averaged for the same period in the 191-200 mile zone for all milk.

267 Now, the differential that is proposed in this order would work out 90 per cent per hundredweight. I would like to file as exhibits four copies each of the price comparisons for Deer Foot Farms with the more distant milk for the years 1927, 1928, 1929, and 1930, and for the J. B. Prescott Company. I have four copies here.

The Presiding Officer: Are they subscribed and sworn to?

Witness Bronson: No, they are not.

The Presiding Officer: Could you put them in that form before they are put in the record?

Witness Bronson: I am presenting here testimony under oath and I would think that the tables that I put in here might meet that situation.

The Presiding Officer: If they are your figures and not someone else's figures.

Witness Bronson: They are my figures.

The Presiding Officer: They will be received as Exhibit No. 2.

(Whereupon, *Exhibit No. 2 was received* in evidence.)

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267 Witness Bronson: Each year. I think the necessity of a Federal order is borne out by the situation this year and last year, as far as nearby producers are concerned:

268 Prices paid for milk to nearby producers inside the 40-mile zone in May last year under the Federal Order averaged 64 cents per hundredweight or nearly a cent and one-half per quart higher than the price received May this year under the Milk Control Board basis of price. A year ago the producers in the 40 mile zone averaged $3.10 per hundredweight for their milk—this year $2.46 per hundredweight, a decrease of 64 cents per hundredweight.

The comparison of milk prices under the Federal Order as compared with prices under the Control Board is still more unfavorable when compared with the prices paid last year and this year for dairy feeds. A year ago grain cost $1.65 per hundredweight, this year $2.50 per hundredweight. Last year 100 lbs. of milk would buy 188 pounds of grain—this year only 102 lbs., a decrease of 86 pounds of grain or 46% in the ability of the milk price to purchase the most important item of expense the dairyman has.

There appears to be no question that based on past history a Federal Order can give these Massachusetts pro-

ducers more money for their milk than a Milk Control Board Order without assistance from the Federal Government, and that even more money can be obtained for these producers under a joint order of both agencies.

TESTIMONY OF MR. CARTEN
PRESIDENT, NEARBY PRODUCERS ASSOCIATION

[280] MR. CARTEN: I am representing the Nearby Milk Producers Association, the membership of which are located within 40 miles of Boston. Our Association voted to favor a license—we voted to favor a Federal license in the market provided that we retained the special place and the preferences that we have had over the past ten years. The reasons for our having a preference have been stated here already, and the fact that we did have a preference has been stated here already. As for the point that it would be discrimination to give us or keep us in the position that we already had, it seems to me that it would be a much greater discrimination to push us out of the place we have had for many years past in the Boston market. If we are pushed out, we can't go back to making cream or raising cows or anything else that the producers back in the country can do. I am specifically interested in paragraph 4. I would like to ask Mr. Aplin just so that [281] I can get this straight how much per hundred pounds advantage that would give the nearby producers over the 191 to 200 mile zone. Mr. Bronson said that the Deer Foot producers got $1.16.

MR. APLIN: 90¢ per cwt.

Mr. Carten: Thanks. Now, we feel that to be protected in our special place in the market requires two things. We must be protected against seasonal surplus. Our production is even and has always been regulated closely to the requirements of our distributors. Some of them asked distributors, will ask for more or less milk as they want it. In the second place, we must have somewhere near our differential—our consumer differential

over the 200-mile zone, and get that much. Now, the methods of protecting us under the old license, we received the class one price for all our rated milk, but our Association is very much opposed to ratings—Federal ratings, I might say. We had bad experience with Federal ratings. They were not announced in the periods on which the ratings were based, which was unfair among producers and small dealers. Many of them found themselves with half to two-thirds of their milk as surplus. I can cite specific instances where they lost farms as a result of those Federal ratings. We don't want Federal ratings. Under those circumstances, the fairest way would be to pay us on a ten per cent surplus the year around. Under that, pay us the 90 per cent, class one price, 10 per cent surplus price. The proposal of the license to give us 96¢ over the 200-mile zone, 90¢ is way below anything that Mr. Bronson produced and we have figures here from one of our producers from 1920 to 1930 for the price received for milk shipped to Salem, Massachusetts, to the H. P. Hood Company,
282 and they averaged—it is hard to average them exactly, because in all cases the butterfat wasn't given, but it was between—somewhere between $1.20 and $1.30 over the N.E.M.P.A. price in the 191-mile zone. We should have at least a cent a quart over the equalized price to be protected. That would be 46¢ instead of 36¢, wouldn't it, Mr. Aplin?

[282] MR. APLIN: 46¢ is a cent a quart?

MR. CARTEN: I said, if we had that, it would be 45¢ in paragraph 4?

MR. APLIN: Yes, it will be $1 a hundredweight.

MR. CARTEN: $1 a hundredweight is much less than was suggested—that the AAA suggested. They suggested $1.02—over the one cent a quart.

MR. APLIN: That suggestion was made by the Massachusetts federation?

MR. CARTEN: That suggestion was made at the hearing by the A.A.A. representative. We were led to believe that was

what we were supporting when we voted for the license. The trouble with the 1¢ a quart and why we are so insistent on the cent a quart is that, unlike our proposed plan, which we feel is fair, the ten per cent surplus the year around, we are at the mercy of a very low equalized price. We haven't any idea, and no one has been able to tell us, what surplus the market is going to carry. As I remember, in the New England Dairyman about March last, they reported somewhere around 10 thousand jugs of milk; bought 9 thousand jugs, surplus 1 thousand jugs sales. The other up-country cooperatives have also gotten a large surplus. There were also cream producers. I asked the A.A.A. representative at the hearing that I attended if the up-country cream producer would not come in to [283] this market. He said, yes, no one could blame them if they did under equalization. If Mr. Bronson is here or anyone who is familiar with surplus figures in the market, for the benefit of our 40-mile producer, I would like to have some idea of the surplus you expect in this market when you get it. If we get a cent a quart over the equalized price and the equalized price is based on a 70 or 80 per cent surplus, we don't feel that we are getting any protection at all. We would be better off out of it either as producer-dealers or as some other way. And, another trouble with the one cent differential is that it does not protect us against seasonal surplus. Our production is even and in the past all the ten year figures that we have we received practically—nearly as much in the flush period in the spring as we receive in the other part of the year, and a price differential over an equalized price doesn't protect us in the flush season. We make less milk and get less for it. I think that if it was possible at all we asked for a payment on 10 per cent surplus throughout the year. If that is not possible, we will go along with the license, but we must have at least one cent a quart over the equalized price. I am not satisfied with that, and I don't think it will protect it, but I think probably we would go along with it. I don't think any less would be acceptable.

MR. APLIN: In reply to that I would like to say that in that ten-year period, covered by Mr. Bronson's figures, the

average price in the 191 to 200-mile zone was somewhere around $2.50. [284] His figures indicate that the nearby producer got somewhere around a dollar to $1.10 more than that. If he got $1.10 more than the $2.50 price, he would get 44 per cent more. At the present time, we are not on as high a price level as we were then.

You asked about the percentage of surplus in the market. Nobody has any definite figures as far as I know on that. If this order were to go into effect the first of August, as amended, with a composite price, we can only make an estimate as to what the surplus would be in the pool. If it should be 50 per cent, it doesn't seem it should be more than that in August, if there were a 50 per cent surplus and the cream market should not go up any between now and then, the composite price in the 200-mile zone would be about $2.05 a hundredweight and this 90¢ added would make $2.95 and that extra 90 cents would be 44 per cent more than the 200 mile zone price so that you would get the same relative position. You would be getting 44 per cent more than the fellow in the 200-mile zone. That is a lower price level now so that if you got $1.10 more added to the $2.50 then and you get $1.10 more with the $2.05 price now, you would have a bigger advantage than you had then. You would be getting more than 44 per cent more. We would be glad to have those figures that you have.

MR. CARTEN: I have one copy, but it isn't sworn to.

MR. APLIN: (To Presiding Officer) He can put those in as part of his evidence, can't he?

MR. CARTEN: Do you think that from a period from 1920 to 1930 that the prevailing price level—that the differential you are proposing— [285] 36¢ a hundred is the same per cent over—

MR. APLIN: I am just looking here, now, at the figures Mr. Bronson has as to the average price which, apparently, averaged about $2.50 in those years. $1.10 more than that would be 44 per cent more. If this price should come out, $2.05, in the 200-mile zone, now, with a 50 per cent surplus you would then be getting 44 per cent more than they

do up there. The relationship and percentage would be just the same.

MR. CARTEN: I see that, but I still think we ought to have not less than a cent. We have much more expense, much more trouble, down here that has to be compensated some way, and the local producers—there is always a row in the market unless they are compensated in some way.

MR. APLIN: The purpose is to get them the same relative position they had before.

MR. CARTEN: Under a cent over the equalized price we would not be in the same relative position we were before because we would be subject to the spring surplus that we never were before.

TESTIMONY OF MR. SHEPARD FOR FEDERATED DAIRY ASSOCIATION

[294] MR. SHEPHARD: I wish to record the Federated Dairy Association of Massachusetts in favor of the principle of control of the Boston market by joint orders and agreements issued by the Massachusetts Milk Control Board and the Federal Government. This organization since the moment of its incorporation has held fast to this position and has reasserted its belief in the soundness of such a program many times. We believe that as long as there are large supplies of fluid milk either within or without our State available for sale to our Massachusetts markets the price of milk in any part of our State is in jeopardy. We consider this so-called homeless milk not only a threat to our price structure but also it provides an opportunity for unfair distributors to threaten our local producers and cause them to submit to intolerable terms and conditions on penalty of losing their markets.

We have worked with the producers who ship to this Boston market and have prepared facts and figures in cooperation with our State College and Extension Service which show the cost of producing milk in these areas and the history of price differentials as compared to other producing areas. These

studies will be presented by Mr. Branch of our State College, at the request of Boston shippers, and by Mr. MacCollom who is a producer of milk for the Boston market.

We believe that zone prices must be set at fair levels or the dairy farmers in these nearby areas will be compelled to readjust themselves to other modes of marketing or discontinue the production of milk. [295] Their availability to the market makes it possible for them to even become producer distributors, a position enjoyed by many of their neighbors. We have many farmers in Massachusetts who now are delivering their own milk direct to consumers and traveling from 40 to 60 miles daily to do it. All will agree that any definite trend in this direction would increase competition and disrupt our markets. This is a real possibility however, if producers do not receive a fair return and their proportionate share of the consumer's dollar. There are many Massachusetts producers who for years have been on an even production program through the operation of the rating system and their attempt to fill the exact requirements of particular dealers. These same producers regret that apparently ratings are to be abandoned and they feel that it will put them at a disadvantage. We urge you to consider this zone differential problem with great care with all these facts in mind that they may be set at a sound and honest level.

The dairy industry of our State is an important one, and to many of our country towns forms a very substantial percentage of the entire earning power of the community. We have viewed with alarm the number of auction sales of dairy herds during the past few months. We have had too many farmers report the necessity of selling cows to pay grain and tax bills. We already have too many abandoned farms in Massachusetts.

We urge you gentlemen who are members of the Massachusetts Milk Control Board to cooperate with the Federal authorities that the out of State milk over which you have no jurisdiction may be properly controlled. We urge you who are representing the Federal Government, to [296] recognize the fundamental differentials which these nearby areas must have,

in order to exist. We hope that through your combined efforts a stabilized price for milk will be paid to all producers that will enable them to meet their increased cost of production and give them a fair return for their own hard labor.

I wish at this time to give these definite figures—that I might request from Mr. MacCollom, who is a Boston producer and who has worked with committees, set up by our Federation, to study these proposed amendments and who have prepared these figures in cooperation with other producers in this immediate vicinity.

PRESIDING OFFICER BAPKALOW: It would save a good deal of time if they could be filed in a brief.

MR. MacCOLLOM: Yes, it could be filed in the form of a brief.

PRESIDING OFFICER BAPKALOW: Would that be acceptable to you?

MR. SHEPHARD: I wish to say that Mr. MacCollom has spent considerable time in preparing these figures, and I hope that you will give them your most careful consideration. We appreciate that the hour is late and we also have figures on the cost of producing milk in Massachusetts which probably Mr. Branch might file; also in the way of a brief, but it does show definitely and thus proves conclusively the need; and the past history of this nearby area of enjoying a differential on zone price as we prefer to file it.

MR. MATHER: Yes, I think it would be much better to file them in a brief. We can study it at our leisure; it will get the sort of consideration that it should have. I think it would be much better.

[297] MR. SHEPARD: I just want to point out to you just this much more. When this proposed agreement first came to our market we went into these areas where these producers are and we called them in together, and these figures are a result of the men who are actually producers in that area on this problem for the last three or four weeks.

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358 **Testimony of Mr. Greer, Attorney**

Mr. Greer: I have just a word with respect to location differential. I want to say first that I have no quarrel with those producers principally in Massachusetts who feel that they are entitled to some preferential position in this market. I want to direct the hearing authorities' attention particularly to the division which has been made of territory, and suggest that it does not achieve the results desired, nor, I feel, is it a provision which can be
359 enforced as a matter of law. The complaint is that certain producers in Massachusetts, because of a peculiar situation, are entitled to preferential treatment for two reasons; first, because of what they claim is a fixed right in the market, and, second, because of additional cost. It is obvious, of course, that the Federal authority cannot write into this order any provision which by its terms limits a preference to a state line, and it is obvious, also, that the thought is to achieve that result without putting it into words. The provision which has been written in here giving a preference to producers who are either within 40 miles of the State House at Boston or 80 miles does take in other persons than those who saved that preferential right as a fixed right, and which to my mind is of such character that it will not stand analyzation. It is possible—it might be contended not probable, but it is possible that if we should achieve the ideal and Class 1 and Class 2 prices should closely approach one another, that the producers who receive this benefit would be receiving for all their milk a higher price than other farmers are receiving for their Class 1 milk.

Now, as I say, it may be impossible, but there is a possibility under the provision as written—and, if we come to the question of the soundness of this from a legal standpoint we are going to view it not from probability but from possibilities—In the second place, the mere distance from a market sets up no advantage nor disadvantage

which in itself is not compensated for by additional transportation costs. The nearby farmer, so far as mere nearness is concerned, has an advantage because of lower transportation costs. It has been suggested, and it is a valid suggestion, that there may be an additional value to his milk because of the speed with which it reaches the market; there being in the mind of the public at least a psychological feeling that fresher milk is in some way more nutritious than older milk, even though kept under the best refrigerated conditions. That might be a basis for a proper differentiation between producers, but that is not the basis of this differentiation. In this case a man, who, because of his location, was required to take just as much time to get his milk to market as a man in the 200-mile zone, and whose costs are no different in so far as participation in Class 1, would be granted no benefit that was not given to the entire market. Now, I have no quarrel with the position, because a group of farmers may be entitled to some differentiation. I do suggest that an analyzation of this provision would indicate clearly that this provision is not designed to grant a benefit based on that differentiation but is a make-shift device, a stop-gap which will not stand analyzation in the long run.

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TESTIMONY OF MR. SHAUN KELLEY

MR. KELLEY: I represent the Pittsfield market which is entirely an intrastate market yet it has endorsed the Federal license. It is of vital importance to the secondary markets that there shall be a license in the Boston market to insure a stable price in Boston. I also wish to be put on record as President of the Massachusetts Council of the N.E.M.P.A. That council met in June, and unanimously endorsed the Federal license. That council is composed of over some three thousand Massachusetts farmers.

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94 **Economic Brief Prepared by the Department of Agriculture**

A study of the comparison of returns to different types of producers under the proposed plan and those under the rating plan effective in Order No. 4 reveals that the two are perhaps not radically different. In the study, a sample of approximately 15 percent of the producers in the market was taken. These producers were classified as even or uneven. Even producers were defined as all those producers whose deliveries in the quarter of the year in which their daily deliveries were lowest were at least 70 percent of their deliveries in their highest quarter.

It was found that only around one-fifth of the producers in the market could be called even under this definition. These even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors. (See table 38.) Only in the nearby zones was there a preponderance of even producers so that, as a group, they showed even deliveries. Nearly two-thirds of the producers located within 40 miles of the market were classified as even. The average of their low-quarter deliveries as a group was over 70 percent of their high-quarter deliveries. Over 50 percent of the producers located between 40 and 80 miles were classified as even, and they, as a group, had an aver-

age of nearly 70 percent. No other zone group had an average of 62 percent. It is proposed that these two groups of producers—that is, those located within 40 miles of Boston and those located between 40 and 80 miles—be given location differentials of $.36 and $.18 per hundredweight, respectively.

Even without consideration of these special differentials the study indicated that even producers under a pool without rating would receive an annual average price of about $.025 per hundredweight higher than the average producer, whereas in a pool with rating—as existed in Order No. 4—the even producers would receive only $.11 per hundredweight higher. The higher price received by even producers under the pool without ratings arises because they deliver relatively less milk in those months when the composite price in the market is low.

It is thought that the proposed plan, which gives consideration to those producers located nearby the market who are preponderantly even and who as a group have very uniform deliveries, and which returns a price higher than the average to the other even producers, accomplishes the purpose for which the rating plan in Order No. 4 was intended.

95 Table 38.—Average percentage deliveries in the low quarter were of deliveries in the high quarter, by zones

Zone	Average distance from market	Average percentage low quarter was of high quarter
	Miles	
1- 4	25.0	70.7
5- 8	56.0	69.2
9-12	111.0	62.1
13-16	140.9	61.4
17-18	169.4	60.6
19-20	191.6	53.7
21-22	215.0	56.1
23-24	231.5	47.7
25-26	246.5	49.3
27-28	268.9	46.9
29-30	290	36.8

Exhibit 2

Comparison of Net Prices Paid for Milk Delivered to a Distributor at the Boston Market (J. B. Prescott Co.) He Purchased Only Local Direct Trucked Milk from the Farm Within 40 Miles of Boston, and the Composite Price Received in the 191-200 Mile Zone Net for All Milk—Both Prices Delivered at the Receiving Station —Per Cwt. 3.7 Milk.

Year	Nearby Delivered	191-200 Mile Zone	Premium Above 101-200 Zone Price
1923	$3.77	$2.62	$1.15
1924	3.32	2.31	1.01
1925	3.56	2.47	1.09
1926	3.57	2.50	1.07
1927	3.75	2.60	1.15
1928	3.88	2.68	1.20
1929	3.89	2.72	1.17
1930	3.45	2.41	1.04
1931	2.54	1.75	.79
1932	2.26	1.53	.73
10-Yr. Average	3.40	2.36	1.04

EXHIBIT 2

Prices Received by Producers Within the 40-Mile Zone for Milk (3.7%) delivered to the Deerfoot Farms Co. at Southboro, Mass. and Prices Received by Producers in the 191-200 Mile Zone

Year	Deerfoot Nearby Price	191-200 Mile Zone Price	Nearby Above 191-200 Mile Zone Price
1927	$3.67	$2.60	$1.07
1928	3.76	2.68	1.09
1929	3.81	2.72	1.09
1930	3.79	2.41	1.38
4-Yr. Average	$3.76	$2.60	$1.16

June 28, 1937

RESOLUTION OF NEARBY MILK PRODUCERS ASSOCIATION

6/28/37

At a meeting of the directors of the Nearby Milk Producers Association, representing producers within forty miles of Boston and shipping approximately 10,000 quarts of milk a day to the Boston market, the following motion was made and carried–

Moved: That we favor a Federal License for the Boston Milk Market, preferably with Class I price for all milk within the forty mile zone–

That if this is not possible that milk within the forty mile zone carry not over 10% surplus.

That if the price in the forty mile zone is not at least one cent over the equalized price we are unalterable opposed to a Federal License.

/s/ Chester E. Barnes
President

NEAR BY MILK PRODUCERS ASSOCIATION

Harold McNiff, Secretary, Groton, Mass.

The directors of the Near By Milk Producers Association favor a Federal License for the Boston Milk Market provided producers within forty miles of Boston retain the preferred position in the market which they have had for many years.

I. We favor a Federal License because we feel:

   A. That such a license, properly administered, can end cut-throat competition and price cutting between cooperatives and dealers and stabilize the the producer price nearer the cost of production than it is at present.

   B. That where milk is taken from producers on a classification plan of payment the records of all cooperatives and dealers should be regularly and carefully audited and individual producers kept informed of the actual state of the market.

II. We favor a Federal License only if our preferred position in the market is protected. This is necessary because of our relatively even production compared with the market as a whole, because our nearness to the market keeps us relatively overinspected by local and state health authorities, because of our high costs of production, and finally because we are all within retailing distance of the market and are potential producer-dealers.

   A. Our production is even thruout the year and has always been adjusted closely to the requirements of our distributors. We must have protection against lower composite prices caused by bulges in production from other areas, particularly during the spring flush season.

B. Our farms are where consumers of milk can easily see them and must be kept in strict accordance with all the rules of local and state health authorities whose officers are frequent visitors.

C. Our taxes, labor, feed costs, and overhead in general are the highest in the market.

D. If a composite price lowers our returns materially below the retail price of milk most of us are in a position to retail milk with the added confusion to the market caused by a large number of small distributors trying to squeeze into Class I sales, or we might be tempted to sell to local dealers not complying with the License.

III. Our price for rated milk has averaged about $1.30 per cwt. for 3.7 milk over the price in the 200 mile zone for the period 1920 to 1930. Rated milk up to 1930 meant practically all milk for local producers because it was always possible to adjust production to secure any rating desired. A list of prices received by one of our members from 1920 to 1930 is attached. This $1.30 is the differential we should receive, plus protection against seasonal surpluses.

A. Class I price for all our milk was considered fair under the last License. However, it was then applied to rated milk and we are opposed to ratings under a License. Rating plans devised in the past by Federal Administrators worked great unfairness on local producers.

1. Many local producers who had increased and decreased their production at the request of small dealers were rated under former Licenses so that one half to two thirds of the daily deliveries which their dealers had asked them to make were classed as surplus milk. Specific instances can be given of local producers not previously on a rating plan who lost their farms thru the imposition of Federal ratings.

2. Federal rating plans were not announced in advance of the periods on which ratings were

to be based so that it was impossible for a producer to adjust his production to secure a fair rating. Under the last Federal Order, for example, it was announced in 1935 that April, May, and June production would not affect 1936 ratings, and in 1936 at least one producer was given a rating based on his production for April, May, and June 1935.

B. As we are strongly opposed to ratings under the License we feel that it would be fair to us to pay Class I price for 90% of the forty mile milk the year around, leaving us to carry a 10% surplus. This would protect us against a low composite price caused by seasonal overproduction outside the forty mile zone and would work no hardship on the rest of the market owing to the relatively small amount of milk involved.

C. The proposal to pay the forty mile producers one cent over the equalized price will not protect us against the effect of seasonal surpluses on prices and we respectfully ask that we be paid as in paragraph B, above. That is, on the basis of ten per cent surplus thru the year. If this is not possible we will go along with the License if we get at least one cent a quart over the equalized price for milk at Boston, altho this gives less than our ten year average differential over the 200 mile zone and not enough protection to our even producers. The directors have voted unanimously that if we do not receive at least one cent over the equalized price we shall oppose the License with every means in our power.

IV. Enforcement. We support the Federal License on the understanding that it will be promptly and effectively enforced on all cooperatives and dealers except producer dealers. We urge that dealers who distribute milk produced on their own farms be exempted from the License as to all milk they produce themselves. As we believe that a License cannot be effectively enforced without

the cooperation of both the Federal and State authorities we feel that no License should be adopted that does not meet the approval of the Massachusetts Milk Control Board.

NEAR BY MILK PRODUCERS ASSOCIATION.

/s/ Chester E. Barnes
President

Prices received by the Crystal Lake Farm, West Peabody, Mass. for milk delivered to H. P. Hood and Sons, Salem, Mass.

		Price paid at Salem, Mass.	Price paid to NEMPA producers at Leicester Junction, Vt.
February	1920—	4.309 per 40 qt. jug.	3.57 per cwt. : test 3.7
March	1920—	4.209 " " " "	3.61
April	1920—	4.209 " " " "	3.44
May	1920—	3.909 " " " "	3.10
June	1920—	3.909 " " " "	2.94
July	1920—	4.109 " " " "	3.24
August	1920—	4.309 " " " "	3.55
September	1920—	4.509 " " " "	3.54
October	1920—	4.509 " " " "	3.56
November	1920—	4.509 " " " "	3.53
December	1920—	4.509 " " " "	3.43
January	1921—	4.776 cwt. — test $	3.01
February	1921—	4.591 " 3.8	2.63
March	1921—	4.196 " 3.7	2.41
February	1921—	4.591 " 3.8	2.63
April	1921—	4.196 " 3.7	2.29
May	1921—	4.079 " 3.68	1.92
June	1921—	4.079 " 3.6	1.93
July	1921—	4.079 " 3.37	2.35
August	1921—	4.044 " 3.6	2.70
September	1921—	4.544 " 3.67	2.82
October	1921—	4.544 " 3.52	2.80
November	1921—	4.544 " †	2.83

Prices above include Grade A premium. Prices below do not.

March	1922—	2.75 test $	2.07
April	1922—	2.9356 " †	1.91
May	1922—	2.908 " †	1.86
June	1922—	2.870 " †	1.85
July	1922—	3.2422 " †	2.15
August	1922—	3.3574 " †	2.27
September	1922—	3.361 " 3.38	2.39
October	1922—	3.948 " †	2.68
November	1922—	3.998 " †	2.84
December	1922—	3.921 " 3.65	2.85
January	1924—	3.864 cwt. — test 3.55	2.85 test 3.7 : per cwt.
March	1924—	3.062 " 3.8	2.10
April	1924—	2.88 " 3.95	1.79
May	1924—	2.88 " 3.95	1.77
June	1924—	2.987 " 4.20	1.81
July	1924—	3.437 " 4.15	2.13
August	1924—	3.537 " 5.85	2.33
September	1924—	4.158 " 4.3	2.57
September	1924—	3.945 " 3.7	2.57
October	1924—	4.108 " 4.2	2.57
October	1924—	4.098 " 4.1	2.57
November	1924—	4.105 " 4.1	2.67
November	1924—	4.086 " †	2.67
December	1924—	4.081 " 4.05	2.67
December	1924—	4.064 " 4.00	2.67

Prices received by the Crystal Lake Farm, West Peabody, Mass. for milk delivered to H. P. Hood and Sons, Salem, Mass.

		Price paid at Salem, Mass.		Price paid to NEMPA producers at Leicester Junction, Vt.
January	1925—	4.069	" 4.1	2.58
January	1925—	4.08	" 4.1	2.58
February	1925—	4.008	" 3.9	2.53
February	1925—	4.009	" 3.9	2.53
March	1925—	3.443	" 3.7	2.33
March	1925—	3.653	" 4.1	2.33
April	1925—	3.597	" 4.0	2.27
May	1925—	3,325	" 3.9	2.05
May	1925—	3.281	" 3.8	2.05
January	1927—	3.656	" 3.75	2.55
January	1927—	3.702	" 3.85	2.55
February	1927—	3.650	" 3.8	2.61
February	1927—	3.546	" 3.6	2.61
March	1927—	3.618	" 3.75	2.58
March	1927—	3.744	" 4.00	2.58
April	1927—	3.618	" 3.75	2.52
April	1927—	3.743	" 4.00	2.52
May	1927—	3.503	" 3.5	2.26
May	1927—	3.462	" 3.4	2.26
June	1927—	3.635	" 3.8	2.14
June	1927—	3.635	" 3.8	2.14
July	1927—	3.535	" 3.5	2.29
July	1927—	3.795	" 3.6	2.29
August	1927—	4.016	" 3.6	2.55
August	1927—	4.186	" 4.00	2.55
September	1927—	4.218	" 3.75	2.79
September	1927—	4.310	" 3.8	2.79
October	1927—	4.290	" 3.9	2.87
October	1927—	4.105	" 3.6	2.87
November	1927—	4.009	" 3.6	3.01
November	1927—	4.374	" 4.1	3.01
December	1927—	4.418	" 4.1	3.08
December	1927—	4.475	" 4.6	3.00
January	1928—	4.089 cwt. — test	3.6	2.91 test 3.7
January	1928—	4.051	" 3.5	2.91
March	1928—	4.001	" 3.6	2.75
March	1928—	4.050	" 3.7	2.75
April	1928—	3.707	" 3.8	2.36
April	1928—	3.613	" 3.6	2.36
May	1928—	3.612	" 3.7	2.24
May	1928—	3.641	" 3.8	2.24
June	1928—	3.778	" 4.1	2.15
June	1928—	3.729	" 4.0	2.15
July	1928—	3.640	" 3.8	2.46
July	1928—	4.040	" 3.7	2.46
August	1928—	3.909	" 3.4	2.77
August	1928—	4.092	" 3.8	2.77
September	1928—	4.112	" 3.8	2.73
October	1928—	4.101	" 3.8	2.84
November	1928—	4.105	" 3.8	3.12
November	1928—	4.155	" 3.9	3.12
December	1928—	4.055	" 3.7	3.02
December	1928—	4.051	" 3.7	3.02

Prices received by the Crystal Lake Farm, West Peabody, Mass. for milk delivered to H. P. Hood and Sons, Salem, Mass.

		Price paid at Salem, Mass.		Price paid to NEMPA producers at Leicester Junction, Vt.
January	1930—	3.954	test 3.7	2.47
January	1930—	4.041	" 3.7	2.47
February	1930—	4.039	" 3.7	2.43
February	1930—	3.970	" 3.5	2.43
March	1930—	4.002	" 3.6	2.41
March	1930—	4.077	" 3.8	2.41
April	1930—	4.116	" 3.9	2.40
April	1930—	4.079	" 3.8	2.40
May	1930—	4.074	" 3.8	2.27
May	1930—	3.681	" 3.9	2.27
June	1930—	3.578	" 3.6	2.12
June	1930—	3.608	" 3.7	2.12
July	1930—	3.574	" 3.6	2.34
July	1930—	3.768	" 3.4	2.34
August	1930—	3.882	" 3.4	2.64
August	1930—	3.955	" 3.6	2.64
September	1930—	3.989	" 3.6	2.73
September	1930—	3.829	" 3.2	2.73
October	1930—	3.911	" 3.4	2.60
October	1930—	3.901	" 3.4	2.60
November	1930—	3.694	" 3.5	2.44
November	1930—	3.583	" 3.5	2.44
December	1930—	3.580	" 3.5	2.12
December	1930—	3.268	" 3.6	2.12

Brief Regarding the Economic Advantage of the Dairy Production Adjunct to the Greater Boston Market

by

Ellsworth W. Bell
Extension Economist
Massachusetts State College

In order to bring to light the character of the economic forces in a milk market, a knowledge of the physical factors influencing the supply of milk and cream is necessary. Usually these factors are so highly relative that an empirical answer is the best that can be offered.

The milk production of Massachusetts dairy industry is intended wholly for sale as Class I or fluid milk. When an enterprise of milk production is undertaken by an operator

on the dairy farms of this area, the whole farm organization scheme is fitted for this particular production, milk for fluid use only. It is a fact that the total milk produced in this area, approximately 800 million pounds a year, does not all sell for fluid milk. A portion is used for home consumption on the dairy farm and another quantity is fed to livestock. The remainder is sold as milk or cream in the markets of Massachusetts. A four year average of the years 1929-1932 shows that 87.6 percent of the milk produced in Massachusetts was sold as market milk. About 20 percent of this market milk was sold at retail or, in other words, from farm direct to the consumer and about 80 percent was sold at wholesale to handlers in the markets who in turn distributed to consumers. Massachusetts milk production is sold in all markets of the state, the principal being the "secondary markets". However, about 15 percent of the milk used in the Greater Boston Market is supplied by Massachusetts dairymen. A minimum of milk is produced in Massachusetts and sold as cream.

Being adjacent to markets the dairymen command a natural sales advantage whereby it is taken first at the fluid price. The supply produced near to market as described above is in competition in the Boston Market with production in Vermont where market outlets average several hundred miles from production. While in Massachusetts 87.6 percent of the production was sold as market milk, during the same four year period 73.7 percnet (sic) of the production in Vermont was sold as market milk. Only about 5 percent of this amount was sold at retail and 95 percent was necessarily sold as wholesale.

About 25 percent of the market milk in Vermont is normally sold in the form of cream. Production in this area does not possess nearness to market which constitutes a natural advantage of sale in the higher price classification. Therefore, production in this area more removed from market is so designed as to produce an market a

constant part of its milk production as cream. As measured by pounds of milk yielded per cow it is not a prerequisite for dairy production in the area far removed from market to be conducted as efficiently as it is near to market. Records show that in Vermont a cow produces only about an average of 5000 pounds per year whereas in Massachusetts 6000 pounds will be produced in one year by one cow. In 1932 each dairy cow in Massachusetts averaged to return a gross income over twice as much as each cow in Vermont returned.

This is due largely to natural conditions dependent upon location in relation to distance to market which results in a requirement for more efficient and productive cows. From data published by the Bureau of Agricultural Economics in "Milk Production Trends" in 1932 the average price per 100 pounds of milk sold by dairy farmers in Massachusetts was $2.81 compared with $1.55 per 100 pounds in Vermont or a differential of $1.26 per 100 pounds.

Assuming a distance of 200 miles from Boston as average for the Vermont production 36 cents freight plus 23 cents station charge plus 3 cents can charge would give amount equal to 62 cents as tangible differentials accruing to the economic advantage of the nearby dairymen in Massachusetts due to location. The difference indicates however an additional amount of 64 cents. (62¢ + 64¢ = $1.26) This 64 cents per 100 pounds is less tangible but nevertheless exists due to peculiar advantages existing for disposal and sale of the milk at the higher market price.

Therefore, it is recognized that freight, country assembling expenses, container services, refrigeration and other charges are not required to the same degree with respect to milk produced nearby for fluid sale. In addition, it is recognized by sellers more remote from market that sellers near to market must receive an additional amount commensurate with their current opportunities of sales which are natural and economic to their location. This is

particularly necessary when a definite plan is established to provide a means whereby the various groups in the milk-shed will cooperate on an orderly plan to share the fluid sales of the market at a fair price.

Evidence is apparent that the majority of sellers are desirous of adopting such an orderly procedure through a regulated plan of equalizing the sales use of milk among the various shippers. It is further recognized by the majority of sellers that adequate location differentials must be allowed to those sellers near to markets thereby making it unnecessary for any group to cut their offering price in order to obtain its share of the market proceeds of fluid sales.

It is therefore necessary in the efforts to establish a workable plan designed to stabilize market conditions in the Boston area that the dairy industry in the near to market area be provided for in its true and natural location advantages. If these advantages now enjoyed are duly considered and fairly provided for the proposed plan has a better than reasonable chance of succeeding in its intended purpose.

It is recognized that undoubtedly considerable must be left to trial in determining what matter of price would be fair. Only good judgment in administration will ultimately yield the result. It must be further established that the right result may not be gained within the short time allowed, if provision is not made to correct without delay an established differential which may be inadequate or without justification due to changing conditions and trends constantly taking place in the distribution and production industry.

Some Reasons Why Milk Production Costs Are Higher in Massachusetts Than in Northern New England States

Higher Wage Rates

According to the Bureau of Agricultural Economics, United States Department of Agriculture monthly wage rates paid by farmers from 1930 to 1936 inclusive have averaged as follows:

	With Board	Without Board
Maine	$29.41	$45.69
New Hampshire	30.32	[illegible] 64
Vermont	28.18	[illegible] 29
Massachusetts	34.39	[illegible]

Allowing for value of board in cases where it is furnished by the farmer, this means that Massachusetts producers pay for farm labor about a third more than Maine and Vermont producers, and about 15% more than New Hampshire producers.

Less Land Available Per Unit of Livestock

According to Farm Management surveys in dairy sections, milk producers in each state have the following acreages of land available for each animal unit of livestock kept.

	Acres Tillable Land per Animal Unit	Acres Pasture Land per Animal Unit
Maine	?	?
New Hampshire	2.36	2.60
Vermont	2.44	2.58
Massachusetts	1.90	1.29

New Hampshire dairymen thus have 24 percent more tillable land, and Vermont dairymen 28 percent more for each animal unit of livestock than have Massachusetts dairymen. In terms of pasture land, New Hampshire and Vermont dairymen have double the amount of pasture for each animal unit of livestock kept.

This limited land area necessitates the purchase of large quantities of hay and also contributes to the higher value of hay at the farm. (See Comparative Hay Prices—middle page 3.)

More Purchased Grain Required in Producing Milk

Because of less land available for pasture and for roughage production, Massachusetts dairymen also find it necessary to use more purchased grain in the production of milk. Comparative grain requirements as determined by cost of milk production studies in the various states follow:

	Pounds Grain Required per 100 Pounds Milk
Maine	34.2
New Hampshire	30.6
Vermont	28.8
Massachusetts	37.5

This means that Massachusetts dairymen are required to feed 30 percent more grain than Vermont dairymen; 23 percent more than New Hampshire dairymen; and 10 percent more than Maine dairymen.

Fewer Cows Raised

Massachusetts dairymen, because of economic necessity, raise fewer cows for replacements than dairymen of Northern New England. According to the United States Tariff Commission study made a few years ago, Massachusetts dairymen were keeping 4.4 cows for each head of young cattle while dairymen of Northern New England were keeping from 2.2 to 2.6 cows for each head of young cattle. The Massachusetts areas included in this study are particularly typical of farms within the 40 mile zone from Boston.

The fact that Massachusetts dairymen raise fewer "replacements" than those of Northern New England means that more cows have to be purchased in Massachusetts with higher costs in maintaining herd numbers.

High Taxes and Real Estate Values

According to the 1935 Federal Census, farm real estate values per acre of land in Massachusetts were from 3.5 to 4 times as high in the Northern New England states. Comparative values follow:

	Farm Real Estate Value per Acre
Maine	$ 30.40
New Hampshire	31.64
Vermont	28.69
Massachusetts	116.44

From 1930 to 1935 farm real estate values declined 27 percent in Maine; 20 percent in New Hampshire; 23 percent in Vermont; and only 11 percent in Massachusetts.

According to figures published by the Bureau of Agricultural Economics (U. S. D. A. Miscellaneous Publication No. 262—issued February, 1937) real estate taxes per acre of land in Massachusetts in 1934 were 2.9 times as high as in Maine; 3.8 times as high as in New Hampshire; and 5.5 times as high as in Vermont. Comparative tax costs follow:

	Real Estate Taxes per Acre of Land
Maine	$ .77
New Hampshire	.58
Vermont	.40
Massachusetts	2.21

Higher real estate values on which to pay interest, and higher taxes mean higher "overhead" costs in producing milk.

The net result of all these things is a higher "per quart" or "per hundredweight" cost for producing milk in Massachusetts. This is shown by the Comparative Cost of Production figures on page 3 of this brief.

ESTIMATED COMPARATIVE COSTS OF PRODUCING MILK IN MASSACHUSETTS AND NORTHERN NEW ENGLAND STATES, AT PRICES PREVAILING FOR YEAR ENDING MAY 31, 1937

Requirements per 100 lbs. Milk:	Maine	New Hampshire	Vermont	Massachusetts
Grain — Pounds	34.2	30.6	28.8	37.5
*Silage — Pounds	70.2	65.3	170.0	90.0
Hay	105.7	85.3	90.0	76.0
Man Labor — Hours	3.24	3.03	3.1	2.65
Percent of Total Net Cost Represented by Above Items	88%	80%	92%	80%
Average Butter Fat Test	4%	4%	4.3%	3.9%
Average Production per Cow — Lbs. Milk	5191.	5155.	4819.	6250.
Prices of Materials: (June 1936 to May 1937)				
Grain per Ton (E.S. 20% Dairy Ration)	$45.00	$45.00	$45.00	$45.00
Loose Hay per Ton — Farm Price (U.S.D.A. Quotations)	9.30	12.52	10.89	17.78
*Silage per Ton	4.75	5.00	5.20	6.35
Labor per Hour (U.S.D.A. Quotations)	.208	.237	.206	.267
Cost per 100 lbs. Milk at Prices Given:				
Grain	$ .7695	$ .6885	$ .648	$ .8440
Silage	.167	.1640	.442	.285
Hay	.491	.534	.490	.675
All Feed	$ 1.4275	$ 1.3865	$ 1.580	$ 1.8040
Man Labor	.6740	.7180	.639	.707
Total Feed and Labor	$ 2.1015	$ 2.1045	$ 2.219	$ 2.5110
Total All Costs per Cwt	$ 2.38	$ 2.63	$ 2.40	$ 3.14
Total All Costs per Quart	5.11¢	5.65¢	5.16¢	6.75¢
Number Farms Included in Study	178	326	186	303
Sources of Information —	Maine Agr. Exp. Sta. Bul. 361 Pub. Jan. 1932	N.H. Agr. Exp. Sta. Bul. 260 Pub. Dec. 1931	Vt. Agr. Exp. Sta. Bul. 268 Pub. Apr. 1927	Unpublished data, Dept. Agr. Ec. and Farm Mgt. Mass. State College

* Including green feed.

** About 50% of value of Hay in Maine and Vermont; 40% in New Hampshire; and 36% in Massachusetts.

Brief of Manchester Dairy, Inc.

REGARDING: PROPOSAL TO AMEND ORDER NO. 4 REGULATING THE HANDLING OF MILK IN THE GREATER BOSTON, MASSACHUETTS, MARKETING AREA.

Article VIII, Section 4, Paragraph 3.

In proposed amendments to Milk Order No. 4, regulating the handling of milk in the Greater Boston, Massachusetts marketing area, "Location Differentials" are provided for. In Article VIII, Section 4, Paragraph 3, recognition is given to dairies located in a zone 40-80 miles distance from Boston. Manchester Dairies plant is the only milk receiving station located within these boundaries. Business conducted by the above named corporation was established in 1923. As a co-operative enterprise, was organized under the New Hampshire Co-operative Marketing Act, and was established a centralizing plant to care for milk supplies made in adjoining towns within an air-line radius of 30-40 miles. Steady growth of volume handled during the so-called depression years is significant of the fact that it serves a real purpose among dairy farmers in southern New Hampshire. Trade has been built in all the Merrimack River Valley cities, in the so-called North Shore territory which is specified as a part of Metropolitan Boston, as well as Boston proper. We were the pioneers here in New England in milk tank truck movements and in daily door to door service to meet the requirements of the retail buyers. Our ability to attract such buyers has enabled us to sell at top fluid prices nearly all of our membership production each year,—in other words, we have been able to secure new additional trade as rapidly as additional supplies were secured from the surrounding towns. The growth of the supply and the out-lets have been simultaneous. Such a program has enabled the Dairy to pay prices to its members which at all times were materially higher than receiving stations in northern New Hampshire, where for long periods they handled heavy supplies of milk which they could not sell in the fluid market.

As early as 1930 we began some jobbing business in addition to handling members' supplies. These jobbing activities include: milk, cream and butter. By jobbing business I refer to the purchase and selling of supplies from other creameries. Such jobbing activities have been almost wholly confined to purchasing from other co-operatives so that at no time have we been guilty of handling more than 15-20% from proprietary concerns.

The attached sheet labeled Exhibit No. 1 is a table which shows the total volume of milk furnished by our members during the year just preceding the first Federal Milk License, likewise it shows month by month the volume of sales and the percentage of sales against purchases, while the fourth column shows the purchases made from outside sources on a jobbing basis. It will be noted that during much of the year our sales exceeded the purchases from our members. On the same sheet we again show a table of performance eleven months following the cancellation of Order No. 4,—again it will be noted that ten of the eleven months we purchased substantial quantities of milk from other co-operatives to fill the requirements of our steady customers. This sheet should show even to the casual observer that previous to any regular marketing agreement as well as during the eleven months following we were able to sell substantial quantities of milk not furnished by our members and that in consequence our surplus losses for these two periods were practically negligible.

Now we refer to the table labeled Exhibit No. 2 in which we show the relations of the prices paid to our members for all milk as compared with those prices enjoyed by shippers in the 190-200 mile zone as of Boston. It will be noted that our prices ruled substantially higher. With a carlot freight rate of approximately twelve cents per hundredweight difference between Boston to Manchester and Boston to the 20th zone. The real premium over and above the difference of freight costs exceeded one cent per quart. Our ability to pay is largely an outcome of our lack of surplus milk to be manufactured. The profit on jobbing business is, of course, a contributing factor.

We had hoped to present to you a full ten-year period of prices and the percentages of surplus carried. We were unfortunate, however, in the spring of 1936 to be flooded out of our place of business by the memorable spring flood and practically all of our office records were badly damaged. In the confusion which naturally followed the catastrophe we made no effort to preserve our older records and this makes it impossible to send this ten-year record which we would like to do.

We lay claim and we hope that this brief furnishes convincing evidence that the size of premium for our location differential as offered in your tentative draft is wholly inadequate to furnish for this corporation the natural advantages already acquired—advantages which are not confined to any twelve months period but have been built into the institution over a period of years so that it has been an integral part of our prosperity.

Official statements were made at the public hearings held recently to the effect that Federal officials do not expect producers to yield natural advantages into the pool. This gives us encouragement and a basis for a petition that our particular problem, while minor in relation to the whole, will be given thoughtful consideration to the end that an upward revision be made of the premium allowances for producers in the preferred 40-80 mile zone. Such an act would provide for a preservation of the natural advantages which have been clearly outlined by this brief.

/s/ Carl A. Smith
Manager

MANCHESTER DAIRY, INC.

I, CARL A. SMITH, Manager of Manchester Dairy, Inc., being duly authorized, on oath depose and state that the facts contained in the foregoing four pages, each bearing my signature, are true and correct to the best of my knowledge and belief.

/s/ Carl A Smith

NOW COMES, CARL A. SMITH, Manager of Manchester Dairy, Inc. duly authorized, and makes oath that the foregoing statements are true and correct to the best of his knowledge and belief.

/s/ Kenneth F. Graf
Notary Public

My Commission expires 7/29/37.

EXHIBIT NO. 1

	1	2	3	4
1932				
November	1,070,486	1,254,967	1.172	292,935
December	1,111,373	1,235,469	1.111	249,691
1933				
January	1,210,033	1,222,125	1.009	137,686
February	1,059,848	1,114,674	1.051	56,069
March	1,186,789	1,185,694	.999	109,477
April	1,134,285	1,123,379	.990	121,602
May	1,202,343	1,115,973	.928	97,790
June	1,278,558	1,227,831	.960	107,070
July	1,256,696	1,298,731	1.033	266,840
August	1,282,930	1,492,741	1.163	395,955
September	1,275,837	1,184,977	.928	116,960
October	1,322,588	1,127,214	.852	74,802
1936				
August	1,255,369	1,112,891	.886	-
September	1,197,812	1,086,551	.907	6,545
October	1,179,446	1,289,565	1.093	125,885
November	1,024,553	1,364,127	1.331	312,290
December	1,092,824	1,582,743	1.448	435,115
1937				
January	1,127,345	1,429,453	1.267	236,187
February	1,009,481	1,266,234	1.254	112,108
March	1,129,956	1,432,482	1.267	312,086
April	1,124,542	1,285,454	1.143	167,919
May	1,250,004	1,243,399	.994	63,662
June	1,275,040	1,330,416	1.043	43,691

Column No. 1 represents pounds of milk purchased from members
" No. 2 " pounds of milk sold
" No. 3 " percentage of milk sold (members)
" No. 4 " pounds of milk purchased from outside sources

EXHIBIT NO. 2

	1	2	3
1929	$3.37	$2.72	$0.65
1930	3.29	2.41	.88
1931	2.22	1.75	.47
1932	2.08	1.53	.45
1933	1.99	1.43	.56
1934	2.206	1.78	.428
1935	2.36	1.639	.73
1936	2.34	1.85	.49
AVERAGE	$2.482	$1.888	$0.594

Column No. 1 represents average price paid producers by Manchester Dairy, Inc.

" No. 2 " average price paid producers in 200 mile zone.

" No. 3 " difference between No. 1 and No. 2.

Brief of Donald B. MacCollom, Dairy Farmer of Clinton, Mass.

A BRIEF SUBMITTED REGARDING THE PROPOSAL TO AMEND THE TENTATIVELY APPROVED MARKETING AGREEMENT AND ORDER NO. 4 REGULATING THE HANDLING OF MILK IN THE GREATER BOSTON, MASSACHUSETTS, MARKETING AREA.

It is my purpose to point out that location differentials such as are called for in paragraphs 3 and 4 of Section 4, Article VIII, have a long-standing precedent in the Boston market. This preferential price set-up may be attributed to freshness of the product, stricter sanitary regulation due to nearness to inspectors' home cities, and the wish of the dealers to have prompt access to and intimate personal contact with their producers of premium grades of milk.

To substantiate these differentials Mr. W. H. Bronson of the New England Milk Producers' Association has offered as evidence a comparison of prices paid by the J. B. Prescott C. for nearby milk and the 191-200 mile zone price for the period from 1923 to 1932 inclusive. The average differential for that period was $1.04. The highest differential of $1.20, paid for 1928, was 26.8% of the nearby price. The lowest was the 73¢ differential paid for 1932 when all prices were approaching butterfat levels. It amounted to 32.3% of the nearby price.

Prices paid to producers of the Deerfoot Farms Dairy in Southborough, Mass., 70% of whose fluid milk sales are in the Boston area, for the years 1923 to 1932, as taken by me from the company's monthly statements to two producers, are as follows:

1923	$3.27	1928	$3.63
1924	2.99	1929	3.69
1925	3.28	1930	3.62
1926	3.37	1931	2.85
1927	3.37	1932	2.46

These prices are for 3.7% milk.

This plant is located more than 14 miles from Boston and milk shipped to it is subject to a deduction of 10¢ per cwt. under paragraph 2 of Section 5, Article VIII of the amendment.

The average differential between these prices and those for the 191-200 mile zone submitted by Mr. W. H. Bronson, as mentioned above, is 75.6¢ per cwt. for the 5 years from 1923 to 1927 inclusive. It is $1.036 for the 5 years from 1928 to 1932 inclusive. The ten year average differential is 89.6¢ per cwt., or 99.6¢ per cwt. if we assume that the Deerfoot Farms Dairy has deducted the 10¢ per cwt. called for by the Amendment, due to the distance of their plant from their city delivery station.

We would further point out that under the present order, which it is proposed to amend, producers in the 40 mile zone are paid 100% Class I price for all shipments within ratings.

It is proposed to eliminate ratings under this amendment. Many of the producers in the 40-mile zone have made milk under ratings for a good many years, practically all of them are in the habit of producing very nearly an even flow of milk throughout the year, and in some cases this evenness of production must be continued in order to keep special markets where premiums are paid for high quality milk.

Due to the inability of many of us to protect ourselves against fluctuations in the composite price which may result from high seasonal surpluses, we would like to make a proposal to apply to the 40-mile zone.

The present method of computing the composite price would apply as long as the surplus does not exceed 50% on the one hand, and as long as the computed price for the 40-mile zone does not exceed the published Class I price on the other. In other words, the producers in the 40-mile zone would share in the surplus on the market only up to 50%, and would at no time receive more than the published Class I price.

In Article VIII, Section 3, entitled "Butterfat Differential", a formula for the payment of a butterfat differential is set up which works out so that the dealer pays less for butterfat in the milk which he purchases from his producers for fluid distribution than he pays for butterfat in cream on the open market. We believe that the deuction of 8¢ made in the formula was made to reduce the deduction from the Class I price to which the producers of milk testing less than 3.7% would be subjected. Due to dealer competition for fluid sales on a butterfat or creamline basis, the butterfat test of all the milk retailed on the Boston market exceeds the test of all the milk produced for the market. As the cream which must necessarily be used for standardization purposes represents a higher cost per pound of butterfat than the proposed differential requires the dealer to pay for additional butterfat in fluid milk, there is a constant pressure by dealers on producers

to produce higher test milk. The low butterfat differential does not, of course, adequately compensate for this higher test. Many producers have spent years and money in building up the herds which the dealers now insist they break up. In order to stop this well-established movement we suggest that the butterfat differential be figured by the formula given in paragraph 3, Section 1, Article IV of the Amendment, namely, to divide the cream price by 330.

Due to the present disparity in the Boston and New York City prices for fluid milk, we feel that in order to prevent an undue shift from the New York to the Boston market by producers on the border between the two milksheds, the period of time required to earn a share in the Boston market pool as set up in Paragraph 2 of Section 1, Article VIII, should be increased from two full calendar months following the first day of the next succeeding month after commencing shipments, to three full calendar months following said first day.

Nominally the price on the Boston market up through June 30th has been 6¼¢ per quart for Class I milk. The proposed amendment calls for a price based on 7¢ per quart for Class I milk. The Massachusetts Milk Control Board has set a resale price in Boston of 13¢ per house deliveries. This price set-up means an advance of ¼¢ per quart in the dealer spread. The producers in the 40-mile zone feel that while dealer costs may have advanced, producer costs, particularly for grain and labor, have advanced so much more as to be beyond comparison. In giving way to dealers' demands for an increased spread, consideration has been confined too generally to the purely fluid milk aspect of the dealers' business. In asking that the Class I price in the amendment be set at 7¼¢ per quart while the Massachusetts Milk Control Board resale price remains at 13¢, rial cost of a half-pint bottle of extra-heavy cream is 8¾¢. sales. At $14.00 per 40-quart jug of 40% cream, the material cost of a half-pint bottle of extra-heavy cream is 8¼¢. After adding the 4¢ which the Rittenhouse report fixes as the cost of retail distribution of half-pints of cream, 6¼¢ remain for net profit to the dealer on this type of trade,—a net margin of 71.4% over material cost.

So long as the price of New England cream from inspected sources is fixed by the price at which dealers can import uninspected cream from points as far distant as Mississippi and Kansas, we ask that the exorbitant profits which dealers receive from this cream trade be considered in fixing producer prices for Class I milk. The two classes of trade are inseparable for all practical purposes.

As further justification for the location differentials beforementioned we wish to offer evidence as to the disparity in costs of production, with especial reference as to taxes and labor, between Massachusetts and northern New England states. From the U.S. Census of Agriculture for 1930, the average taxes per acre paid by Maine farmers was 74¢, by New Hampshire farmers 79¢, by Vermont farmers 56¢, and by Massachusetts farmers $2.04.

The average monthly wages for farm labor in 1932 from statistics of the New England Crop Reporting Service of the U.S. Department of Agriculture was $27 with board and $43.50 without board for the three northern New England states. Comparable figures for Massachusetts from the same sources were $34.37 and $60.31.

I live in Sterling, Massachusetts. My mail address is Sterling Jct., Mass. I ship an average of 650 quarts of milk per day to the Deerfoot Farms Dairy in Southborough, Mass. This testimony is offered at the request of the Federated Dairymen's Associations of Massachusetts, having a membership of 5,000 dairymen.

/s/ Donald B MacCollom

Clinton, Mass. July 7, 1937.

Worcester, ss:

Subscribed and sworn to before me this seventh day of July, 1937.

/s/ G. L. Hammon
Notary Public

BRIEF OF NEAR BY MILK PRODUCERS ASSOCIATION

Harold McNiff, Secretary, Groton, Mass.

In addition to the paper which was presented in the testimony of John L. Carten, Jr. for the Near By Milk Producers Association at the hearing July 1 in Boston, the Near By Milk Producers Association wishes to submit the following points for the consideration of the AAA on Article VIII, Section 4, paragraph 4, of the proposed amendment to the License:

I - Mr. Aplin observed at the hearing that 36¢ is a differential of 44% over the composite price expected in the 200 mile zone under the new License which is the same percentage shown by Mr. Bronson's ten year average differential from 1922 to 1932. If 44% of the 200 mile price is the fair differential for local producers then whenever the composite price changes the 36¢ per cwt will beocme unfair and our producers will swarm to the office of the Market Administrator to remind him of it and to demand an adjustment. It will greatly facilitate the administration of the License to give the near by producers the flat 46¢ they insist on and let that amount ride unchanged with any composite price.

II - The 46¢ per cwt, or one dollar differential over the 200 mile zone which our association asks is less than either of Mr Bronson's figures, $1.16 for Deerfoot Producers, and $1.04 for Prescott Producers. If Mr. Bronson had taken a ten year average from 1920 to 1930 the differential would have been even more, between $1.20 and $1.30 per cwt. Figures submitted in our testimony at the hearing show that in September 1920 milk delivered to Hood at Salem, Mass. brought a flat price, regardless of weight or test, of $4.509 per 40 quart jug, a differential of about $1.703 over the 200 mile price. In September 1921 milk at Salem brought $4.544 per cwt for 3.67 milk, a differential of about $1.724. Both these prices include a cent a quart Grade A premium. In December 1922 milk at Salem brought $3.921 for 3.65 milk, a differential of about $1.071. The 1922 price did not include a grade A premium, this being paid separately in 1922. The balance in the shrinkage in our differential can be attributed to the

NEMPA getting dealers not to deduct freight charges in figuring Class II prices. This was done in 1922 and as a result dealers lowered the Class I price FOB Boston enough so that their milk cost them no more than before the bargain with the NEMPA and the near by producers received less. It is unfair to local producers to start a ten year average with 1922.

III - The five directors of the Near By Milk Producers Association represent a fair cross-section of Essex County and Middlesex County dairymen. It may interest the AAA to know that when they met to discuss the License, two directors were in favor of the License, two were opposed, and one was undecided. After a long discussion they reached a unanimous decision on two points. All five directors agreed to support the License if the forty mile producers received at least 46¢ differential. And all five agreed to oppose the License with every means in their power if forty mile producers received less than a 46¢ differential. It is the hope of our association that the License to be voted on will either pay forty mile producers on a ten per cent surplus the year around, or pay a flat 46¢ differential. If it does either we can promise the support of our members to the License and the support of the many Essex and Middlesex County producers outside our association who listen to our opinion with respect.

NEAR BY MILK PRODUCERS ASSOCIATION

/s/ John L. Carten, Jr.
Vice President

[Jurat Omitted in Printing]

Portions of 1951 Hearings and Order

USDA Docket AO 14-A20—Portions of Testimony From Hearings Held on April 2-7, 1951

From Notice in Federal Register, Sept. 12, 1951, Vol. 16, p. 9250.

HANDLING OF MILK IN GREATER BOSTON, MASS., MARKETING AREA

DECISION WITH RESPECT TO A PROPOSED MARKETING AGREEMENT AND A PROPOSED ORDER AMENDING THE ORDER NOW IN EFFECT

The material issues presented on the record of the hearing were whether:

• • • • • • • • • • •

(4) The present location differentials paid to nearby producers should be eliminated;

• • • • • • • • • • •

(4) No change should be made at this time in the location differentials required to be paid to nearby producers. Certain producer interests proposed that § 904.9 (e) of the order, which sets forth the conditions for and amount of location differentials to be paid, be deleted. However, in support of their proposal they presented no materia. facts different from those considered in establishing specified location differentials as a part of the order provisions.

• • • • • • • • • • •

714 **Testimony of Clifton Whitney**

At recent hearings on Federal orders for Worcester, Springfield and Lowell-Lawrence one of the reasons advanced for establishing special location differentials for nearby producers at the expense of more distant producers has been the fact that they exist under the Boston order. For example, I quote from the hearing record on amendments to the Lowell-Lawrence order, dated June 28, 1950, page 265,—"First, the basis of reasons for establishment of location differentials payable to nearby producers:—one,—is the fact of their existence under the Boston order".

715 In the decision on this hearing, the Government states "The nearby differential plan has been a part of the payment plan in the Boston milk order for many years. The proposed differential plan is necessary in the Lowell-Lawrence market to reflect this customary differential.

It, therefore, becomes necessary to carefully examine the justification for these special location differentials under the Boston order if they are to set the pattern not only for Boston but for other Federal markets in New England.

We are aware that the act provides that prices shall be uniform to handlers, subject to adjustments for customary differentials. We do not believe, however, that the act was intended to be an instrument to freeze existing marketing practices for all time to come. One indication of that fact is the provision for amending marketing orders issued thereunder.

The question raised is how long should order No. 4 be the means for perpetuating special differentials to nearby producers. We feel that the time has come for termination of these special location differentials under the minimum price provisions of the Boston order.

During the past decade, the number of producers within the 40-mile zone has declined more than half even with the

46-cent subsidy paid by more distant producers. Alternative opportunities and the continued growth of
716 cities in the geographical area have been among the principal factors responsible for this change. It is enevitable (sic) that land in this area continues to become more valuable for other uses than dairy farming. Capital invested in other enterprises in this area yields greater returns than from dairy farming.

As a result of these economic developments, dairy farmers close to the market are being outbid for their land and capital. They, in turn, cite the high cost of production as a reason for special location differentials. It is time that we remove from the Boston order the provision which encourages nearby farmers to oppose the gradual economic trends and development in this 40-mile metropolitan area at the expense of producers in Maine, New Hampshire, Vermont and part of New York State.

If these special location differentials can still be called customary it is primarily because the Boston milk order has been the instrument which has preserved them.

One of the common arguments advanced as to why nearby producers should receive a special premium for their milk, over and above the premium reflected by freight advantage, is that these producers produce more evenly than producers more distant from the market. We contend that evenness of production provides no justification for establishing location differentials. For the sake of the record, however, let us examine some facts on this
717 question of even production. The Market Administrator's monthly statements show the following information for 1950:

1950	Total Receipts of Milk (Thousands of Lbs.)	Receipts from Producers Over 80 Miles from Boston (Thousands of Lbs.)	% of Total
June	166,995	154,353	92.4
November	98,152	90,695	92.4

This comparison shows that receipts from producers whose farms are located more than 80 miles from Boston shipped exactly the same proportion of the total receipts for the market as a whole in June as they did in November—namely, 92.4%. This would indicate that there is little justification to be found in these figures for penalizing more distant producers with a deduction from the pool called "Location differentials" for nearby producers.

Next, let us examine a comparison of the daily average deliveries per producer during the months of highest and lowest productions this past year, by areas, according to their distance from the Boston market.

I would like to offer this as an exhibit.

Examiner Rogers: Give me the title of the document.

The Witness: The title is "Comparison of Daily Average Deliveries Per Producer During the Months of Highest and Lowest Production in 1950, by areas, according to distance from Boston."

Examiner Rogers: The document referred to will be marked for identification as Exhibit No. 20.

718 (The document above-referred to, submitted by Witness Whitney, was marked for identification as Exhibit No. 20)

Examiner Rogers: Was the exhibit prepared under your direction and supervision?

The Witness: That is correct.

Examiner Rogers: And I believe you indicated that the statistics were taken from the Market Administrator's monthly statistics?

The Witness: That is correct.

Examiner Rogers: Any questions with reference to Exhibit No. 20?

Do you want to offer it for the record?

The Witness: Yes, I do.

Examiner Rogers: Apparently there are no questions. Exhibit No. 20 will be received in evidence.

(The document marked Exhibit No. 20 for identification, submitted by Witness Whitney, was received in evidence.)

Examiner Rogers: Proceed.

The Witness: It can be seen from this table that producers within the 40-mile zone produce 100 pounds more milk each day in the month of high production than they do in the month of low production, and that producers within the 41 to 80 mile zone produce 105 pounds
719 more milk each day in the month of high production than they do in the month of low production. In contrast, producers from the 11th to the 18th zones produce on an average 90 pounds per day or less in the month of highest production over the month of lowest production. In fact, the average producer from the 11th through the 22d zones inclusive produces less pounds of surplus milk in the months of high production compared with the month of low production than do producers within the 40-mile and 41 to 80 mile areas.

We contend that the pattern of seasonal pricing provided in the Class I pricing provisions of the order has provided encouragement for more even production. Any further encouragement to changes in the producers seasonal production patterns should be provided in this same section. This method compensates all producers equally, and permits each producer to determine his individual production pattern on an equal footing.

If a producer can command a premium for his milk due to quality, nearness to the market or any other reason, he can still command it under the minimum price provisions of the proposed order. If that extra quality or service rendered by a producer has a real value to the handler of that milk, than (sic) the handler should pay for it and not the producer on the outside of some arbitrary line.

The assertion is made that producers near a market
720 have the alternative of delivering their own milk to consumers and that somehow or other this opportunity justifies their receiving a special slice from the total pool payments in addition to the differences in freight. This thinking seems particularly unjustified in case of

producers living from 41 to 80 miles from the market. It's a long haul for bottled milk in addition to the fact that if they are interested in the retailing of milk there are sizeable cities and towns much closer to them.

With regard to those producers living close enough to the Boston marketing area who wish to engage in retail distribution following the removal of locations differentials, let them do so. They will have substantial investments to make in pasteurization and other plant equipment; delivery trucks; and bottles. They will need additional labor of various skills. Let them do it. We believe any loss of Class I sales will be more than offset by ridding ourselves of these special location differentials in excess of a quarter of a million dollars annually.

Times have changed. Raw milk has been replaced with pasteurized milk. Deliverymen on milk routes have become unionized. Transportation facilities have been improved. Milk quality has been improved. No provisions in the order provide that we should follow the customary practices of 15 or 20 years ago with regard to these factors
721 which influence the pricing of milk. No more is there reason for maintaining these out-dated special location differentials supposed to represent values which no longer exist.

Q. (By Mrs. Henderson) Have you examined the studies that have been made on individual responses to seasonal factors? A. No, I don't believe I am sufficiently familiar to discuss them.

Q. Your study of seasonal variation was limited to data for the year of 1950? A. I just took the most recent year's figures, yes, in this comparison that I presented.

Q. You think that would be a reliable basis for judging seasonality to examine just one year? A. Well, we could go back one or two years, but introduction of the seasonal pricing provisions which have incurred producers to become more even of the proposed order have been in effect a comparatively short time and I think it would be normal to expect that

1950 would be as soon as you could expect producers to adjust and get their production over. I do recall a study that was made by Martin Parsons which indicated that producers have a short and long time lag in their response to price stimulant and in this case, if I recall correctly, there was a two year lag which I would assume would apply. In other words, 1950 is about the first year you would [722] expect to begin to measure the affect of taking 44¢ higher Class I price in October, November and December and corresponding lower price in flush season.

Q. You were testifying concerning the normal area of distribution from bottling plants, could you give us something more specific on that? A. What page are you reading?

Q. Bottom of Page 4. I would just like to have your basis for defining what is reasonable and unreasonable in terms of distances for bottled milk to be hauled. A. In this case we are talking about producers. If a producer wants to undertake to market his milk and he lies, say, between the 41 and 80 mile line, if I recall there never have been more than two or three producers who attempted to deliver—I don't know if I know of any cases where there has been a producer living from 41 to 80 miles from the Boston market who attempted to market his own production within the marketing area.

Q. You have made a study of that, have you? A. No, I am just drawing upon—I don't know of any. I did think when I first started to speak I had heard there was some particular arrangement where I believe it was Seven Oakes Dairy, that history would show attempted to set up its own farm production, which might be construed to fall within this category; they agreed to buy the cows from the farmer [723] and have the farmer ship milk, and I don't know if that was beyond the 41 mile zone.

Q. Is it your impression that this proposal would change the structure of prices to producers in the New England Region? A. That is a pretty relative question. Could you limit it a little more?

Q. I think it is a pretty important question. This whole scheme is directed toward establishing a frame work of prices

within a region and so it is important to know what changes you would expect to result from this proposal in the general structure of prices, comparative prices. A. In this particular case we are discussing the Boston market.

Q. (By Mr. Walsh) Mr. Whitney, you already said on Page 1 location differentials ought to set the pattern not only for Boston but other Federal markets in New England. A. I was referring to the fact this particular pool is for Boston. This implication is much wider as I have indicated, but I was just going to describe the Boston end of it first.

As far as I can see in Boston, as I have indicated previously here, one of these things is justified or it isn't. Now if it is not justified, I think that there is a need to make a correction, even though it does have an influence on the over all pricing structure.

Q. How can we tell if what you are proposing is justified [724] unless we know what it is going to result in? That is what I would like to get an idea of what you anticipate would happen if your proposal were adopted. A. If this proposal were adopted the first difference that would take place is a quarter of a million dollars would be distributed in what we feel is a more equitable manner.

Q. What money is that now? A. On Page 5 I stated at the end of the first paragraph approximately a quarter of a million dollars annually. The reason I put that in there is because we hear this affects the price per hundred weight up country only a fraction of a cent, but it is a fairly sizeable amount of money we are discussing.

Q. You mean then you would expect the net effect of the proposal to increase the price to producers in Northern Vermont? A. To a very slight extent.

Q. (By Mr. Derr) Mr. Whitney, what do you think—strike that, I am sorry.

If your proposal were adopted, what effect do you think it would have upon the seasonality of production upon the nearby farmers? A. Well, it would place them in the same position as far as seasonal production goes and the price they

receive to a seasonal pattern in exactly an equal footing with producer up country.

Q. From what do you think that effect would be then? [725] A. Anything I offer would be only an opinion. I don't think it would make any difference in the seasonal production.

Q. Well if it is true, if it were true for some reason nearby milk is more valuable to handlers, do you think it would be in order to adjust the freight differences presently provided to handlers? A. I don't think any adjustment should be made in the freight rate based on some other reason than the actual freight rates.

Q. If the milk is more valuable to handlers, do you think the more distant farmers should be required to pay the freight, or should the handler pay it? A. Do I think that the handler or the producer should pay the freight on more distant milk?

Q. If nearby milk is more valuable to the handler, which seems to be implied in a special payment provided to nearby farmers, do you think that the more distant farmer should be required to stand the freight differential bringing that milk to market, or should the handler himself pay it? A. Well emphasizing the first "if", yes.

Q. Do you have any other comments? A. Well, we don't feel that a quart of milk produced in Massachusetts is more valuable to a Boston consumer than a quart of milk produced in Jericho, Vermont.

* * *

726 **Testimony of Chester Smith**

The Witness: This is not the proposal of the organization which I represent listed in the hearing notice, but the general economic position of the organizations I represent.

In general, this is the same as that expressed by Northern Farms. I am not sure that a case has been made by the testimony offered by Mr. Whitney. I have not made any particularly exhaustive studies into the various elements of this problem. I do believe from general familiarity of this market for quite a long time, both up country and other dairies that there are quite a number of angles to

the problem, it is a complex one and the general structure of milk prices is involved.

I am also convinced, although I am not prepared at the moment to offer detailed supporting statistical information

that this section 9(c) of the Boston Order has no
728 economic justification; that it is becoming worse as it has since January 1, 1950, when it now becomes the keystone of the arch which supports similar location differentials in three other Federal Orders, Worcester, Springfield and Lowell-Lawrence, the whole sytem in general, it seems to me, is not much more or less in effect than the sharp and clear economic trade barrier which starts at a radius of 80 miles of Boston at that point there is a hurdle; this is a fence 23¢ high, and as you move in and get to a radius of 40 miles there is another fence on top of that of an additional 23¢. If that 46¢ and 23¢ respectively are justifications for more even production, then certainly geographic farm location is certainly a very, very crude testimony of where they should be applied.

There is specific authorization in the Marketing Act for plans and techniques generally known as the base rating plan, but as the law says based on marketing during a representative period of time.

And there are numerous precedents and other orders and in other markets without orders for techniques for analyzing the problem of seasonality of production.

If the technique of a particular payment came out of the pool, out of the value of all members, all producers is justified, and I think it may be, as an inducement for more

even production, then any producer no matter where
729 located in the milkshed should have such opportunity to earn that premium as any other producer.

I venture to say that an analysis of the record of say 5,000 producers, up country producers, would reveal at least several hundred. I am sure they would reveal many more producers located in the distant zones who as individuals have more even production than these particular

producers in the 40 mile zone and the 80 mile zone who are now getting back those premiums just because their farm is located there.

It is true in general the whole group has evener production than the milkshed as a whole, but I have looked and I have listed lots of individual farm production patterns seasonality and know that there is a wide range even in a small locality, so that within this 40 and 80 mile zone, while the production is evener than for the milkshed as a whole, there are no doubt numerous producers who are just as uneven as the most uneven of up country producers, and conversely there are no doubt many up country producers who are just as even as the group within 40 miles and 80 miles, as a whole.

As one example, Mr. Montgomery, a producer of Randolph, Vermont testified up in Burlington that he produces milk almost exactly evenly on his farm the year round. He is within the neighborhood of 150 and 160 miles from Boston. No doubt there are many others like him, and if there is justification for an evenness of pro-
730 duction incentive of that type, then it seems to me it is quite unfair if all producers in the milkshed do not have an opportunity to earn it.

That certainly would be a much more scientific basis than the present plan. I don't want to take up time by laboring that point any further because that is not precisely the proposal. All I would say is for organizations who take positions in hearings here, characterizing or indicating a conclusion from presumed knowledge that the operations of other organizations are inefficient and certain changes ought to be made, I cite specifically the conclusion by one witness that it is a known fact that Milton Cooperative, for example, is inefficient to the extent of keeping a feeder plant system in operation and it ought to close some and concentrate their milk in one plant, I will say that to have to subsidize these producers in the 40 mile zone and 80 mile zone is certainly an indication that we are keeping even,

efficient production in this milkshed. And the sooner we eliminate that drag on the rest of the producers, I think the more economic justice we will have for all producers in the market.

Our organization would be glad to see this proposal adopted, but we do feel that it is quite an involved question, and that even though by any possibility it is not adopted, it certainly is of concern to the great majority of producers in the milkshed of sufficient financial magnitude to warrant [731] a comprehensive and exhaustive study be started to promptly work out just what all the ramifications of this thing are.

* * *

[734] TESTIMONY OF C. W. SWONGER

resumed the stand and testified further as follows:

THE WITNESS: I am not sure whether Mr. Whitney understands the order or the effect of his proposal. Section 9(e), which Northern Farms proposes to eliminate from the order, provides for both location differentials (as commonly referred to) and for transportation differentials applicable to milk received from producers at country plants. Northern Farms would abolish both. It is an interesting hypothesis, but we doubt if the order can be used to abolish transportation costs, at least in the present state of technological progress.

One result that would flow from adoption of Mr. Whitney's proposal would be to bankrupt the pool. Handlers presumably would continue to be charged for their milk in accordance with the zone transportation differentials set forth in Section 7(c), and credited with payments to their producers at the blended price, without any transportation differentials. The pool would make up the difference, but from what source is not clear.

Since we understand that Mr. Whitney intended to aim his attack at the differentials paid to nearby producers, [735] the remainder of our testimony is directed to that feature of the order.

The subject of location differentials has been the chief stock in trade of Northern Farms for years. It has been used

for membership purposes, and to play one portion of the milkshed against another. This proposal illustrates a problem that faces a regional organization such as NEMPA in working to develop stable marketing conditions for all producers in New England. In southern New England, we have to stand off the attacks of people like Mr. Abrams, Mr. Gahan, and others, who like to label us as a northern New England outfit; and in northern New England we are referred to as a southern New England organization.

The present proposal relates only to Boston, but it involves all of the federal orders in secondary markets of New England. A similar proposal has been made by Northern Farms for consideration in the Lowell-Lawrence hearing, but no such proposal was made for Worcester or Springfield. Apparently, location differentials are all right for Worcester and Springfield, but not for Boston or Lowell-Lawrence. What this would do to price relationships between the various federal order markets, I think is sufficiently apparent.

The principle of location differentials, paid to nearby producers, has been confirmed by three separate decisions of the Secretary of Agriculture, within the last two years. [736] I refer to the Decision on the Springfield, Massachusetts, order issued November 18, 1949; the Decision on the Worcester order, issued the same date; and the Decision on the Lowell-Lawrence order issued September 14, 1950—and request that the Secretary take notice of these three decisions. Two of these decisions arose out of original hearings, and applied to new markets. The other, in Lowell-Lawrence, was in connection with conversion of that order to a market pool.

In each of these hearings, Northern Farms appeared for the purpose of opposing location differentials to nearby producers. It would not have been possible, or equitable, to adopt federal orders in these markets without a provision for location differentials. As we pointed out in the hearings, if all that nearby producers in these markets can expect to receive is the Boston blend price plus transportation, then they do not need a federal order. They could obtain that much without any regulation. They had in fact obtained more. The record showed

in each case, that despite the competition of unregulated milk, and in Lowell-Lawrence the inadequacies of a dealer pool, nearby producers had continued over the years to receive blended prices which were about 1¢ per quart higher than could be explained on the basis of transportation cost on up country supplies. In opposing location differentials, Northern Farms was opposing the adoption of federal orders in these markets.

[737] I want to amplify that point. The standard charge made by Northern Farms' representatives for years, has been that location differentials "subsidize" the nearby producers. The fact is that nearby producers have always been able to sell a higher proportion of their milk in Class I, and that situation existed long before federal orders. Northern Farms was as interested—or should have been as interested—as any other group of producers in stabilizing marketing conditions in southern New England. Federal orders were the only means of stablizing marketing conditions, and of insuring equal competitive opportunity for the sale of the milk of their producers in the markets of southern New England. It would not have been possible, to adopt such orders in secondary markets of southern New England, without recognition of the differential value of the milk produced near the market. The orders would not have been acceptable to producers in the markets involved. Northern Farms took no part in developing federal orders in these markets, but confined its activities to opposing location differentials which were an essential condition if effective regulation was to be adopted. If Northern Farms' position had prevailed, it would have meant turning over these markets completely to L-C and unregulated milk. Their members, together with all other Boston producers, would have been unable to compete for the sale of Class I milk in these markets, and more of their [738] members' milk would have gone into Class II or into butter.

Turning more particularly to Boston, the basis for location differentials rests upon at least three important facts. One is the existence of alternative marketing opportunities with respect to producers located in fairly close proximity to the

market. Producers in the differential area are close to urban centers and have the opportunity to sell to any one of a number of dealers. If they do not like the price they are receiving from their dealer, there is always the possibility of their going into direct retail distribution. This would mean a loss of Class I sales to the pool, and rather than suffer such loss of sales, it has been considered desirable to recognize such alternative marketing opportunities in the form of a higher blend price to nearby producers. It is sometimes argued that this opportunity is less today, with expensive equipment and stricter Board of Health requirements relating to milk handling and distribution, but there are handlers in the market who make a business of processing and bottling milk for other producer-handlers, and more of these arrangements could be made.

A second factor has been that of more even supply. Nearby producers on the whole have done a better job of adjusting the seasonality of their production to the requirements of their dealers and the fluid milk needs of the market. This is apparent from an examination of the seasonality of [739] production for various zones in the Boston milkshed. We submit as an exhibit, a table comparing Average Deliveries Per Day Per Dairy of producers delivering milk to plants located in various zones. The table shows average daily deliveries per producer for June and November 1950, and the ratio of June-to-November deliveries in various zones.

EXAMINER ROGERS: The document referred to will be marked for identification as Exhibit No. 21.

(The document above-referred to, submitted by Witness Swonger, was marked for identification as Exhibit No. 21.)

THE WITNESS: This table shows, in general, that the seasonality of production increases with increasing distance from the market. Producers delivering to city plants, who are essentially the producers covered by location differentials, showed a June-to-November ratio of 124 per cent. Their average deliveries in June were 124 per cent of their November deliveries. The June-to-November ratio of deliveries at plants in the 20th zone was 145 per cent; in the 25th zone, it was 186 per cent; and beyond the 26th zone, it exceeded 200

per cent. The average for the milkshed as a whole was 161 per cent.

It is obvious that the seasonal variation in production is widest in the most distant areas of the milkshed. Location differentials are a means of cushioning the nearby-producer from having to absorb the heavy surplus of the more [740] uneven producers located further distant from the market. The nearby producer does not create, nor is he expected to carry, the same proportion of surplus as does the more uneven producer located further distant from the market. It may be said that rating plans would be a more selective way of rewarding even production. But rating plans are anathema to many producers in northern New England, and location differentials have been used instead, to recognize the more even production of producers located nearer to the market.

The other factor, on which there was extensive testimony in Boston at the time the present system of location differentials was adopted, was that of historical price relationships. This testimony showed that over a period of years prior to regulation, nearby producers in Boston had received prices approximately 1¢ per quart higher than could be explained solely on the basis of transportation costs. Producers located near the market were able to sell a larger proportion of their milk as Class I. The federal order did not create this situation. It existed before regulation. The federal order recognized these natural marketing advantages, by provision of location differentials to nearby producers.

It is true, of course, that market-wide equalization has now obscured the measure of advantage in price or in utilization of the nearby producers in Boston. They have been melted into a marketing structure in which competitive [741] forces do not freely operate. There are numerous markets, however, in southern New England, which do not operate under federal orders and make no provision for location differentials. Prices to producers in these markets are generally as high—in many cases, higher—than to nearby producers in Boston. Included here are the markets of Rhode Island and Connecticut, as well as lesser markets in southern New Hampshire and in Massachusetts.

I would like at this point to offer as an exhibit a table and chart showing blended prices to nearby producers in various markets of southern New England, by months, for 1950. This table and chart was prepared originally by the Boston Market Administrator, and covers the markets of Boston, Lowell-Lawrence, Springfield, Worcester, Fall River, Providence, Rhode Island and Connecticut.

EXAMINER ROGERS: The document referred to will be marked for identification as Exhibit No. 22.

(The document above-referred to, submitted by Witness Swonger, was marked for identification as Exhibit No. 22.)

THE WITNESS: I have made slight additions to the original table and chart which I have indicated in the form of typewritten figures at the bottom of the page. The original table showed estimated prices for December, 1950, and I have substituted the final prices for that. I have [742] also added prices, final prices for January and February of 1951.

EXAMINER ROGERS: From where did you obtain the figures in Exhibit No. 22?

THE WITNESS: The prices for the federal order markets of Boston, Lowell-Lawrence, Springfield, Worcester and Fall River were all obtained from the Market Administrator's Office for those markets.

Prices for the Providence markets represents those published monthly by the Rhode Island Milk Control Board. Prices for Connecticut markets are those published by the Connecticut Milk Administrator.

EXAMINER ROGERS: You have crossed out the figures for December which is "estimated figures" and inserted the final figures below?

THE WITNESS: Yes.

EXAMINER ROGERS: Exhibit No. 22 was prepared under your direction and supervision?

THE WITNESS: Yes.

EXAMINER ROGERS: What about Exhibit No. 21? I notice the source is the Boston Milk Market Administrator, Monthly Statistics, is that correct?

THE WITNESS: Yes.

EXAMINER ROGERS: The exhibit was prepared under your direction and supervision?

[743] THE WITNESS: Yes.

EXAMINER ROGERS: Proceed.

THE WITNESS: These markets operate under varying conditions. The Boston, Springfield, and Worcester markets operated during 1950 under federal orders providing for market pools and location differentials to nearby producers. The Lowell-Lawrence market was under a federal order dealer pool until October, 1950, but since then has operated on a basis similar to Boston, Worcester or Springfield. Fall River has a federal order but without a market pool or location differentials to nearby producers. Providence and Connecticut markets have neither federal orders nor location differentials.

Despite the wide range of conditions, the exhibit shows a fairly close relationship between prices to nearby producers in all of these markets. It also throws some light on the question of whether location differentials place an excessive valuation on the milk of nearby producers in Boston. In Providence and Connecticut markets, without federal orders or locaton differentials, prices were generally 25 to 50 cents higher than to nearby producers in Boston. The Fall River market was most consistently higher than Boston. It has a federal order, but without a market pool or location differentials.

Perhaps the best evidence as to whether location differentials place an excessive valuation on the milk of [744] nearby producers, is to be found in the relative trends of production. At the time the present system of location differentials was adopted in the Boston order, concern was expressed that it might lead to an expansion of nearby production, at the expense of production in the more distant areas of the milkshed. This, of course, has not been the case. I offer as an exhibit a table showing the volume and percent of receipts from producers, within and outside the differential areas, by years, 1938 to 1950 inclusive.

EXAMINER ROGERS: The document referred to will be marked for identification as Exhibit No. 23.

(The document above-referred to, submitted by Witness Swonger, was marked for identification as Exhibit No. 23.)

(Discussion off the record.)

EXAMINER ROGERS: On the record.

Doctor, I notice the source of Exhibit No. 23 is Boston Milk Market Administrator figures. Are these from Market Administrator bulletins or obtained from him by you?

THE WITNESS: Taken from published reports of the Market Administrator, and the table was prepared from such published statistics under my direction and supervision.

EXAMINER ROGERS: You may proceed. I am going on the theory that after you have finished there may be some questions on all of these exhibits and we are not receiving them until we have given a chance for questions.

You may finish your statement.

[745] THE WITNESS: In the early years of the Boston order, 1938-40, receipts from producers within the 40-mile zone were from 8.5 to 9.0 per cent of total receipts from producers. Such receipts have declined both absolutely and relatively since that time, and in 1950 represented 4.2 per cent of total receipts from producers.

Similarly, receipts from producers in the 41-80 mile zone, during 1938-40, ranged a little under 3 per cent of total receipts from producers. By 1950, such receipts had declined to .5 of 1 per cent of total receipts from producers.

All producers in the differential areas, during 1938-40, accounted for about 11.5 per cent of the total receipts from producers. By 1950, this proportion had dropped to 4.7 per cent.

Receipts from producers outside the differential areas, in 1938-40, represented about 88.5 per cent of the total receipts from producers. By 1950, this proportion had increased to 95.3 per cent.

Over the decade, from 1940 to 1950, the actual volume of receipts from producers in the differential areas declined 46 per cent. Some of these producers went out of business. Others shifted into secondary markets, both federal and non-federal. During the same period of time, receipts from pro-

ducers outside the differential area increased 37 per cent. Certainly the facts do not lend any support to the argument that the present location differentials "subsidize" local [746] producers, or place an excessive valuation on the milk of these producers.

I would like to refer again to Exhibit 21, which shows the seasonal variation of producer deliveries by zones. If Northern Farms is really interested in developing a plan for "a fair sharing of the surplus" we suggest that they devote their efforts to developing some form of even-production program that will more nearly put the burden of surplus where it belongs.

EXAMINER ROGERS: Any questions with reference to these Exhibits Nos. 21, 22 and 23.

Q. (By Mrs. Henderson) I had one question as to the heading of this Exhibit No. 22. It says here across the top, "Market Administrator–Greater Boston Marketing Area" and I see no further connection with those facts. A. As I think I stated, the chart and table in its original form was prepared by the Boston Market Administrator. I have added figures required to bring it up to date.

Q. Then you didn't actually compile those figures for the earlier periods? A. Well, I suppose, as you say, the Market Administrator compiled the figures which were used in preparing the original chart and table.

Q. Does this appear in some public release? A. I believe it was prepared in connection with producer meetings of some sort, at which representatives of the Market [747] Administrator's Office were to speak.

MRS. HENDERSON: I suppose we can receive it in evidence as far as the information which Doctor Swonger has prepared and taken on faith perhaps that the rest of those figures are what he thinks they are, but apparently I had thought he had prepared the whole exhibit.

EXAMINER ROGERS: The chart at the top is representative of the figures that appear below?

THE WITNESS: Yes.

EXAMINER ROGERS: Then the same period is covered?

THE WITNESS: Yes. In so far as Boston prices are concerned, of course, they are shown in general market statistics which have already been introduced in this hearing.

Q. (By Mrs. Henderson) Do you know whether those are the blended prices established in the Rhode Island order and the Connecticut order? A. Yes, I have checked the prices for those markets and they in both cases represent a weighted average blended price pay by dealers in those markets, as computed and published by the Rhode Island Milk Control Board or the Connecticut Milk Administrator.

MRS. HENDERSON: I have no objection if he takes responsibility for the accuracy of that information.

THE WITNESS: I am willing to take responsibility for the accuracy of the Market Administrator's Office with [748] respect to the other prices.

EXAMINER ROGERS: But you are stating that they are from published figures of the Market Administrators of these various areas? In other words, they are government figures released by government agencies?

THE WITNESS: All of these figures are published by state or federal regulatory agencies.

EXAMINER ROGERS: Any further questions?

Apparently there are no further questions. Exhibits 21, 22 and 23 are received in evidence.

(The documents heretofore marked for identification as Exhibits Nos. 21, 22 and 23, submitted by Witness Swonger, were received in evidence.)

EXAMINER ROGERS: Any further questions of this witness?

Q. (By Mr. Whitney) Doctor Swonger in your statement here—this is a little personal—have you made any calculation of other class of sales that will be lost, as you call it, from the Boston pool? A. I presume you mean if there were no federal order.

Q. I mean if we eliminate location differentials. A. May I finish my statement? In Lowell, Lawrence, Worcester or Springfield, the only reference in my statement, I think, is to loss of Class I sales is related to the question of federal orders

in the secondary markets which are [749] mentioned. If there had been no federal order in those markets, the Boston pool would have been effectively precluded from selling Class I milk to those markets.

Q. Do producers within, what we call nearby producers, do they deliver more milk to the pool in May or in June? A. You are referring to Boston?

Q. Yes. A. I would have to check. My memory doesn't serve me as to whether they reach their peak in May or June. They may possibly reach it in May rather than June, but the two months are closely in line.

Q. To the extent you base some of your conclusions upon the fact the comparison of June or November, if deliveries are higher in June of this year than you have put in here, it would make some difference, would it not? A. Might make a pound or two. The reason for taking June, 94 per cent of Boston milk supply is up country, and the peak with respect to that 94 per cent occurs in June.

Q. I believe in your table, it was table 21, you made a comparison of deliveries at city plants? A. Yes.

Q. Why didn't you develop your figures to show the issue in question deliveries by producers between 41 and 80 miles for purposes of comparison? A. I don't think the figures are available in that [750] form. I had to do the best I could with what I had.

EXAMINER ROGERS: Any other questions?

Q. (By Mr. Smith) Doctor Swonger, with respect to the 41-80 mile zone, you don't know of—do you know of any producers in that area getting 23¢ premium who deliver their milk to Bellows Falls Cooperative? A. There may possibly be, but I have no knowledge of it. I would doubt it.

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751 **Testimony of Jerry Bond, Jr.**
Needham, Massachusetts

The Witness: My name is Jerry Bond, Jr. I live at 38 Edgewood Road, Needham, Massachusetts. I am employed by the Massachusets Milk Control Board as Director of Milk Control in the Division of Milk Control, Massachusetts Department of Agriculture.

The Massachusetts Milk Control Board wishes me to make a statement for them at this time on Proposal No. 10. The Massachusetts Milk Control Board wishes to be recorded in opposition to Proposal No. 10 which would eliminate the location differential. The Board opposes this amendment because this is an essential feature written into the order in 1937 after careful and full hearing.

It is not as claimed by the proponents a discriminatory provision, but one which was adopted by way of partial compensation to nearby producers for the losses which they suffered when the equalization provisions deprived them of those natural advantages which prior to federal regulation always enabled them to sell at a relatively higher percentage of their production of Class I milk.

Exhibit No. 20

Introduced by Mr. Whitney

COMPARISON OF DAILY AVERAGE DELIVERIES PER PRODUCER DURING THE MONTHS OF HIGHEST AND LOWEST PRODUCTION IN 1950, BY AREAS, ACCORDING TO DISTANCE FROM BOSTON

	High Month (1)	Low Month (2)	Difference
Within 40 miles	490	390	100
41-80 miles	310	205	105
Zones 11-15	318	228	90
" 16-17	348	258	90
" 18	338	266	72
" 19	352	232	120
" 20	356	245	111
" 21	328	237	71
" 22	326	204	122
" 23	466	275	191
" 24	465	253	212
" 25	434	233	201
" 26	377	236	141
" 27	543	261	282
" 28	519	241	278
" 29-38	401	188	213

(1) High month is June for all areas except within 40 miles, which is May.

(2) Low month is November for all areas.
Source: Boston Market Administrators Monthly Statistics

Prepared by: S. E. Whitney

Exhibit No. 21

BOSTON MARKET

Average Deliveries Per Day Per Dairy in Pounds

Producers Delivering to:	June 1950	November 1950	June as % of Nov.
City Plants	458.9	370.5	123.9
Country Plants:			
Zones 11-15	318.2	227.6	139.8
16-17	348.4	257.6	135.2
18	337.9	265.9	127.1
19	352.0	231.7	151.9
20	355.5	245.0	145.1
21	336.3	237.0	141.9
22	325.9	204.4	159.4
23	466.3	275.3	169.4
24	465.4	252.7	184.2
25	433.6	232.9	186.2
26	377.1	236.0	159.8
27	542.7	260.8	208.1
28	519.2	241.2	215.3
29-38	401.1	187.6	213.8
Averate (sic) — All Producers	389.0	241.5	161.1

Source: Boston Milk Market Administrator, Monthly Statistics.

BOSTON MARKET

Receipts of Milk from Producers (000 lbs.)

Year	Within 40 miles of Boston	41-80 miles from Boston	More than 80 miles from Boston	Total
1938	86,904	29,351	903,732	1,019,987
1939	96,739	29,050	953,782	1,079,571
1940	97,828	28,859	1,007,701	1,134,388
1941	97,202	28,815	1,057,823	1,183,840
1942	88,501	21,726	1,092,386	1,202,613
1943	72,932	13,741	1,120,789	1,207,462
1944	66,012	10,183	1,232,851	1,309,046
1945	57,231	9,987	1,280,456	1,347,674
1946	51,513	7,850	1,150,383	1,209,746
1947	54,695	7,185	1,262,423	1,324,303
1948	55,112	7,110	1,237,182	1,299,404
1949	60,812	7,150	1,387,236	1,455,198
1950	61,458	6,760	1,378,439	1,446,657

Percentage of Total Receipts of Milk from Producers

1938	8.5	2.9	88.6	100.0
1939	9.0	2.7	88.3	100.0
1940	8.6	2.6	88.8	100.0
1941	8.2	2.4	89.4	100.0
1942	7.4	1.8	90.8	100.0
1943	6.1	1.1	92.8	100.0
1944	5.0	0.8	94.2	100.0
1945	4.3	0.7	95.0	100.0
1946	4.3	0.6	95.1	100.0
1947	4.1	0.6	95.3	100.0
1948	4.2	0.6	95.2	100.0
1949	4.2	0.5	95.3	100.0
1950	4.2	0.5	95.3	100.0

Source: Boston Milk Market Administrator. Revised figures through September 1950, preliminary figures thereafter.

[redacted]

[redacted]

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 861

FREDERICK T. ZUBER, ET AL.,
Petitioners,

v.

RUSSELL ALLEN, ET AL.,
Respondents.

No. 1076

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE,
Petitioner,

v.

RUSSELL ALLEN, ET AL.,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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From the Findings, 14 F.R. 7085 Promulgating the Springfield, Mass. Federal Milk Order, Nov. 23, 1949

• • • • • • • • • • •

• • • The evidence in this record shows the need for Federal regulation of all of the sources of milk supplies for the Springfield market in order to give Massachusetts producers who are now supplying the market an opportunity to retain the market on an equal basis with out-of-state producers. Any delay to study possible alternatives as suggested by the excepters threatens certain producers with the loss of their market with resulting unstable marketing conditions.

• • • • • • • • • • •

Producers supplying milk to the Springfield market are located in Massachusetts, Vermont, New York, New Hampshire and Connecticut. Witnesses estimated the number of producers outside the state of Massachusetts from 30 to 40 percent of the total number supplying the market. Several handlers who do business in Springfield engage in the milk business also in adjacent states.

• • • • • • • • • • •

(b) Marketing conditions in the Springfield area indicate that the issuance of a marketing order such as that set forth herein will tend to effectuate the declared policy of the act with respect to milk produced for the Springfield market.

The record shows that conditions exist in the Springfield market which have resulted in a loss of market for several producers. These conditions must be remedied in order to establish and maintain such orderly marketing conditions as will establish prices to producers for milk delivered to the Springfield market that reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and milk products in the marketing area and which will insure a

sufficient quantity of pure and wholesome milk and be in the public interest.

The unsettling conditions which are disrupting the Springfield market result from the opportunity on the part of milk handlers to purchase milk from producers outside Massachusetts on a wholly unregulated price basis whereas the handlers who purchase milk from Massachusetts producers are required to make payments to producers in accordance with a classified price plan enforced by the Massachusetts Milk Control Board. The classified price plan in the Springfield market is similar to that in use in several New England markets. Class I milk, principally fluid milk and milk drinks sold in bottles, is priced relatively higher than milk for all other uses which is Class II.

Handlers purchasing milk under the regulations of the Massachusetts Milk Control Board are required to pay Massachusetts producers delivering milk to their plants these prices for the quantities of milk utilized in such classes. Handlers buying milk out of State are subject to no governmental price regulation and purchase milk at a price competitive with the prices paid to producers in those areas for all milk. The level of the competitive price is dominated by either the uniform price established for producers delivering milk to plants regulated by the New York Federal milk order or the Boston Federal milk order or both. The uniform prices established under the Boston and New York Federal milk orders reflect the average percentage of Class I and of Class II in each of these markets. To the extent that any handler in the Springfield area has sales of Class I milk which give him a higher utilization of Class I milk than the average for either the New York or Boston markets, that handler can purchase milk for such Class I sales at the uniform blend price paid producers in the Boston and New York markets for all milk. The evidence in this record indicates that handlers are aware of this opportunity, that some handlers have

acquired milk on this flat price basis and that at least one handler intends to expand this type of buying in preference to purchasing milk from Massachusetts producers.

The advantage accruing to a handler purchasing milk outside the State of Massachusetts has increased in recent months as the uniform blend prices in the New York and Boston markets have dropped relative to the Class I price in each of these markets and in the Springfield market. The lower uniform prices result from substantial declines in excess milk values and in an increase in the quantity of milk utilized in excess classes.

In addition to the disturbing influence of out-of-state milk in the Springfield market, the lack of a uniform marketwide price plan for all producers supplying the market is a disrupting factor. The range in prices paid by 16 large handlers in the Springfield market to producers per hundredweight of milk testing 3.7 percent butterfat was, delivered at city plants, from $5.40 to $6.326 in June 1948 and from $6.05 to $7.005 in November 1948. In May 1949 the range in prices handlers paid producers in that region was from a low of $4.2162 to a high of $5.8177 per hundredweight of milk testing 3.7 percent butterfat.

The lack of price regulation effective with respect to all of the sources of fluid milk for the Springfield market and the absence of a uniform pricing method are contributing to the growth of an unstable milk market in this area. A marketing order is needed in the area to assure producers of a market for their milk at reasonable and uniform prices.

* * * * * * * * * *

The sources of milk supply for the various cities and towns in the proposed marketing area overlap and are intermingled to such an extent that the general supply area may be considered as one milkshed for the entire marketing area. In many cases handlers receive milk at a plant supplying several of the towns in the marketing area.

* * * * * * * * * *

The supply area for the Springfield market overlaps with the supply areas of other markets. * * *

* * * * * * * * * *

(6) *Payments to producers.* The percentage of milk utilized by individual handlers in Class I varies so widely that prices to producers have differed under an individual handler type pool by over $1.00 per hundredweight. Provision should be made for a market-wide type of pool in order that all producers delivering milk to all handlers may receive a uniform price for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered. This method of paying producers will require a producer-settlement fund for making adjustments in payments by handlers so that the total sum paid by each handler shall equal the value of milk received by him and utilized in the classes established by the proposed marketing agreement and order.

* * * * * * * * * *

Most of the dairy farms in Massachusetts are close to urban centers. This probably explains why prices to Massachusetts farmers for milk sold wholesale average considerably more than the prices paid to Vermont farmers. This difference cannot be attributed to transportation cost alone. The many opportunities for dairymen to market their own milk directly influence the price which they demand for their product.

* * * * * * * * * *

Certain producers located outside the proposed differential area claimed that they should receive differential payments because they had been supplying the Springfield market for a number of years and they had received the Springfield price less a hauling charge. Some of these producers testified that they received prices approximately equal to the Boston blend prices at nearby country points. Other producers did testify that they were currently receiving a price which was about 50 cents over the competitive

price in their territory. A price difference of that amount cannot be expected to be maintained in a period of adequate milk supplies.

* * * * * * * * * * *

From Order Regulating the Handling of Milk in the Springfield, Massachusetts, Marketing Area

(e) *Location differentials.* The payments to be made to producers by handlers pursuant to subparagraph (1) of paragraph (b) of this section shall be subject to the Class I price differentials applicable pursuant to § 996.7 (c), and to further differentials as follows:

(1) With respect to milk delivered by a producer whose farm is located in any of the following cities or towns, there shall be added 23 cents per hundredweight, unless such addition gives a result greater than the Class I price pursuant to § 996.7 (a) and (c) which is effective at the plant to which such milk is delivered, in which event there shall be added an amount which will give as a result such price:

Massachusetts: Becket, Florida, Hinsdale, Otis, Peru, Sandisfield, Savoy, Washington, and Windsor;

New Hampshire: Chesterfield and Westmoreland;

Vermont: Brattleboro, Dover, Dummerston, Marlboro, Newfane, Putney, and Wilmington.

(2) With respect to milk delivered by a producer whose farm is located in Franklin, Hampshire, Hampden, or Worcester Counties in Massachusetts or in any of the following cities or towns, there shall be added 46 cents per hundredweight, unless such addition gives a result greater than the Class I price pursuant to § 996.7 (a) and (c) which is effective at the plant to which such milk is delivered, in which event there shall be added an amount which will give as a result such price:

* * * * * * * * * * *

From the Secretary's Decision, 14 F.R. 7097 Promulgating the Milk Order for Worcester, Mass. Area, Nov. 23, 1949

* * * * * * * * * * *

* * * The evidence in this record shows the need for Federal regulation of all of the sources of milk supplies for the Worcester market in order to give Massachusetts producers who are now supplying the market an opportunity to retain the market on an equal basis with out-of-state producers. Any delay to study possible alternatives as suggested by the excepters threatens certain producers with the loss of their market with resulting unstable marketing conditions.

* * * * * * * * * * *

Producers supplying milk to the Worcester market are located principally in Massachusetts, Vermont and New York.

* * * * * * * * * * *

The record shows that conditions exist in the Worcester market which permit handlers to purchase milk for fluid use at substantially different prices. These conditions must be remedied in order to establish and maintain such orderly marketing conditions as will establish prices to producers for milk delivered to the Worcester market that reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and milk products in the marketing area and which will insure a sufficient quantity of pure and wholesome milk and be in the public interest.

The unsettling conditions which are disrupting the Worcester market result from the opportunity on the part of milk handlers to purchase milk from producers outside Massachusetts on a wholly unregulated price basis, whereas the handlers who purchase milk from Massachusetts producers are required to make payments to producers in accordance with a classified price plan enforced by the Massachusetts Milk Control Board. The classified price

plan in the Worcester market is similar to that in use in several New England markets. Class I milk, principally fluid milk and milk drinks sold in bottles, is priced relatively higher than milk for all other uses which is Class II.

Handlers purchasing milk under the regulations of the Massachusetts Milk Control Board are required to pay Massachusetts producers delivering milk to their plants these prices for the quantities of milk utilized in such classes. Handlers buying milk out of State are subject to no governmental price regulation and purchase milk at a price competitive with the prices paid to producers in those areas for all milk. The level of the competitive price is dominated by either the uniform price established for producers delivering milk to plants regulated by the New York Federal milk order or the Boston Federal milk order or both. The uniform prices established under the Boston and New York Federal milk orders reflect the average percentage of Class I and of Class II in each of these markets. To the extent that any handler in the Worcester area has sales of Class I milk which give him a higher utilization of Class I milk than the average for either the New York or Boston markets, that handler can purchase milk from producers outside Massachusetts for such Class I sales at the uniform blend price paid producers in the Boston and New York markets for all milk. The evidence in this record indicates that handlers are aware of this opportunity, that some handlers have acquired milk on this flat price basis and that at least one handler intends to expand this type of buying in preference to purchasing milk from Massachusetts producers.

The advantage accruing to a handler purchasing milk outside the state of Massachusetts has increased in recent months as the uniform blend prices in the New York and Boston markets have dropped relative to the Class I price in each of these markets and in the Worcester market. The lower uniform prices result from substantial declines in

excess milk values and in an increase in the quantity of milk utilized in excess classes.

In addition to the disturbing influence of out-of-State milk in the Worcester market, the lack of a uniform market-wide price plan for all producers supplying the market is a disrupting factor. In May 1949 prices paid to producers delivering to different handlers varied as much as $1.24 per hundredweight in this area for milk of basic 3.7 percent butterfat content.

The lack of price regulation effective with respect to all of the sources of fluid milk for the Worcester market and the absence of a uniform market-wide pricing method are contributing to the growth of an unstable milk market in this area. A marketing order is needed in the area to assure producers of a market for their milk at reasonable and uniform prices.

* * * * * * * * * *

The sources of milk supply for the various cities and towns in the proposed marketing area overlap and are intermingled to such an extent that the general supply area may be considered as one milkshed for the entire marketing area. In many cases handlers receive milk at a plant supplying several of the towns in the marketing area.

* * * * * * * * * *

(5) *Class prices.* Class prices for the Worcester market should be established on a formula basis similar to that under which class prices are determined for the Boston market. The Boston and Worcester milk markets are so interrelated that a close correlation of price changes is necessary to maintain stable market conditions. Boston is the larger market and therefore the dominant one in effecting price changes. The milksheds of these two markets overlap so that there is opportunity for producers to shift their supply from one market to the other if substantially different prices are offered. The Worcester

market draws milk directly from plants at which milk is priced under the Boston milk order. Careful alignment of prices in the two markets is necessary to maintain equal cost of milk to handlers for milk used similarly.

• • • • • • • • • • •

(6) *Payments to producers.* The percentage of milk utilized by individual handlers in Class I varies so widely that prices to producers have differed under an individual handler type pool by over $1.00 per hundredweight. Provision should be made for a market-wide type of pool in order that all producers delivering milk to all handlers may receive a uniform minimum price for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered. This method of paying producers will require a producer-settlement fund for making adjustments in payments by handlers so that the total sum paid by each handler shall equal the value of milk received by him and utilized in the classes established by the proposed mar-
posed the marketing order (sic).

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Most of the dairy farms in Massachusetts are close to urban centers. This probably explains why prices to Massachusetts farmers for milk sold wholesale average considerably more than the prices paid to Vermont farmers. This difference cannot be attributed to transportation cost alone. The many opportunities for dairymen to market their own milk directly influence the price which they demand for their product.

• • • • • • • • • • •

(e) *Location differentials.* The payments to be made to producers by handlers pursuant to subparagraph (1) of paragraph (b) of this section shall be subject to the Class I price applicable pursuant to § 999.7 (c), and to further differentials as follows:

With respect to milk delivered by a producer whose farm is located in Franklin, Hampshire, Hampden, Worcester, Middlesex, or Norfolk counties in Massachusetts, there shall be added 46 cents per hundredweight, unless such addition gives a result greater than the Class I price pursuant to § 999.7 (a) and (c) which is effective at the plant to which such milk is delivered in which event there shall be added an amount which will give as a result such price.

From the Secretary's Decision, 23 F.R. 8225 Promulgating the Southeastern Milk Order, Oct. 24, 1958

• • • • • • • • • • •

The Southeastern New England market is an interstate market encompassing all of the State of Rhode Island and a substantial area in Southeastern Massachusetts. Within this market there is a substantial and continuing interstate commerce, both in the procurement of milk and in the sale of fluid milk and its products.

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More than one-third of the fluid requirements for the Southeastern New England area originates from sources outside the States of Massachusetts, Connecticut and Rhode Island. Much of the upcountry milk is assembled and received at country plants in Vermont and New Hampshire and is then transported to the Southeastern market for processing and distribution. Additional quantities are handled by bulk farm tank pick-up and moved directly from farms in northern New England to plants in the local market.

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The situation in both Fall River and New Bedford has continued to deteriorate as handlers, seeking to avail themselves of milk supplies at the most advantageous price, have tended to look to upcountry unregulated supplies which are generally available at a price comparable with the Bos-

ton blended price, which on a year-round basis reflects approximately 55 percent utilization in Class I. As a result local producers have had difficulties in maintaining regular outlets for their production. This condition is most serious in the Fall River market where the several associations of producers whose members are the predominant suppliers of the market have a substantial volume of milk which is not accepted by handlers. Much of this milk is sold at manufacturing milk prices even though the local milk supply is inadequate to meet market demands.

Producers who are members of New Bedford Milk Producers Association, the principal supplier of local handlers in the New Bedford area, are in the same situation as that of regular Fall River producers. The same pressures which have led to a loss of market for many local Fall River producers are applicable to the New Bedford area. Pending consideration of Federal regulation has no doubt forestalled substantial supply changes by local handlers thus far. However, it is likely that if no action is taken handlers will seek lower priced unregulated milk supplies.

The situation in the Rhode Island part of the market is substantially similar to that in the Fall River-New Bedford area. Early in 1951 the association representing a large segment of the registered Rhode Island producers requested a hearing to consider a Federal order for that market because of the then existent market disorder. On the basis of the facts presented at that hearing it was recommended that an order be issued. However, following that decision the association negotiated a settlement with local handlers which minimized the effect of the disorder and accordingly the association asked that the order not be issued.

The increase in available milk supplies generally and the fact that milk is readily available from upcountry sources at prices approximating the Boston blend has provided a strong incentive for handlers to drop local producers in favor of cheaper sources of supply.

Less than one-third of the fluid requirements of Rhode Island dealers are supplied by Rhode Island dairy farmers. An additional forty-five percent is supplied by dairy farmers located in nearby Massachusetts and Connecticut and the remainder is secured from other sources, primarily from the States of Vermont and New York. Several of the larger handlers in the market customarily have secured a lesser proportion of their necessary supplies from local producers than have other handlers. The buying advantage that these handlers have had on their purchases of outside milk has prompted other handlers to drop local producers in favor of sources of supply at upcountry points also.

While the record does not reveal the specific prices at which all of such milk has been purchased it does show that one of the larger handlers in the market secured milk in the month of December 1957 from his unregulated plants at Benson and Whiting, Vermont at a cost of $5.384 which compares with the local city plant Class I price at Providence of $7.00. Even when handling and transportation are considered it is evident that the buying advantage in using unregulated milk deters the use of local milk.

Relatively large quantities of local producer milk were dropped during the latter months of 1957 and early 1958; in some cases entire pickup routes were dropped at one time. The burden of handling the homeless milk in the market has rested with the local producer cooperatives whose members are involved.

The Rhode Island Milk Control Board in the latter part of 1957 initiated an allocation program which was intended to assure a market for local producers and to equalize the percentage utilization of local and outside milk as among handlers. Because of the interstate character of the market handler participation was necessarily voluntary and, while the program has resulted in some redistribution of producers among participating handlers, it has not been

effective in restoring market stability. Unregulated, lower-priced milk continues to move into the market in even greater quantities than before the allocation scheme was initiated.

Registered Rhode Island producers have enjoyed a preferential market over an extended period of years. The allocation program and the procedure employed by the responsible officials of the State in issuing permits for importation of nonregistered milk have tended to maintain such preferential market to the detriment of other dairy farmers whose production is an essential part of the market supply.

Proponents presented an analysis of the annual statistics of the Rhode Island Milk Control Board which purported to show that returns to registered producers reflected all the Class II utilization for the market. While the form of the annual statistics does not permit the precise analysis made by proponents, such statistics support this general position. Local producers, however, do not carry an unreasonable volume of the necessary market surplus. The overall Class II utilization for the market is only 5.8 percent of total market utilization and less than 10 percent of receipts from registered producers which, from experience in other federally regulated fluid markets, is substantially less than the necessary reserve which a market such as Rhode Island must carry to assure a continuing adequate supply to meet daily and seasonal fluctuations in supply and demand. Hence, the market relies primarily on up-country unregulated supplies and surrounding Federal order markets to provide the necessary reserves. Since, as previously stated, nonregistered milk is purchased at prices closely related to the Boston blended price, which reflects an average Class I utilization of about 55 percent, the crediting of registered producers with the total Class II utilization tends to enhance the overall buying advantage of importing handlers.

A market structure which grants a preferential price to registered Rhode Island producers cannot provide a stable market for such producers over any extended period while handlers have the opportunity to gain a procurement advantage through the use of lower priced milk from upcountry sources. The State, as a practical matter, cannot effectively regulate milk which moves across State lines, and while local dealers may voluntarily reduce imports of outside milk temporarily to gain support from local producers, it is inevitable that the incentives for using unregulated milk will result in a loss of market for local producers.

The Southeastern New England market is a deficit market and must rely on sources of supply in northern New England and New York to supplement the local supply. Recent developments in bulk tank cooling and transportation facilities have contributed to efficiencies which permit greater flexibility of handler operations at greater distances from the consumption center in Southeastern New England. Handlers serving this market, because of the high demand for fluid milk locally and the existing opportunity to procure fluid milk at prices related to the Boston blend price in the country for fluid use in the marketing area, have a material competitive advantage over those handlers buying on a classified use plan in this and other Federal order markets in the region due to the difference in their product cost and the Class I price. Premiums over the blend price which may be offered by local handlers making "upcountry" purchases have a detrimental effect upon adjacent markets by inducing producers to leave cooperative associations and markets with which they have maintained association for a number of years to deliver to handlers for this market. This situation has resulted in uneconomic short-time shifts in producers between markets and has had an adverse effect upon not only the Southeastern New England market but also the adjacent markets in New England.

The marketing situation as it now exists constitutes a serious and continuing threat to the stable and orderly marketing of milk and to the maintenance of an adequate supply of pure and wholesome milk for the Southeastern New England marketing area.

The issuance of a marketing agreement and order for the Southeastern New England marketing area will contribute to greater stability of the fluid milk market and will tend to effectuate the declared policy of the act. The adoption of a classified pricing plan based on audited utilization of handlers will provide a uniform system of pricing throughout the area and assure a fair and equitable return to all producers.

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Location differentials. Location differentials should be established for milk received at plants located substantial distances from the market. Such differentials recognize the principle that milk similarly used and located should be similarly priced. Milk originating nearest the market should command a higher price than milk located at greater distances by at least an amount which reflects the difference in the cost of transporting it to the marketing area.

• • • • • • • • • • •

Provision should be made for the payment of farm location differentials to producers in the nearby supply area. The amount of these differentials will be obtained by an appropriate deduction from the total value of all milk before completing the computation of the marketwide uniform price.

Producers located in the State of Rhode Island and east of the Connecticut River in the State of Connecticut and in the Massachusetts Counties of Barnstable, Bristol, Dukes, Nantucket, Plymouth, Norfolk and Suffolk and that part of Worcester and Middlesex south of the Massachusetts turnpike should receive a farm location differential over the basic blended price of 46 cents per hundredweight. Pro-

ducers located in the Massachusetts counties of Essex and that part of Worcester and Middlesex north of the Massachusetts turnpike and in the New Hampshire towns of New Ipswich and Greenville should receive a farm location differential of 23 cents per hundredweight. However, in no event should the amount of such differential result in a price higher than the applicable Class I price at the plant where the milk is received.

Historically, dairy farmers in the States of Massachusetts, Rhode Island and Connecticut, because of their location with reference to the large population concentrations of New England have disposed of a substantially larger percentage of their production for fluid uses than have dairy farmers in the upcountry area. Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. Under the marketwide pooling herein proposed and without some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk on the milkshed rather than according to the utilization of his milk. Under a regulated market, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and has assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources. The distant producer also benefits from an established Class I price, and by the fact that he gains a larger share of the fluid market than is likely without marketwide equalization.

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From the Secretary's Decision, 29 F.R. 11205 Promulgating the Mass.-Rhode Island Milk Order, Aug. 4, 1964

• • • Distinguishable markets for milk in most of eastern Massachusetts and Rhode Island no longer exist, however. The population increase of recent years, and particularly

the growth of suburban areas around principal cities in Massachusetts and Rhode Island, has induced handlers in one defined marketing area to extend their distribution routes into other such marketing areas. This action has been encouraged by the increasing proportion of business done through supermarkets and by improved roads and transportation facilities. To achieve economies of scale and to meet consumer demand, a number of handlers have concentrated their processing and packaging operations in larger plants which contain the specialized equipment necessary to package milk in the many sizes and types of containers in use today. This has resulted in regular distribution to more than one regulated market at the same time from an individual plant. Also, the Boston, Southeastern New England, and Worcester marketing areas adjoin each other and the eastern periphery of the Springfield marketing area is relatively close to the western boundary of the Worcester marketing area. Because distributing plants are scattered widely throughout these four marketing areas, only short distances are involved in many cases for operators of these plants to extend their distribution routes into another marketing area. The numerous instances of overlapping of handler sales areas is thus resulting in intermarket competition for fluid milk sales throughout an area which has become essentially a single fluid milk consumption center.

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It is clear that a single marketing area has developed where previously separate markets existed. Under this circumstance, the economic stresses, marketing instability and price uncertainties which have developed and persisted must be eliminated by the adoption of a single milk order with a single marketwide pool.

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Some evidence would suggest that the difference between the receiving costs at country plants and such costs at city

plants is as low as 5 cents per hundredweight. Other evidence indicates that this cost difference may be significantly higher. In view of the wide variation in costs apparently being experienced by handlers, it is concluded that the difference between country plant and city plant handling of 10 cents per hundredweight, which is now reflected in the 54-cent zone differential, should not be modified on this record. As marketing practices, conditions, and technology change, perhaps a somewhat lower handling allowance will be appropriate. Evidence in this record suggests that a thorough review of this matter would be warranted at a future date.

As just indicated there are, however, certain reductions which have occurred in the costs of handling milk and transporting it from country locations to city plants. This makes the present zone differential of 54 cents inappropriate for valuing milk received from producers at city plants in relation to milk received from producers at plants in the 21st zone. The present zone differential exceeds the indicated total additional cost of receiving milk at the city through a country plant. Therefore, the operator of a city plant who receives milk directly from producers in fact pays, insofar as the order is concerned, a greater amount for his milk supply than does the operator of a city plant who obtains his fluid supply from country plant sources.

This situation encourages city plant operators to obtain increasing quantities of milk from country plants for their fluid requirements. Such plant operators were described as able to purchase milk from country sources delivered f.o.b. the city plant at approximately the city plant Class I price. Under this arrangement, it is conducive for city plant operators to purchase milk from country sources and avoid the costs of field service, quality control, bookkeeping, and added receiving costs normally associated with receiving milk directly from individual producers. Multiple-plant handlers with both country and city plants are in a

particularly favorable position to take advantage of the lower handling and transportation costs than are now reflected in the city plant Class I zone differential. One of the results has been that a major cooperative association has had to expand its manufacturing facilities in southern New England in order to market an increasing proportion of nearby produced milk for which Class I outlets have been lost to country plant sources.

* * * * * * * * * *

It is therefore concluded that the allowance for transportation to be reflected in the city plant zone differential should be 37 cents. Further, the plant handling allowance to be reflected in this differential should continue to be 10 cents. Accordingly, the Class I price applicable at nearby (city) plants under the Connecticut order and the proposed Massachusetts-Rhode Island order would be 47 cents greater than the Class I price at plants located in the 21st zone.

* * * * * * * * * *

A city plant zone differential of 54 cents per hundredweight under the New England orders is applicable also to the blended price which is returned to producers delivering milk directly to city plants. The nearby plant zone differential of 47 cents proposed herein for Class I prices likewise should be made applicable to blended prices under both the Massachusetts-Rhode Island order and the Connecticut order. Inasmuch as milk pooled under the orders is produced primarily for the fluid market, the blended prices returned to producers by location should reflect the same differentials which attach to Class I milk.

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4. *Farm location differentials.* The farm location differential provisions under the present New England orders should be continued under the Mssachusetts-Rhode Island order and the Connecticut order.

A group of nine cooperative associations, which represents principally producers whose farms are located out-

side any of the specified farm location differential areas proposed that farm location differentials be eliminated under the New England orders. Three other cooperative associations proposed that a producer whose farm is located within New England and who is presently eligible to receive a farm location differential (either 46 cents or 23 cents depending on the location of the farm) under any New England order be eligible to receive the same differential irrespective of the New England order under which his milk is pooled. Another cooperative association proposed that the farm location differentials be increased as an offset to any reduction made in the city plant Class I zone differentials under the orders.

Farm location differentials represent payments of 46 cents and 23 cents per hundredweight to producers whose farms are located in specified "nearby" and "intermediate" areas, respectively, in addition to the applicable zone blended price which these producers receive. The payments are met by deductions from pool funds. The additional returns to producers who are eligible for these differentials are, in essence, monies which, in the absence of such differentials, would accrue through the blended price computation to all producers, including more distant producers.

Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.

While considerable testimony in support of removal of the provisions was received, it was not established that the

farm location differential provisions are resulting in unstable or disruptive marketing conditions which warrant their deletion from the orders at this time. Although certain marketing problems in the nearby and intermediate market areas were referred to in the testimony, these problems are not the result of production increases on farms in these areas which logically might be attributable to the higher returns to producers in these areas. Such increases have not been significantly different from those on farms not eligible for the farm location differentials.

During a period of general incerase (sic) in milk production throughout the milksheds of the New England markets, the average daily milk deliveries per farm for those farms located in the farm location differential areas under the Boston order and for those farms located outside such areas both increased 23 percent in 1962 over the average of such deliveries in 1960. In the Southeastern New England market the average daily deliveries per farm for those farms located in the differential areas increased about 16 percent in 1962 over 1960 while such deliveries from farms not located in any differential area under the Southeastern New England order increased about 13 percent during this period.

Comparable percentage figures for Connecticut market producers for this period are not available. A comparison of 1961 with 1960, however, shows that there was an increase of 8 percent in the average daily deliveries per farm for those farms located in the differential areas and an increase of 13 percent in such deliveries for those producer farms located outside the Connecticut differential areas. In the Springfield market the average daily deliveries per farm for those producers in the differential areas increased about 18 percent during the 1960-1962 period. In this market very few farms are located outside the differential areas. Such increase of 13 percent is not out of line with comparable increases in the other markets, however. In

the Worcester market such daily average deliveries from farms located in the 46-cent differential area (there is no 23-cent differential area under the Worcester order) increased about 17 percent during this two-year period while such deliveries per farm located outside such differential area increased about 32 percent.

The average number of producers with farms located in the farm location differential areas is decreasing in the Boston, Springfield, Southeastern New England, and Connecticut markets. The farm location differential area under the Worcester order was expanded in September 1960 and this caused an increase in 1961 over 1960 in the average number of producers who were eligible to receive such a differential. The average number of such producers decreased in 1962 from such number in 1961, however.

Marketing problems which have been attributed to the farm location differentials do not relate to the rates of the differentials as such but rather to the changes in applicable differential rates which often occur for producers when they are shifted from one market to another. Problems of this kind, however, are dealt with by the proposed merger of orders. Further, an unwarranted decrease in returns to nearby producers would result at this time if any reduction were made in the farm location differentials in conjunction with the 7-cent reduction in the city plant Class I zone differential proposed herein. It is therefore appropriate that the present levels of farm location differentials continue to be applicable under the New England orders.

The proponent cooperative associations excepted to the findings and conclusions on this issue and requested that a decision on the issue be deferred pending a suggested study of the economic and legal aspects of farm location differentials by industry and governmental representatives. As indicated above, we believe there are adequate reasons on this record for continuing the farm location differentials

at their present rates. An industry study of such differentials may be made, of course, at any time or could have been made at any time in the past in preparation for their review. The matter may be reviewed when it is shown that further consideration in hearing is appropriate. We are not warranted in deferring the decision until such a study has been made.

It would not be apropriate to increase the farm location differentials under the Massachusetts-Rhode Island .and Connecticut orders, however, by part or all of the proposed reduction in the city plant Class I zone differential. Proponent of this proposal contended that under a reduced transportation differential such an increase in farm location differentials should be made to reflect in the returns to nearby producers the full value of nearby producer milk as compared to country plant milk.

It is probable that the attractiveness to handlers of nearby producer sources of milk will be increased under the circumstance of a reduced city plant Class I zone differential. As described under Issue No. 3, country receiving and transportation costs have decreased in recent years, indicating that the present zone differential for city plants is excessive. Reducing the zone differential merely provides for a proper relationship between the price to the handler for producer milk received at city plants as compared with the price to the handler for milk purchased from country plants. While such action may increase the marketability of nearby milk, the intrinsic value of the milk has not been increased. Accordingly, this proposal is denied.

The present farm location differential areas under the Boston, Springfield, Worcester, and Southeastern New England orders should be combined under the Massachusetts-Rhode Island order. With minor exception as described later, all territory which is within the present 46-cent differential area under any of the four orders should

constitute the 46-cent differential area under the consolidated order. Similarly, all territory (also with minor exception as described later) which would not be within this proposed common 46-cent differential area but is now within the 23-cent differential area under any of the present four orders should constitute the 23-cent differential area under the consolidated order.

Producers now under the four orders to be merged would be suppliers of a single marketing area under the Massachusetts-Rhode Island order. Because only one marketing area will be involved, producers should receive the highest farm location differentials for which their farm locations would have made them eligible under any of the present four orders, regardless of the plant to which their milk is delivered under the merged order.

The consolidation of the respective farm location differential areas now provided under the four orders would eliminate sometimes unexpected decreases in returns to individual producers. When a distributing plant becomes pooled in another market, the producers delivering milk to that plant become associated with the new market also. This has been a disturbing condition for certain producers who were eligible for the 46-cent differential before a plant shift but who became eligible only for the 23-cent differential, or for no differential at all, after the shift was made. Handlers experience difficulty at times in handling milk with maximum efficiency because of their reluctance to shift producers from one market to another when such producers would experience a reduction in returns. Cooperative associations also may be handicapped in shifting producers to plants which have need for additional supplies. It is appropriate, therefore, that the application of farm location differentials under the Massachusetts-Rhode Island order be as described.

It is not necessary to provide that a New England producer who is eligible for a farm location differential under

the Connecticut order or the Massachusetts-Rhode Island order be eligible for the same differential when his milk is pooled under the other New England order. The consolidation of the four orders and the farm location differential areas provided thereunder will remove, for all practical purposes, the problem of change in differentials for producers who shift, or are shifted, from one to the other of these markets. This is so since it is likely that there will be relatively few instances of plant shifts with only two orders in New England and since virtually all producers shipping to the merged market but readily available to the Connecticut market would be in the 46-cent differential area under either order.

As indicated, the 46-cent and 23-cent differential areas under the Boston order are proposed to constitute a part of the areas in which farm location differentials would be applicable under the consolidated order. In contrast to the other four New England orders which now define farm location differential areas in terms of city and town boundaries or easily distinguishable highways or rivers, the differential areas under the Boston order are defined by "40-mile" and "30-mile" airline arcs which are measured from specified locations. To facilitate the administration of the orders, it is concluded that the peripheries of the two differential areas provided under the Massachusetts-Rhode Island order should be described in terms of city and town boundaries. The use under the consolidated order of long-established, well-known, and readily ascertainable political boundaries will provide a less burdensome procedure for determining a producer's eligibility to receive a farm location differential than does the use of airline arcs measured from a base point.

Under this proposed modification of a portion of the peripheries of the Boston order farm location differential areas, all cities and towns in Maine and New Hampshire which are wholly within the present 40-mile arc, as meas-

ured from Lawrence, Massachusetts, would be included in the 46-cent differential area under the consolidated order. In addition, the modification would extend the 46-cent differential area to the entire area of the following cities and towns which are now intersected by the 40-mile arc: the cities and towns of Barrington, Chichester, Deering, Francestown, Greenfield, Pembroke, Pittsfield, Rochester, Rollinsford, Strafford, and Weare in New Hampshire.

The 23-cent differential area under the merged order would include those cities and towns in Maine and New Hampshire which are wholly within the presently defined 80-mile arc under the Boston order but which would not be included in the Massachusetts-Rhode Island 46-cent differential area. In addition the entire area of each of the towns of Kennebunkport and Lyman in Maine and Gilmanton, Middleton, Milton, and Surry in New Hampshire would be included in the 23-cent differential area under the merged order.

The cities and towns individually listed above are those areas which are intersected by the respective airline arcs used in defining the differential areas under the Boston order and from which one or more producers recently have delivered milk to the Boston market from farms located inside the respective arcs. The remaining cities and towns which are intersected by the respective arcs are areas from which no milk has been delivered to the Boston market since January 1, 1962. Accordingly, it is appropriate that these areas not be included within the respective differential areas. Under this arrangement, only nine Boston producers known to have farms located in the 23-cent differential area at the time of the hearing would be shifted to the 46-cent differential area and the farm of one known Boston producer not located in any differential area would be shifted to the 23-cent differential area.

Exception was taken to the proposed continued use of certain highways in defining the peripheries of the farm

location differential areas under the Connecticut order. Exceptor contended that inasmuch as it was proposed in the recommended decision that the peripheries of the farm location differential areas under the consolidated order be defined in terms of political boundaries similar procedure should be used in all cases under the Connecticut order.

No proposal of this nature was presented at the hearing which would provide a basis for this action. Moreover, the highways used to describe part of the area boundaries are easily ascertainable lines of delineation. This is in contrast to the more difficult determination of area peripheries on the basis of airline arcs as currently in use under the Boston order. The principal purpose of the proposed change in the manner of defining farm location differential areas under the Massachusetts-Rhode Island order is to establish for both producers and the market administrator boundaries which can be easily determined. In many instances well-defined highways also meet this requirement for the establishment of boundaries. We know of no problem in this connection under the Connecticut order.

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9. *Method and scope of pooling.* (a) The marketwide pooling plan for distributing returns to producers presently in use under the Boston, Springfield, Worcester, and Southeastern New England orders should be provided under the Massachusetts-Rhode Island order.

A proprietary handler in the Southeastern New England market proposed that the method of pooling returns to producers in that market be changed from marketwide pooling to individual-handler pooling. Another proposal listed in the hearing notice but not supported by proponents or other parties would require that individual-handler pooling replace the present marketwide pooling under each of the four orders proposed herein to be merged.

The conclusion that the Southeastern New England order should be merged with the Boston, Springfield, and

Worcester orders into a single regulation renders moot the question of individual-handler pooling under any one of the now separate orders. The question then is raised as to the propriety of individual-handler pooling under the Massachusetts-Rhode Island order.

Under such form of pooling all producers supplying the same regulated handler would be paid a blended price (subject to butterfat and location differentials) based upon the uses of milk made by such handler. With this arrangement it is usual that producers supplying one handler receive a blended price different from that paid by other regulated handlers in the market inasmuch as the proportions of milk used in the different classes usually vary among handlers. This method of pooling is in contrast to marketwide pooling now provided in each New England order, whereby the values of milk delivered by all producers to all regulated handlers in the market are combined into one fund and all producers supplying the market are paid the same blended price except for adjustments for butterfat and location of the plant of receipt.

Individual-handler pools generally are more practicable for markets where milk supplies are relatively short and where reserve supplies are distributed rather evenly among all handlers in the market. These conditions do not prevail in the Boston market, and would not prevail in the consolidated market because of the predominance of the Boston market's position among the four markets proposed to be merged. Most distributing plants in New England are not equipped to handle reserve milk in any volume. Consequently, operators of such plants customarily have relied on the relatively limited number of manufacturing plants, most of which are presently associated with the Boston market, for the disposal of often substantial quantities of reserve milk. In this situation the institution of individual-handler pooling under the consolidated order would result in widely differing blended prices as between those pro-

ducers whose milk is received directly at distributing plants and those whose milk is received at country supply plants where available manufacturing facilities are maintained.

It is logical to expect that individual handlers and cooperative associations would find it necessary to make substantial changes in the present patterns of milk movements and disposal in order to obtain for their respective producers the highest possible returns. The major readjustment of the entire marketing structure in New England which undoubtedly would accompany the institution of individual-handler pooling would add to marketing costs and thus be uneconomical and undesirable. The differences in producer prices which could be expected to ensue from such method of pooling would not promote the objective of more uniform alignment of prices to producers which, as elsewhere described in the decision, is important to orderly marketing in New England. The application of market-wide pooling under a merged order will promote market stability by insuring that all producers supplying the Massachusetts-Rhode Island market will share on a uniform basis the Class I and Class II utilization in the entire market and thus assist to permit the assembly of supplies in an economical manner for available outlets. Accordingly, the proposals for individual-handler pooling are denied.

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(c) No provision should be made in the New England orders for a "base-excess" plan of distributing producer returns. A cooperative association in the Southeastern New England market proposed that such a plan, which would provide for a system of Class I bases for all producers presently shipping to the New England markets, be incorporated in the New England orders. Proponent contended that the present method of pricing milk under these orders does not provide sufficient incentive for producers to adjust their production to the Class I utilization of milk in the market.

The Agricultural Marketing Agreement Act of 1937, as amended, authorizes the inclusion of base plans in Federal orders. Such plans have been incorporated in a number of Federal orders, but only for the statutory purpose of minimizing seasonal fluctuations in milk production. The objective of the type of base plan proposed, i.e., the reduction of aggregate deliveries of milk by producers to pool plants in relation to the market's fluid needs irrespective of price, would supplant the function which is intended under the Act to be performed by prices established at the levels required by the Act. Prices under milk orders must be established at levels which will tend to equate demand and supply for the market, insure a sufficient supply of pure and wholesome milk, and be in the public interest. Order pricing is intended to operate under conditions where milk supplies will remain reasonably free to respond to changing price conditions. Under a base plan of the type proposed, total production would be influenced greatly by the impact of the base plan rather than by the level of prices provided under the order and would be in conflict with the price criteria of the Act. The proposal therefore is denied.

Portions of Hearings Held Commencing January 7, 1963, Docket Nos. AO14-A35, AO203-A17, AO204-A17, AO302-A9, and AO305-A9

Testimony of James D. Lee for New England Milk Producers

The Witness: I wish to describe the effect on blended prices of mergers and of elimination of nearby farm location differentials with respect to Proposal No. 3, which is our own proposal, and Proposal No. 1, of the CDES.

First, with respect to the effects of merging all five markets—and I shall use as an example the prices and situation as of August, 1962: In August, 1962, the blended prices to nearby producers were as follows for each of the five markets: Boston, $5.70; Connecticut, $5.99;

Southeastern New England, $5.96; Springfield, $5.58; and Worcester, $5.36.

Dr. Young: Would you read those again?

The Witness: Surely.

Boston, $5.70; Connecticut, $5.99; Southeastern New England, $5.96; Springfield, $5.58; and Worcester, $5.36.

Dr. Young: Thank you.

The Witness: If the five markets were one in August, 1962, and if there were the same farm location differentials in effect, the price to nearby farmers would have been $5.82 for the nearby area, $5.50 in the intermediate zone, $5.36 in city plants from milk coming from different zones, and $4.82 at plants in Zone 21.

Mr. Whitney: That is for Boston?

The Witness: No; all five.

Now, if that were the case, the Boston blended price (1702) would have been—

I beg your pardon. This five-market price would have been 12 cents higher than the Boston actual price.

I wish to start that again.

Comparing this five-market price with the actual blended prices in the separate markets, the Boston price would have been raised 12 cents, and the Connecticut price would have been dropped 17 cents. The Southeastern New England price would have been dropped 14 cents. Springfield would have been raised 24 cents, and Worcester dropped four cents.

Now, if, along with the effects of pooling the utilization over five markets, and at the same time we were to eliminate the nearby farm location differentials, the whole level of the price structure would be raised 20 cents, except for the nearby part of the price level, and the structure would be as follows:

The price at the 21st zone would be increased from $4.82 to $5.02. The price at city plants for milk coming in from different farms would increase from $5.36 to $5.56. And the prices to all producers at city plants would be $5.56.

Comparing the revised price structure with the actual price structure at that time, prices to nearby producers in Boston would be reduced 14 cents from the actual price. The five-market price to producers at city plants would be 43 cents less than the actual price to Connecticut producers. It would be 40 cents less than the actual price to producers in Southeast (1703) New England, two cents less than the price to nearby producers last August in Springfield, and 30 cents less than the price to Worcester producers from nearby farms last August.

In the intermediate area, the effect of this modification of the price structure would be to increase prices to producers in the intermediate area by nine cents, reduce them 20 cents in that area for Connecticut, reduce them 17 cents for that area in Southeastern New England, and raise them 21 cents for that area in Springfield.

Looking at the Boston up-country producers alone, under these assumptions, their price would be about 32 cents a hundredweight higher than it actually was in August, 1962.

If the Boston, Springfield, and Worcester markets were in one pool in August, 1962, with nearby farm location differentials substantially as they were, the three-market blended price to nearby producers at city plants would have been $5.71 a hundredweight, the price to such producers in the intermediate zone would have been $5.43, the price to distant producers at city plants would have been $5.25, and the Zone 21 price would have been $4.71.

The blended prices that would have obtained under this assumption would have been one cent a hundredweight higher than the actual Boston price. It would have been 13 cents higher than the Springfield price at city plants, nearby producers and it would have been 15 cents less than the actual price to Worcester (1704) producers at nearby plants.

If the principle of eliminating the nearby farm location differentials were adopted—and such elimination has not been proposed by us in our testimony on Proposal 3—the price to distant producers in Zone 21 would have been raised from $4.71 to $4.81. The price to distant producers at city plants would have been raised from $5.25 to $5.35, and we would have had those comparisons with the actual prices.

As far as the nearby producers' prices are concerned, the change due to a three-market merger with farm location differentials out would be to reduce the Boston price 35 cents, the Springfield price 23 cents, and the Worcester price 51 cents.

Mr. Chermauskas: These are all reductions?

The Witness: Yes.

In the intermediate zone, the price to Boston producers would be 12 cents lower. Of course, there would be no change in Springfield. But in Worcester, the price would have been 28 cents lower.

Mr. Tipton: Did you say the price in the intermediate area of Worcester? I did not get what you were talking about. There is not an intermediate area to Worcester, is there?

The Witness: That is correct. There is no intermediate. I had those two interchanged.

The price in the intermediate zone in Springfield was $5.35. Under these assumptions, it would be $5.48, so that it (1705) would be raised 13 cents; and there is no comparison for the intermediate zone in Worcester, so the figure I gave of 28 cents is to be stricken.

Mr. Aplin: I think maybe there is a basic error in these figures, in that the actual supply in Southeast New England is slightly different than Mr. Lee stated it. I wonder if that would not affect some of the subsequent figures.

Is that true, Mr. Lee?

Exhibit No. 7, page 2, shows that the blended price to nearby producers is $5.98, and I think you are using $5.96.

The Witness: Yes, I did.

Mr. Aplin: That would change some of the figures you have given, would it not? The comparison of actual prices and what they would be in Southeastern New England?

The Witness: It would have a slight effect, yes.

Mr. Aplin: There was one other point I wanted to make before you go on. In the comparison of what it would be with all markets merged, but with no farm location differentials, I think you said that the 21st zone price would be $5.02, and the price to nearby producers at city plants $5.56, but would not these have to be 54 cents apart?

Excuse me. I guess I am wrong. I guess they are 54 cents apart. I am fast on that one.

Then this other one would make, I agree, only a slight difference. But would you not need to revise slightly these (1706) figures?

The Witness: I am not positive that in my scrap paper I didn't use $5.98 and copy on this chart I am using to talk from $5.96. I would want to check that before I answered on it. And if I did, I shall attempt to get a measure of the distortion that is introduced.

Dr. Johnson: Could I ask a question of a somewhat similar nature?

In making the computations using the month of August, there was a take-out-and-pay-back plan in effect in Connecticut under which money accumulated in April, May, and June was repaid in July, August, and September, and in August an amount of approximately 17 cents a hundredweight, and my question, I guess, the first question: If that 17 cents, and the amount of money on which it was based was not available under Proposal 1, would not your results on the five-market computations have been somewhat different?

The Witness: Yes, they would, Dr. Johnson.

Dr. Johnson: And then only one other follow-up question. And specifically where you made the calculations for Proposal 1, where there was one order, and the location differential was eliminated, and you came out with a $5.56 city plant price, which you showed was only two cents lower than Springfield, would not that two cents be increased to perhaps six cents, or some figure in any event larger than two cents?

(1707) The Witness: Yes.

Examiner Holstein: Mr. Tipton?

Mr. Tipton: I was late, and I was just wondering if the method of determining what the price would have been has been put into the record.

The Witness: No, I haven't explained the basis of the computation, but I would be glad to tell you.

Mr. Tipton: Second, I wondered if you intended to present these figures in tabular form, or do anything further than just reading them into the record at this time. It is rather difficult to follow the figures, the meaning of them and so forth, their not being in tabular form.

The Witness: I think in view of Mr. Alpin's comments and those of Dr. Johnson, it would be appropriate to recheck them, with those points in mind, and after I have done that, I would be glad to put them in tabular form and make them generally available.

Examiner Holstein: Is that satisfactory, Mr. Tipton?

Mr. Tipton: Yes.

Were you through with your direct, now?

The Witness: No.

Examiner Holstein: Go ahead.

The Witness: If the prices to up-country producers were reduced on the order of 32 cents a hundredweight, to use as an example the figure that I gave you, and

variable sharp (1708) decreases in prices occurred to producers delivering to city plants from these nearby areas, particularly the areas close in to the distribution centers, we could expect that the volume of production from the northern producers would increase substantially and that producers, many producers, in a perhaps desperate effort to survive in southern New England, would resort to jug operations in peddling their own milk.

Mr. Geyer: Mr. Lee, I thought you said if the up-country price was reduced 32 cents.

The Witness: That was a slip of the tongue. I meant increased 32 cents. Thank you.

It is obvious that there would follow serious adjustments.

Within perhaps two years the supply-demand adjuster in the Class I price formula could conceivably reduce the Class I price 44 cents. This reduction in the Class I price and a decrease that would take place in the percentage of Class I milk could (1710) wash away everything gained by up-country producers from the merger and appropriation of the differentials to nearby producers.

The production in the nearby areas, contrary to that in northern New England, has not been following an upward trend over the years. In the Boston market before amalgamation with the Merrimack market, the percentage of nearby milk was substantially less than it is now, and it is only about three per cent at the present time.

The nearby farm location differentials were established at the outset of the orders, recognizing the existing pattern of prices prior to Federal regulation. There has been no move over the years to change the original rates of 46 and 23 cents, to keep them proportionally aligned with the upward trend in prices, so that these differentials have become a declining percentage of the price. There has been no inflation, in other words, in that farm location differential.

Dairy men in southern New England have entered into many capital commitments during all these years, and may have done so even very recently, while those differentials have been frozen into the price structure.

Doubtless, many loans have been made to producers by the Federal Land Bank, long-time loans, using normal prices to producers. The farm location differentials have been in the orders for so long that I feel it is only reasonable to assume that in considering granting loans, the differentials would be (1711) certainly considered to be a part of the normal price. It is doubtful that they could

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For the reasons that I have indicated, the credit institutions serving northern New England producers would be poorly advised if they thought there would be anything but a temporary shot in the arm to returns to the up-country producers.

I have not time to do any extensive research on this question, and I might just as well admit now that such little bit as I have done underlying these comments today was done in the wee hours of this morning, and I make no claim to extreme accuracy, and apologetically wish to say that I will do everything I can to try to correct any numbers that I have made errors on.

It seems to me that any radical change in the price structure of the market warrants long and careful research. The nearby farm location differentials have been a part of the New England price structure for so many years that they need not be destroyed summarily without permitting reasonable time for thorough research to be made as to the impact of such action on the market and the dairy economy of the region.

I cannot accept that over the years the Secretary has permitted outrageous discrimination against up-country producers to have been perpetrated by the orders, and that they need to be swept away at one fell swoop.

(1712) I do not feel that the southern New England producers or the Secretary of Agriculture have any reason

or having any guilt complex over having allegedly discriminated unfairly in behalf of nearby producers; nor that nearby producers should feel, as the result of the testimony presented at this hearing, unless before it is concluded overwhelmingly convincing conclusions from extensive research would warrant it, that they have accepted millions and millions of dollars to which they were not entitled, or that they have been picking the pockets of their fellow producers in northern New England.

As I have said, the price structure that has been recognized is the one that was found by USDA to have existed just prior to regulation—I submit that the nearby farm location differentials question does not hinge alone on the question of the quality of the milk now versus what it was then.

Quality premiums were always a matter of negotiation between handlers and producers. It is not alone the better roads and larger tank trucks which should decide this issue, it seems to me. And the argument that handlers today would not pay a higher price by virtue of the nearby location of the milk is presumptive.

We have many instances over the country of premiums being paid. There have been instances in markets in the country where premiums over the order price have been paid, and the prices established under the order seem to take into account (1713) all of the purely economic factors involved.

In other words, we cannot conclude that handlers necessarily would not agree to pay at least something more for nearby milk. Handlers are not always economic men.

When the Springfield, Worcester, Southeastern New England and Connecticut orders were promulgated, they contained the nearby farm location differentials which had been established in the Boston order, and for the same reasons. In each case it was unregulated milk from outside sources which was being sold in these markets, milk that the state control boards could not control effectively, that led to the orders.

The problem was not one of the nearby farmers receiving low prices for their milk, but rather it was largely one of the regulated milk having to compete unfairly in those markets with the unregulated milk. That is to say, Boston handlers, for example, were trying to compete in these southern New England markets with pool milk and were at a disadvantage. The prices under state authority to the local producers, as I recollect, were not comparatively low.

I do not mean to imply that had not Federal orders been instituted in the southern New England markets that I have mentioned, marketing conditions could not have degenerated to the point where local producers would have been hurt substantially; but at the time they came in the local producer prices were generally favorable.

(1714) Southern New England producer organizations voted for the new orders, even proposed them. They were fully aware that the orders did provide for nearby farm location differentials which recognized their existing price structure; and these pricing provisions seemed to them to be fair and equitable and in their long-run best interest.

I know of no one in the NEMPA who anticipated that after a period of years, in the case of Southeast New England and Connecticut only a very few years, this price structure would be greatly changed.

I am not in accord with Attorney Carroll's characterization of the proposal to eliminate nearby farm location differentials as "squawks from the North Country." I do not believe we are dealing with any "squawks," but an honest question of what is right, rather than who is right, and that we should explore all of the factors involved.

Nevertheless, I do think it is unfortunate at this particular time that our producers should be divided on this question. Our New England producers in their cooperative associations now are and seem destined to be in

peril from outside dangers, from unfavorable court decisions, technological developments in dairy products, and this does not seem to be an appropriate time to rock our own boat.

I guess that is all I have to say.

Examiner Holstein: We will take a ten minute recess.

(1715) (Short recess.)

Cross Examination by Mr. Tipton:

Q. I am sure you are very familiar with Exhibit 24, which contains an article on farm location differentials. In this article you portray or make a statement as to what testimony was entered at a hearing prior to the issuance of the order in 1937, which happens to correspond with the differential rate that was put into effect in 1937.

That differential, or the testimony that was given, closely related to the 46 cent differential, did it not? A. Yes.

Q. Now can you tell me: Who paid that differential? I do not mean by name, but as a group. A. Who paid the differential? There was no differential.

Q. Did the handlers pay the differential? A. The handlers paid the producers who delivered the milk at the city plants a level of prices which was in relation to the up-country prices, as the evidence in the hearing record at (1719) that time, which is quoted in the article, explains.

Q. So if the 46 cent differential was based on that difference, then handlers naturally paid the money that gave the basis for writing the 46 cent differential. Is that not

correct? A. I wouldn't want to testify beyond what was quoted from the record at that time.

There is in the room Professor Ellsworth Bell, who made statistical investigations at that time of prices actually received by producers, nearby producers, at that time, and I would not care to expand on that myself.

Q. You mentioned in your testimony somewhere that you did not think that it could be fully justified on quality, and you mentioned some other elements that you did not think this fully justified it—"it" being the differential.

Can you tell me what your impression or what you think authorizes a nearby farm location differential under the Act?

Mr. Hall: I think that that is asking this witness, who is not a lawyer, a question of law.

Examiner Holstein: That is correct. The addition of that last phrase put it in the legal realm.

If you are asking for economic justification, I will allow this witness to answer; but if you are asking what justifies the differential under the Act, I do not think Mr. Lee should attempt to answer that.

(1720) Mr. Geyer: In addition, it seems to me Mr. Lee spent nearly 30 minutes putting into the record what he thought was the justification for a nearby differential.

Examiner Holstein: I think that is correct.

I do not know whether you were here for all the testimony, Mr. Tipton, but I do not think Mr. Lee should be required to repeat it.

Mr. Tipton: I am sorry if I was asking you to repeat it. I had no intention of doing so.

By Mr. Tipton:

Q. Let me ask it this way, then. I take it from your testimony that you have justified it basically on the historical fact that nearby differentials were paid, or

a price was paid which reflected the 46 cent differential rate back in 1937.

Is this true? A. I pointed out that the very fact that it has existed over this period of time led to decisions, and they were business decisions by producers and institutions serving producers, which resulted in the both short-term and long-term capitalization into the southern New England dairy industry of the nearby farm location differentials, which certainly greatly supplements the reason which you cited, that they had been, or that they did, come about as USDA studied the situation at the time of the promulgation hearings, economic briefs that were prepared in anticipation of those hearings.

(1721) I don't wish to say that I have made a study of the dusty old economic briefs to have at my fingertips a long list of economic factors that at the time justified their inclusion in the order.

Q. Why would a handler—just give me some reasons as to why a handler would customarily apply a differential?

Let me make it more specific. Would he customarily apply a differential because such differentials were historically paid? A. I don't know how he would pay if we swept the differentials away and set up under the order the revised structure which would result from plowing the money now going to southern New England producers over the entire milkshed.

Q. Well, would he customarily apply a differential, if he acted in an economically rational manner, unless the milk had some additional value over another source of milk that he might purchase? A. Well, I testified that handlers don't always pay prices that we economists would rationalize as being appropriate.

Q. I realize that. But if he acted in an economically rational manner—and you are an economist, so you have some connotation of what an economically rational manner might be. A. Well, I am also a political economist,

I think, and I am not sure that we can conclude that handlers will pay farmers always even closely the prices that location theory and the (1722) traditional economic rationale of prices would seem to justify.

Q. So you are saying that in general handlers do not pay for milk according to it's value? A. No, I didn't say that.

Q. Then in general do handlers pay for mik according to the value, too? A. Yes.

Q. So in general would a handler customarily apply a differential to milk which did not have an additional value to him over some other source?

Examiner Holstein: Now you are asking the same question you asked him a moment ago, when he answered at length. I think you are repeating.

Mr. Tipton: I do not think he answered that, sir.

Examiner Holstein: Well, I will let Mr. Lee tell you whether he answered it or not. It sounded to me like the same question you asked three or four questions back: Will the handler pay a location differential if the mik concerned did not have some additional economic value.

Was that not the question you asked two or three questions ago?

Mr. Tipton: I said "generally" in this question, which I think changes it considerably.

Examiner Holstein: You said "generally"? You mean now you said "generally"?

(1723) Mr. Tipton: Yes.

Examiner Holstein: How was the question before any different?

Mr. Tipton: I think the record will show what he said, and I cannot remember what he said, but in my mind it changes it.

Examiner Holstein: You said this question was different because it contained the word "generally." Is the only difference that the question previously did not contain the word "generally"?

Mr. Tipton: That is the only difference that I intended it to have.

Examiner Holstein: I do not think that is a difference, Mr. Tipton. When you asked the question before, it was generally, too, was it not?

Perhaps we are wasting more time than we can save. But do not repeat. You are repeating, because you did not get an answer that you thought was satisfactory. I can realize that. You would like to get a better answer. But I do not think that you should repeat questions in that attempt.

Go ahead, Mr. Lee.

The Witness: I would not want to speculate now as to just what handlers would do price-wise, if we had this changed situation.

By Mr. Tipton:

Q. Well, do you know of handlers that are customarily (1724) applying the differential today to nearby milk? A. All handlers who are buying nearby milk are required by the order to pay producers the differential.

Q. They are paying a differential above the Class I price? A. No. What I mean is that the handlers are paying the blended prices established by the order.

Q. Do you know of any handlers in the nearby area that are paying in addition to the blend price a premium? A. I don't of my own knowledge know any handlers who are now, but if I said I did know that there are such, your next question would be, "Who are they," and I just have the feeling that there are some—

Examiner Holstein: Let's not anticipate what Mr. Tipton's next question will be. This question is: Do you

know of any? If you can answer that, do so; then when he asks his next question we will decide on that.

The Witness: I don't know the names of any handlers paying premiums.

By Mr. Tipton:

Q. I think you made a statement in connection with I believe the promulgation of the Connecticut order, or the hearing leading up to the Connecticut order, or the conditions prior to the promulgation of the Connecticut order; but the problem was not one of nearby farmers receiving low prices for their milk, but rather one of regulated milk having to compete (1725) largely with unregulated milk. A. And I made that statement also with reference to Southeastern New England, and years before that in Springfield and Worcester.

Q. Was there some difference in the price—

Let me ask first: The regulated milk you are speaking of would have been regulated under Federal orders? A. I meant Federal orders.

Q. You also meant regulated under state order, too, did you not? A. I was thinking of the unregulated milk as milk shipped in from other states, which couldn't be effectively regulated under any order.

Q. Yes; but it was competing with milk that was regulated under Federal order, as well as milk that was regulated under state order. Is that not correct? A. That is correct, yes.

Q. Now, you say "compete unfairly." What was this unfair competition? A. Well, as I recollect, the handlers in those markets—

I wish to qualify it. Some handlers in those markets had a supply of milk which they obtained from sources, the exact sources of which only brokers could tell us. It came from unregulated out-of-state areas, which cost them a basic cost equal to the blended price plus the cost of getting the milk to Rhode (1726) Island or Connecticut.

Q. It cost them a blended price? A. Their basic cost was a blended price somewhere. And I won't go so far as to say, although I did hear some comments, that the cost could have been as low as the Class II basically in some instances.

I am not implying that there is anything wrong with the quality of the milk. If it came from a manufactured milk company, there is a chance that the basic cost of that milk would be Class II value.

And handlers in the regulated markets had a legitimate complaint that they were having to compete with other handlers who had a lower cost of product, which was recognized by the Secretary in establishing the orders, and I think was the primary reason for extending Federal regulation into these other markets.

Q. So the handlers were purchasing milk on some kind of an opportunity basis. They were looking for the cheapest source of milk that met their demands. Is this correct? A. Well, I don't want to put all handlers in bed together on this, because they weren't all doing this. Some were paying the prices that the state control boards specified, and they did not seek this commerce that we are talking about now.

Q. But if the situation would have continued without Federal regulation, then you might have anticipated that all of them would have attempted to have got the cheapest supply possible (1727) that still met their demands as far as quality and regularity and all of these things? A. Yes, I pointed that out in my testimony.

Mr. Tipton: I think that is all I have.
Examiner Holstein: Is that all, Mr. Tipton?
Dr. Johnson.

By Dr. Johnson:

Q. Did I understand you to say that although the reduction or elimination of location differentials in the first instance would increase the up-country price, because of

an increased difference from the New York-New Jersey blend, more milk would be attracted and the increase would be washed out in a short period of time? A. Not the increase in production would be washed out in a short time, no.

Q. If I said "production," I meant blend price. A. Well, I said that I thought within a couple of years it would be washed away, yes.

Q. If this occurred, so that the up-country New England blend came down to the New York-New Jersey blend, and at the same time the nearby price in New England was lower, would it not follow that it would tend to have an adverse effect on milk production in New England? A. Why, yes.

Q. With less New England milk in the pool of the merged

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(1729) Examiner Holstein: Mr. Tipton.

By Mr. Tipton:

Q. First I would like to ask if you have made such a detailed study of the movements of milk that might occur between New York and Boston and the effect on the Class I price and the offset on the utilization, that you can say without qualification that any increase would be wiped out. I thought you said a flat yes to a question, without qualification, that any increase would be wiped out. A. Looking back on the history of supply response to price as we have seen it develop over the years, I concluded that it would take about two years for these forces to wipe out the gain which would come from eliminating the location differentials.

I did say also that I thought that the economic effects of such a radical change in the price structure are so significant that it would seem to warrant, after there has been no urgency about the farm location differentials for these many years, that a committee of economists

could well devote a considerable amount of research to get at some of the answers—or to get at the answers to some of the questions we have been discussing here today.

I wanted to be the first to admit that such research does not seem to be available for our use in considering the matter here.

(1730) Q. You said that one of the reasons why this difference would be wiped out would be because we would have an increase in production up-country as a result of the higher price, and you said that this, with the other thing, within the two-year period, would wipe it out; and then all of a sudden we have a lower price, and then you said that we would have a cut-back in production.

Now, what period of time are we talking about, both in terms of the increase in price and the effect on production, and the decrease in price and the effect on production? A. I haven't given much thought to where we would go from a couple of years from now, time-wise. I wouldn't want to try to off the cuff estimate how long before we would be worse off.

Q. Have you stated in the hearing record anywhere what is the membership or approximate membership of your organization? A. No, I haven't.

Q. Do you intend to, or do you wish not to?

Examiner Holstein: You can answer.

The Witness: Frankly, I don't know myself yet.

By Mr. Tipton:

Q. My next question was going to be, then: What proportion of your membership is within an area that is subject to the farm location differential?

Mr. Hall: I object to that question, Your Honor. I do (1731) not think that that adds anything to help the Secretary arrive at a determination.

Examiner Holstein: The question has been answered. The witness does not know.

Mr. Tipton: That is all I have, sir.

Examiner Holstein: Mr. Pelley.

By Mr. Pelley:

Q. In answer to Dr. Johnson's questions, here, with respect to the effect of prices on supplies, does not the answer to that have to be predicated upon the slope of the supply curve, whether it is elastic, inelastic, or something else? And is this not a one-to-one relationship? A. I will answer your question, Mr. Pelley, in this way. I don't believe the process of contraction is in proportion to the process of expansion. And involved also are time periods long enough to allow the forces that are set up to run their course.

There are short-run responses immediately that dairy ration feeding could be stepped up. Then a couple of years later there would be time to make herd adjustments. And supply response is a phased affair.

Q. Is it not true that a supply response is a real thing? A. Yes.

Q. In other words, a supply response to merely the relationship of the flow of product in response to price? (1732) A. Yes, definitely.

Q. And in answer to Dr. Johnson's question, I believe you gave an unqualified "yes," this would happen.

Now, you could say this generally, that milk would flow in in response to price, as merely accepting the proposition that the supply response is upwards sloping to the right. This is all that this indicates, does it not? A. Yes.

Q. Now, would it not be true that to determine this would be good or bad for producers, in this area, you would have to know the slope of the curve? Is that right? A. Yes, definitely.

Q. So without knowing what that slope is, you could not say whether this was good or bad; you could just say that price will tend to adjust supply? A. I would be more specific than that, because we saw what happened to production a few years following the end of World War I. We saw a production response to the higher prices which we had during the Korean War come along shortly after the war, in the early 1950's. We have seen that the maintenance of the difference between blended prices in New England and New York of in the area of a half a cent a quart would lead milk into our New England markets.

When I said that I expected that there would be a decrease in production when the blended price went down, it (1733) reflects the fact that I just don't believe in the doctrine of heresy, you might say, that producers will increase production in response to a decrease in price.

As I said, the matter is a phased affair.

Q. As a general proposition, would you think that the supply response of a given number of producers—now, I am separating here supply response of producers already in the market as against a supply and response inter-market. A. Yes.

Q. Is that the supply and response of producers already in the market was inelastic, or relatively elastic? A. I would want to sit down with a group of my fellow economists and explore that whole question before forming an opinion on that.

Q. You would not want to guess whether it is one or less than one or more than one, even in a general area?

Mr. Hall: I object to the question on the basis of asking this witness to make guesses. I thought we were here to elicit facts.

Examiner Holstein: I think that is right. I presume Mr. Pelley means an estimate.

Do you, sir?

Mr. Pelley: Yes.

Examiner Holstein: Well, we do not have to enter into a discussion. You asked him a question. If the witness will (1734) understand that as an estimate based on his background and experience, I will permit an answer, if he can answer.

Mr. Pelley: I would like to say, Mr. Hearing Master, that I am just trying to explore further a positive answer that he gave to Dr. Johnson, because I did not understand this thought went into this, and I do not think the industry does.

Examiner Holstein: Do you have a clarification question, Dr. Johnson?

Dr. Johnson: Were you through?

Examiner Holstein: He has asked the question and has not gotten an answer yet.

The Witness: Well, I would want to review what literature is available on the response of producers, the supply response of producers, Mr. Pelley, before expressing anything more than my own conviction that a reduction in prices to producers, given reasonable time for farmers to adjust, will cause a contraction in the total output of producers.

I want to leave out—

Examiner Holstein: You need not explain the answer. The answer to your question is "no."

By Mr. Pelley:

Q. I am traveling on the assumption that in order for the Secretary to assimilate this information in the record, he is going to have to make an estimate of what he thinks it is, in order to respond properly to your testimony. And I wondered (1735) if you could help him in that respect by indicating that if the supply response is found or decided or determined by the Secretary to be inelastic, in that case would it not be true that your

northern Vermont producers would be better off by having a higher price?

In other words, would it not be true that their total income, then, would be improved by a higher price, facing an inelastic supply curve? Is this not the doctrinaire principle? A. My memory isn't sufficiently sharp this morning on the few bulletins I have read on supply response to answer.

Q. Then I think we can end this session with this question.

On this basis, you leave it up to the record to make this determination, and hope that a determination will be made such as to maximize returns to your producers, whatever the case may be? A. I'm anxious that the determinations that the Secretary makes will be in the best interests of all producers in the long run.

Q. So that if the Secretary should determine or find, on the basis of this record, that the supply responses brought about effects different than you indicated in your answer to Dr. Johnson, you would like him to reverse your judgment on that and maximize price? This is your consideration? A. You are asking me what I hope. I hope that he finds that there is a great need for research to be done on this (1736) question of supply response, given the rather new set of production conditions that have been brought about by the revolution in dairy farm technology that we have been seeing for the past few years, and not on the basis of some dusty research experiment station bulletins on supply response which tried to derive supply response information at a time when these conditions were quite different.

Q. In view of further delving into this matter, would you still want to maintain the answer you gave to Dr. Johnson, or would you want to qualify it. A. I wouldn't want to qualify it from the stand new, no. I have indicated time and again that I think it is a matter that we all ought to be giving a lot of intensive study to, and not speculating on at this time.

Q. Did I not understand you to indicate to Dr. Johnson that if the differentials were lowered and if prices were balanced between New England markets and New York, then you would have a reduction of supplies in these markets, and the supplies would be fulfilled by substitution or transfer of milk from the New York market, which in turn would reduce the blend prices to producers in this area and be to the detriment?

I am saying in view of further delving into this, would you still want to maintain that answer? Or would you want to qualify it? A. No, I wouldn't want to delve into that area of prophesy. (1737) For all we know, the Congress of the United States might institute a quota production control plan, which would prevent the increase in production effectively, and a whole new set of production conditions could be brought about sometime this year, 1963, that would upset any—

Q. So it is all pretty indefinite? A. Yes.

Examiner Holstein: Is that all, Mr. Pelley?
Anyone else?
Dr. Johnson.

By Dr. Johnson:

Q. You have been answering questions concerned with supply response. Are there two general types of supply response, namely, production response of given producers, or of producers within a given area? That is one; and the other, the response in the way of the shifting of given production or supplies among markets? A. Yes. And I thought that I made that clear in my original statement, Dr. Johnson.

Q. Comparing the two types of supply response, the production response and the shifting among markets, and thinking of them in terms of the short run, of a few months or one or two years, and thinking of them in terms of milk in the Northeast, in which type do you find the greatest price elasticity?

Mr. Pelley: Mr. Hearing Officer?

(1738) Examiner Holstein: Is this a clarification question?

Mr. Pelley: Yes.

Examiner Holstein: In other words, you do not understand Dr. Johnson's question? Is that right?

Mr. Pelley: It is partially an objection, I suppose, to the nature of the question, in asking the witness, now, to make a judgment between something that he knows not of and something that he may know of.

He may know of the inter-area response curve, but he has indicated that he did not know the character of the producer supply response, whether it was elastic, unity, or inelastic, in this range, and I would not want him to over-burden the witness now with this kind of a comparison.

Examiner Holstein: I would be extremely puzzled now to describe exactly what it is the witness said he did not know and what he said he did know. But objection on the ground that the witness does not know the answer to a question is not an objection.

If Mr. Lee knows the field which is being explored by Dr. Johnson, he may answer, and if he does not know, he can say he does not know. And if you assume a discrepancy between what Mr. Lee assumes to know now and what he assumed to know when he was answering your questions, you can explore that area further when you get to it.

So the objection is overruled, and he may answer, if (1739) he knows.

The Witness: I would say that the more significant response is that which comes following the short period of change in price. I think in the short run, farmers may even make changes in response to price which don't

seem to make economic sense. But if the change persists, we see the whole dairy farm picture change.

So that I think the answer to Dr. Johnson's question is that given more than this short run time for adjustments to take place, there would be significant price changes.

By Dr. Johnson:

Q. If the market response, the shifting of supplies among markets through a price increase, occurred rapidly, as contrasted to a response of farmers in changing their milk output, would that not tend to affect the power position of New England cooperatives relative to New York adversely more than if the reverse were true? A. I believe the answer is "yes." But I don't wish to comment on the power position of our cooperatives in New England versus our neighbors in New York.

Dr. Johnson: That is all.

Examiner Holstein: Mr. Chernauskas, did you have a question?

By Mr. Chernauskas:

Q. In your direct testimony, you mentioned something (1740) to the effect that if the nearby location differentials were removed, and the price in that area went down—I think you mentioned 32 cents as a figure—producers in that country— A. Up-country?

Q. They would go up 32 cents, up-country? A. To the present Boston producers.

Q. All right. And the producers presently receiving the nearby differential would have a price reduced by that amount? A. No. Not that precise amount. No.

Q. Well, it would be reduced? A. It would be reduced from what they are now in Worcester and Connecticut and Southeastern New England, yes.

Q. Well, there would be a reduction. And you said on the basis of that many of these producers might

decide to go into the jug business. Was that your statement? A. Yes.

Q. And if they went into this jug business, they would be distributors distributing their own product? A. Yes.

Q. And to that extent they would have to have processing facilities? A. Or they would have to have the milk processed for them.

Q. Well, they would either become producer-distributors or producer-handlers? A. Yes.

(1741) We have already seen instances of farmers who have gone into the jug milk business, selling milk right from the farm to the neighbors.

Q. Well, would this reverse the trend? The evidence presently shows the producer-distributors and handlers declining over the years.

Mr. Hall: Will you speak a little louder so that I can hear you?

Examiner Holstein: I will ask Mr. Chernauskas and Mr. Lee to speak up.

The Witness: Yes, I can visualize many farmers striving desperately to maintain their incomes by distributing their own milk. And it seems under present conditions that the gallon jugging operation is the least expensive way that they can get into that distribution business.

By Mr. Chernauskas:

Q. Can you tell us if there is any significant difference in cost of production—

Examiner Holstein: Part of the difficulty here is because of the murmer of conversation. I do not like to restrict your conversation, gentlemen, but it makes it very difficult for those in the back of the room to hear your questions and the answers.

Will you ask your question over again, Mr. Chernauskas?

By Mr. Chernauskas:

(1742) Q. Can you tell us whether there is any significant difference in the cost of production of a producer in the socalled nearby area and a producer located in the up-country area? A. It has been my understanding down through the years that farm management studies do show that the costs of production are higher in southern New England.

Q. Well, do those studies indicate that if there is that difference in cost, the difference approximates the nearby differential? A. Mr. Chernauskas, I happen to be one of the economists who subscribes to the belief that cost of production on dairy farms is not a suitable basis for concluding what prices should be to producers.

Q. Well, actually, the intent of my question was to find out why these nearby producers would go into the extra curricular business if they received this lower price. And from what I gather from your testimony, you are indicating that somehow or other they need that nearby differential in order to continue to exist. And I was trying to explore why they needed it, and why, if they lost it, the results that you say will occur, will occur. A. We have had testimony from Walter Lewis. And I will leave it there. I do know that there is a short-run, anyway, tendency for producers, whether they be located in southern (1743) New England, or northern New England, for whatever reason their blended price is reduced, in view of their fixed commitments for income, who take any and every measure to try to maintain their income.

That is why I believe that faced with a loss of something approaching a cent a quart, they would attempt to realize a higher return by selling their own milk at resale. And I say that even though resale margins have been under some pressure.

Q. You also indicated that they would lower their production or go out of production, as I understand it.

A. The problem has both a short run and a long run aspect. Eventually, they will probably give up the ghost. We see at the present time, within the past couple of years, the phenomenon of up-country producers evening up their production quite sharply in order to increase their returns.

Only time will tell whether these farmers who have decided to make less milk on pasture and more in the fall and winter months will increase their income sufficiently to stay in business.

In view of rising costs of production factors, it seems to me that what we have had developing is a situation in which many producers are going to extreme lengths to increase their income by shifting in the direction of more fall and winter milk.

Q. Well, you say that is occurring presently? (1744)
A. It has been for the past two or three years.

Q. Have you any reason to believe that that process will be discontinued if the nearby differentials are removed? A. I would say that there would be less pressure on farm families in the north country to make what eventually might turn out to be a bad allocation of their resources by shifting to more fall and winter milk, simply because their costs are up and their blended price—

May I have your question read back?

(The pending question was read by the reporter.)

The Witness: I think there would be less pressure on them to take such extraordinary measures to increase their income, yes.

By Mr. Chernauskas:

Q. Well, you indicated that your prognosis would be that there would be a short-run increase in price in the up-country, and that will result in over-production and eventually a lowering of the price.

Mr. Hall: I do not like to complain, but this is a private conversation, and if it is on the record may we hear it?

Examiner Holstein: Will you read it?

(The question referred to was read by the reporter.)

By Mr. Chernauskas:

Q. And if the price lowers, the up-country producers will again be under the same pressure they are now. Is that (1745) not true? A. Yes, they would.

Q. And then would they not do the same thing they are doing now, that you describe, taking these measures? A. Yes.

Q. In response to a question of Dr. Johnson's, you indicated that eventually you thought that perhaps the blended prices of the New England markets would equate or be comparable to the New York prices, and that would encourage an influx of milk from New York, with the result that it would encourage producers in New England to go out of business or cut down their production. I think that is what you stated. Is that right? A. Yes, it is.

Q. Now, assume that the prices for the New York producers and the New England producers are the same. Would the decisions that would have to be made by a New England producer be any different than those which would have to be made by a New York producer, as to remaining in production or not? A. No.

Q. Then can you tell us why the New England producer would go out of business and the New York producer as to remaining in production or not? A. No.

Q. Then can you tell us why the New England producer would go out of business and the New York producer remain in business?

Mr. Hall: I do not like to keep objecting, but this is getting, from my point of view, pretty far

out in the realm of speculation and guessing.

Examiner Holstein: Well, we have had a lot of guessing (1746) here. Let's have a little more.

Mr. Hall: I know we have had a lot, but I have objected to it from time to time as being highly improper and adding nothing to the record that would help the Secretary. And while the Administrative Procedure Act says that any evidence can be received, whatever it might be, and for whatever source; nevertheless, in determining the answers which the fact finding body must make, it must be based on evidence that is relevant, pertinent, and material. And I would like to strongly urge the Hearing Officer that this is neither relevant, pertinent, nor material. It is speculative.

Mr. Chernauskas: Mr. Examiner, I am the last one to try to burden the record with irrelevancies. I think I have been objecting along that line to try to keep the record straight. But I think it is important that this witness did make the statement, and that is his expert opinion as to the result; and I was endeavoring to find out the basis of his conclusion in that regard.

Examiner Holstein: Mr. Hall, we are in the area of economic opinions, than which there is no more shall I say vague field. I do not know where to separate fact from estimate, and I am sure you cannot draw a sharp enough line for me which would enable me to say yes or no.

I am going to overrule this objection.

Mr. Hall: May I state a further objection on the record?

(1747) Mr. Hall: In response to your ruling.

Examiner Holstein: Mr. Hall, just a moment. I do not want to restrict anyone, but we need not get into a debate on every objection. The rules of practice provide that you should state the grounds

for your objections briefly.

Now, you can say that a question is either irrelevant, immaterial; but state your grounds briefly. If I want enlargement, I will ask for it.

Now, what are the grounds?

Mr. Hall: The statement that you have made—

Examiner Holstein: Never mind the statement I have made.

Mr. Hall: May I preface my statement?

Examiner Holstein: I want to hear your objection first. I would like to know what you are talking about before you get into it.

Mr. Hall: I am objecting to this line of inquiry as being purely estimate, speculation. The ruling which you have made is that, this being economic testimony, you cannot distinguish between fact and estimate and speculation.

When the question is based upon a statement of, "Do you estimate," or opinion—that is not fact.

I have stated my objection, and that is it.

Examiner Holstein: The objection is overruled.

The witness may answer the question, if he remembers it.

(1748) Do you?

(The pending question was read by the reporter.)

The Witness: I didn't say as a result of a change in the price structure in New England, New York producers would go out of business, any more than they are at the present time going out of business. Producers in both regions, some producers in both regions, are going out of business currently all the time.

Examiner Holstein: Maybe I can save some time for this record.

I did not understand your question to be based on New York producers going out of business, but upon New England going out of business and New York producers staying in business.

That is the question.

The Witness: Under the present price structure, the line of indifference as to which market to ship to on the part of producers in the country overlapping to the west of New England is closer to New England under the existing price structure, and that that has prevailed down the years, than it would have been without the farm location differentials.

I think I will let it rest there.

Mr. Chernauskas: I have no further question.

Examiner Holstein: Mr. Cobb?

By Mr. Cobb:

Q. Mr. Lee, in your testimony in regard to these nearby (1749) farm location differentials, do you justify them essentially on the premise of when they have been paid historically, and that based on the fact that they have been paid historically, nearby producers have made some investments based on the fact that they get these nearby farm location differentials? Is this basically what you feel is a justification for these differentials at the present time? A. Yes, I do. And I would go further to say that, that being true, it would be logical even if we could conclude that times have changed sufficiently, and factors that should be taken into account in the price structure have changed sufficiently, that a change should be made, either a sharp reduction or elimination of the differential, that considerations of equity would require that a program for the gradual reduction, maybe over a 10 or 15 or 20 year period, in that differential, could be and should be made.

Q. I believe maybe you have answered my second question, then, but I will ask it anyway.

Then would it be your recommendation that if the Secretary did decide that nearby farm location differentials perhaps are no longer justified, your recommendation would be that they not be eliminated abruptly, but

that perhaps a gradual reduction in the nearby farm location differentials take place, so that nearby producers would haves a chance to adjust to the new conditions? (1750) A. First of all, I want to say that it is pure coincidence that our statements have been as they are at this time. Mr. Cobb and I have not discussed this question at all at any time.

And, yes, I strongly feel that there should be only a gradual adjustment in price, due to a contemplated eventual elimination, if that should be the conclusion that should be taken. And that the speed of the reduction could well be one of the topics for extensive research on this whole question.

Examiner Holstein: Is that all, Mr. Cobb?

Mr. Cobb: That is all.

Examiner Holstein: Mr. W. T. Smith.

By Mr. W. T. Smith:

Q. Mr. Lee, just one or two more questions in regard to this problem of farmers in New England or New York going out of business.

Is it not true, Mr. Lee, that the decision as to whether a farmer were to continue in business or go out of business is an individual matter in the individual case? A. Why, yes.

Q. And might that decision not be based very largely on the individual set-up of that particular farm? A. It certainly would.

Q. And is there not a decided difference in the make-up of the typical New England dairy farm from that of the typical New York dairy farm? (1751) A. I wouldn't want to answer that. I have driven through all New England dairy farm country, and I have driven across New York State to Buffalo, and I am not sufficiently acquainted with New York State's dairy farms, although as a boy of eight I lived on one, to answer that.

Q. Well, would you not agree, Mr. Lee, that many, many dairy farms in New York are of rather large size, with a number of enterprises—the selling of hay, the selling of livestock, the selling of even some grains, as compared to very little of that type of enterprise in New England? A. I do know that New England is on the end of the grain line, the feed line, and has to pay higher prices for grain. I know that New England dairy farmers purchase practically all of their dairy feed for concentrate and in New York State a very substantial percentage of the grain fed to dairy cattle is grown on the dairy farms.

Q. In other words, the New England dairy farmer is a specialist in the production of milk, rather than making it a general enterprise, such as is true in many New York farms? A. I think it is a question of the proportion of dairy farms in New England that are highly specialized, and those in New York. I think, in fact I knew, the proportion is higher in New England than in New York, because I have seen evidences of agricultural enterprises other than dairying on dairy farms in New York State. But I can't think of a commercial dairy farm in (1752) New England that has a beef cattle enterprise and possibly some either fruit or some other enterprises along with the dairy.

Q. Well, if your total income were being derived from the dairy enterprise, and there was a sizeable drop in the prices that you were receiving for your product, you would be more apt to go out of business than if you had other sources of income on that same farm, would you not? A. Alternative sources of income would be a definite factor in deciding whether you would go out of the dairy business, yes.

Examiner Holstein: Anyone else?
Mr. Pelley, I believe.

By Mr. Pelley:

Q. In regard to that question, do you happen to be acquainted with the dairy farm of Mr. Stanley James of Vermont? A. No.

Q. So that I can understand your answer to this last question better, I will say that Mr. James I think is one of the larger apple growers in Vermont, plus he keeps about 60 head of milking cows.

Now, would you think that that is the only farm of that type in Vermont? A. I know that MacIntosh apples are grown in the Connecticut Valley, but I hadn't observed that it was in conjunction with dairy farming. I was thinking of Connecticut Valley orchards, (1753) a very extensive MacIntosh apple producer.

Q. Do you think this is the single exception to your rule? A. I wouldn't want to say that, because I have not toured in the course of my duties with the Market Administrator over the past 21 years over the roads and by-ways of Vermont to an extensive extent, to a great extent.

Examiner Holstein: Mr. Garelick.

By Mr. Garelick:

Q. Mr. Lee, you are 21 years in the Market Administrator's office. Would you say that the principal reason for putting in Federal orders in New England has been the competition from unregulated sources of supply? A. Yes, and I have so testified.

Q. Is it not true that over the years the milk which has been closer to the markets has been principally supplying the Class I needs? In other words, does not milk which is closer to market normally go into fluid consumption, and the milk which is up near the Canadian border goes into manufacturing? A. To the extent that there are departures from that, I would agree that the conditions should not exist.

Examiner Holstein: That is an honest question. If you can answer his question, do so.

Do you remember the question, Mr. Lee?

The Witness: The answer is "yes."

(1754) By Mr. Garelick:

Q. Now, has it not been true, or is it not true, that when these orders are put into effect, the farmers who get a chance to vote for or against the order are the farmers who are currently supplying the market at the time the promulgation order is under consideration? A. Yes, and I mentioned that, too.

Q. All right. Now, such being the case, is it not also true that local producers have voted for these orders, because they have been willing to sacrifice some of their Class I sales in return for the protection against unregulated supplies? A. Yes.

Q. Now, would you say that the acreage on farms in Vermont is considerably higher per farm than the acreage on farms in Massachusetts? A. Yes. Many farms in Massachusetts have only exercising lots for the cows.

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[1759] MR. PELLEY: It is in relationship to the witness's testimony to the effect, in response to different questions, first of all, that New England dairy farms are more concentrated single enterprise farms than is true with the New York milkshed; that New England farms, as a generality, have fewer alternatives. This has been put into the record by the witness. I want to examine the witness in more detail with respect to this to find out—

EXAMINER HOLSTEIN: Thank you. You have said enough to give me an idea of how you connect the two things.

[1760] Now, Mr. Hall, do you want to be heard further?

MR. HALL: The only comment I want to make is on the basis of Mr. Pelley's admission that his question had nothing to do with the issues.

EXAMINER HOLSTEIN: No. That is what I thought he said, but–

MR. HALL: That is the impression I had. And he also was a little critical, if I may be so bold as to say, that you in your capacity as the Presiding Officer at this session have let in a lot irrelevant testimony, which I did my best to get out.

MR. PELLEY: I object to that characterization and move it be stricken from the record.

EXAMINER HOLSTEIN: Well, we do not generally strike things from the record unless it is scurrilous. I do not think this went that far.

MR. HALL: It was not intended to be that.

EXAMINER HOLSTEIN: This is an example of the amount of time that can be spent by debating the question rather than letting the witness go ahead and answer it.

MR. HALL: Especially when he is going to say, "I don't know."

EXAMINER HOLSTEIN: Now for the objection.

I do recall that Mr. Pelley did mention the characteristics of certain New England farms, of New England farms in [1761] general, in connection with his discussion of the question of farm location differential.

On that basis, Mr. Pelley's question is material, and the objection is overruled, and Mr. Lee may answer the question if he can remember it.

THE WITNESS: I remember the question.

EXAMINER HOLSTEIN: Good.

THE WITNESS: I will answer it this way: that my analyses of dairy farm management records have been limited to those that I studied at the University of Massachusetts many, many years ago. And I recall that at that time specialization in dairying had advanced to a great degree in Massachusetts, a much greater degree in southern New England than it had in northern New England.

For two years I did land use planning work for the Extension Service in Massachusetts, and traveled extensively throughout the state, and met with groups which included the intelligentsia among the dairy farmers in Massachusetts in many parts

of the state, and at that time there was great impetus to urge all dairy farmers in Massachusetts to become highly specialized.'

Now, I would not want to enter into a discussion with you as to the extent to which the proportions of highly specialized dairy farms in southern New England versus those in northern New England have changed since that time.

[1762] By Mr. Pelley:

Q. From your study of the agriculture of the area, and the general organization, my specific question was: Do you find a dispersion among this totality of areas, where there are, first of all, other alternative enterprises, and then are there dispersions of the application of adoption of it?

MR. CHERNAUSKAS: I am going to object to that question, because it is based on the primary response of the witness, and the witness indicated that his study was made years and years and years ago, and he has not shown any relation to that in present day conditions.

EXAMINER HOLSTEIN: I think I will sustain that.

I think the witness indicated in short he could not answer the question. That was the sum and substance of what he said.

MR. PELLEY: Mr. Hearing Master, how am I going to interpret the prevous answer that he gave to the effect that in generic generality New England consisted of specialized dairy farming enterprises? And then if he begs off of interrogation within that realm on the basis of lack of knowledge, where are we? Am I precluded then from finding out how little he knows?

EXAMINER HOLSTEIN: Well, he has told you that he does not know. So how much further can you go? You ask me what you can do. You can make the most of it in your brief.

* * *

[3392] JAMES D. LEE

was called as a witness, and after having been first duly sworn by the Hearing Examiner, was examined and testified as follows:

THE WITNESS: NEMPA is strongly opposed to the elimination of reduction of farm location differentials suggested in Proposal 52.

Farm location differentials are deeply imbedded in the New England orders, and the New York-New Jersey order, and have been since the inception of the various orders. They have been in the Boston order since August 1, 1937, a period of more than 25 years, and in the other New England orders since their inceptions at the existing rates of 46 cents and 23 cents, depending upon nearness of farm to market. Part of the testimony on this subject at a public [3393] hearing held in June-July 1937, given primarily by Mr. Wesley H. Bronson and by the Late Mr. John L. Carten, Jr., is summarized in the Market Administrator's Review for August 1962. (Exhibit 24) Later I shall review the details on farm location differentials brought out at this hearing.

Such payments have been justified over the years as a recognition of the historical pattern of prices which existed prior to regulation, or as compensating nearby producers for sharing a part of the fluid milk market which they formerly enjoyed, with producers more distant from the market. They have the opportunity to go into direct distribution reducing pool Class I sales. They do not create, nor are they expected to carry, the same proportion of surplus as the more uneven, distant producers. Base ratings might be used to accomplish this same result, but they have been unacceptable for many years. They did receive higher prices under the conditions prevailing before Federal regulation, and the regulation recognized this fact. The higher prices realized by nearby producers for their milk have been capitalized into farm values. We believe it is neither equitable nor necessary to undertake to remake the structure of milk prices in New England or New York, as between the nearby and distant producers.

There appears to be a notion that nearby differentials have a widely different effect as between Boston and [3394] other

Federal order markets of New England. Apparently they are acceptable if they apply to a relatively small proportion of the milk, but otherwise they constitute an unwarranted "burden" on the pool. In Boston, nearby differentials apply to about seven per cent of the milk in the pool. They apply to a much larger proportion of the milk in other markets of southern New England for the simple reason that there are relatively more nearby producers. Yet their effect is the same in each of the five markets, to establish a particular pattern of relationship of prices as between nearby and more distant producers, which is identical for the five markets.

* * *

[3397] Farm location values per hundredweight of milk received from all producers in 1962 amounted to about $.033 in Greater Boston, $.434 in Connecticut, $.272 in Southeastern New England, $.428 in Springfield, and $.341 in Worcester. The total values given in Table 2 show that producers eligible for location differentials "contributed" to their own differentials at the rate of seven per cent in Greater Boston, 96 per cent in Connecticut and Springfield, 59 per cent in Southeastern New England, and 74 per cent in Worcester. The average for Boston, Springfield and Worcester was 62 per cent while that for the five markets was 79 per cent. For the three markets the value from distant producers amounted to $877,486 of the $2,325,627 value of location differentials. For the five markets the "contribution" from distant producers amounted to $1,797,130 of the $8,670,032 value of location differentials. Expressed as rates per hundredweight on their own milk these values from distant producers amounted to about $.043 a hundredweight for Boston, Springfield and Worcester producers, on the average, and to about $.077 a hundredweight, on the average, for the five markets.

If, as NEMPA has proposed, the Greater Boston, [3398] Springfield, and Worcester markets are consolidated into a "Massachusetts marketing area," the value of "Own Contribution" would drop, using the 1962 data in Table 2 for the sake of illustration, from $1,448,141, to $474,757, or from rates of about $.279 to $.091 a hundredweight. On the other hand,

the value from distant producers would rise from $877,486 to $1,850,870, or from about $.043 to $.091 a hundredweight. In a five-market consolidation, the value of own contribution would drop from $6,872,902 to $3,905,575, or from about $.358 a hundredweight to $.203 a hundredweight, while the value from distant producers would rise from $1,797,130 to $4,764,457, or from about $.077 to $.203 a hundredweight.

* * *

[3403] Whether for separate New England markets or any combination of them, elimination of farm location differentials would misalign blended prices.

At this time I should like to call attention to a [3404] compilation of the material concerning returns to nearby producers which is included in Dr. Gilbert R. Barnhart's, Doctor's thesis. Mr. Barnhart, while a graduate student in the Department of Government, Harvard University, was employed by the Market Administrator of Order No. 4 on a part-time basis because his thesis work was of great historical interest. Covering the years before USDA issued recommended and final decisions which describe and explain the milk marketing issues and actions concerning them, Dr. Barnhart's thesis is entitled "Federal Regulation of Milk Handling in Boston, 1933-46. The Development of the Licenses and Order Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area, November 3, 1933–June 1, 1946." The thesis was prepared for–and I might add, with the assistance of–the Market Administrator. I have excerpted and had mimeographed all sections pertaining to nearby producers, and I wish to offer this 9 page compilation of excerpts as an exhibit.

EXAMINER HOLSTEIN: The document to which Mr. Lee refers will be marked Exhibit 77A for identification.

(Exhibit No. 77A was marked for identification.)

MR. TIPTON: Mr. Hearing Examiner, I would like to object to the inclusion of these documents as an Exhibit because the individual who prepared the statement that is [3405] included in the exhibit apparently is not available for cross-examination and I doubt if he can be produced for cross-examination.

EXAMINER HOLSTEIN: Mr. Lee, what is your purpose in offering Exhibit 77A? Do you intend to make it a part of your own testimony in connection with your testimony on Proposal No. 52?

THE WITNESS: Dr. Barnhart's thesis contained an authoritatively prepared record of the early history of the Federal Milk Order Program in the Greater Boston Market.

EXAMINER HOLSTEIN: Does it contain any expressions of opinion, conclusions?

THE WITNESS: It does not. The material that I have quoted is descriptive of the terms of the provisions of the early licenses and insofar as I know does not include any opinions of Mr. Barnhart. If there are, I would just as soon that they themselves not be included in the record.

EXAMINER HOLSTEIN: I am not aware that any comments of his could be so classified. I believe Mr. Tipton himself has referred to Dr. Barnhart's thesis in his own testimony on this subject.

MR. TIPTON: In regard to opinions expressed, I think there are some interdispersed throughout here. I haven't had a chance to review it all, but I find one on one page, the second paragraph of the first page, same expression [3406] of opinion, beginning with the first sentence of that paragraph. As I say, I haven't had a chance to–

THE WITNESS: In my statement, I am not quoting all of Dr. Barnhart's statements.

EXAMINER HOLSTEIN: In your Exhibit 77, which you are in the process of reading, I notice that there are various quotations from statements made by other persons. Do any of those–are any of those quotations taken from Exhibit 77 Mr. Barnhart's thesis?

THE WITNESS: Yes, there are some direct quotations from that material.

EXAMINER HOLSTEIN: Well, with reference to these, the direct quotations which you have incorporated in Exhibit 77, do you intend to adopt those as your own viewpoint?

THE WITNESS: Yes.

EXAMINER HOLSTEIN: I will reserve ruling on Mr. Tipton's objection until we have a chance to examine Exhibit 77-

A a little more closely. You may proceed with your testimony reading Exhibit 77. In the first place, I overlooked procedure. Exhibit 77A has not been offered, it has merely been identified, so your objection was a little bit premature. He hasn't offered it yet. The witness hasn't yet offered it. He merely asked that it be identified. Go ahead.

THE WITNESS: In the first excerpt in Exhibit 77A, [3407] it is recorded that under License 15 ". . . producers whose milk on September 1, 1933, was being trucked directly from farms to plants located in the marketing area or was being distributed in the market by the producers who retained their cooperative association or handler bases, or if no such bases existed, were allotted bases equal to 90 per cent of their average daily deliveries of milk during the general base period (September, October and November, 1932) or any part thereof, or if no deliveries were made during the general base period, 90 per cent of their average daily deliveries for the first 90 days of deliveries or part thereof elapsed on September 1, 1933; . . . Producers not covered by an exceptional class and who delivered milk or cream during the general base period received bases after the computations were completed, equal to 64 per cent of their average daily deliveries during the general base period." It is pointed out that under License 38 the Market Administrator, "acting under his power to revise bases to maintain equity among producers, allotted preferential bases to nearby producers to give effect to the historically higher prices they had received in the market. A study was made of the eight years 1926 to 1934 to obtain the proper differential between nearby and distant producers' returns from the sale of milk. It was determined that all producers whose milk was delivered directly to plants located within 35 miles of the State House in Boston should [3408] have bases equal to 85 per cent of the higher of their daily average deliveries in the alternate base periods."

In the excerpt beginning on page 2 of Exhibit 77A, it is recorded that NEMPA has introduced a base rating plan in Boston in 1930. It recalled hearing testimony by Reginald W. Bird, representing the Massachusetts Producer's Advisory Com-

mittee and in general nearby Massachusetts producers, suggesting that nearby producers be those located within a 30 mile limit from the State House in Boston, and that they bear only the surplus which they created.

In the excerpt beginning on page 4 of Exhibit 77A, it is recorded that "Effective March 16, 1935, an administrative change of considerable significance took place in the percentage applied in the establishment of nearby producers' bases. Before this date producers whose farms were located within 35 miles of the State House had been assigned bases equal to 85 per cent of their average daily deliveries in September, October, and November, 1933, or 85 per cent of their average daily deliveries for the entire calendar year 1933, whichever amount was greater." In an effort to gain enforcement support from the Massachusetts Milk Control Board "the cooperative associations agreed to allow to producers whose farms were located within 40 miles of the State House bases equal to 100 per cent of the higher figure yielded by the two alternatives mentioned above. These bases became [3409] effective March 16, 1935.

In the excerpt beginning on page 5 of Exhibit 77A, it is recorded that Order No. 4 did not provide for preferential bases to nearby producers and reduced their bases about 25 per cent. "Nearby producer differentials under the order took the form of a guarantee of payment of the city plant Class I price of $3.30 per hundredweight for all delivered base milk testing 3.7 delivered by producers whose farms were located not more than 40 miles from the Boston State House to handlers' plants located not more than 40 miles from the State House."

In the excerpt beginning on page 6 of Exhibit 77A, it is pointed out that provision for payment to nearby producers the Class I price of $3.30 for base milk "had been necessary under the base rating system as set up after February 9, 1936, to make a real differential effective to these producers. The amended order (as of August 1, 1937) having omitted base rating, converted this provision into one providing, in paragraph 4, section 4, Article VIII, for payment of 46 cents per

hundredweight in addition to blended prices to producers whose farms were located within the 40 mile zone. Deliveries to plants located within the zone was omitted as a condition and the differential was thereby converted into one depending solely on farm location." Reference is made to testimony at the hearing preceding the [3410] August 1, 1937 amended Order No. 4 by Mr. Wesley H. Bronson, then of the NEMPA, and the late Mr. John L. Carten, representing the Nearby Milk Producers Association which led to the establishment of the farm location differentials. In this excerpt it is recorded that the Dairy Section had proposed the amendment which recognized the price advantage that intermediate producers had enjoyed long before the regulation had taken effect in the market and which the base rating system had recognized by the allocation to them of high bases. When base rating disappeared from the order, some other provision had to be substituted with respect to intermediate producers, or the order would operate to their disadvantage."

The last two excerpts appearing on pages 8 and 9 of Exhibit 77A, record that the nearby differential was, for a time, extended to producers whose farms were located in Barnstable and Plymouth Counties, Massachusetts, and "that the total price payable to both nearby and intermediate producers be limited to the zone Class I price payable at the plants at which their milk was received."

At this time I should like to offer as an Exhibit photocopies of 26 pages in the record of the hearing which immediately preceded the issuance of Order No. 4 as amended effective August 1, 1937. It includes all of this hearing material cited by Dr. Barnhart in his sources concerning the establishment of the amounts of the farm location [3411] differentials. Because of its importance to our present proceedings I feel that this record should contain this basic information in its original form.

MR. CHERNAUSKAS: I am going to object to that, Mr. Examiner.

EXAMINER HOLSTEIN: I won't accept the offer of the exhibit now. I will mark it for identification so we know

what we are talking about when we hear objections and hear rulings on it. Exhibit 77B for identification.

(Exhibit 77B was marked for identification.)

MR. TIPTON: I would like to also join in that objection and also point out that–

EXAMINER HOLSTEIN: Objection at the moment is out of order because I am not considering an offer.

MR. TIPTON: I would like to make one other comment then, if I may.

EXAMINER HOLSTEIN: Is it in the nature of an objection?

MR. TIPTON: It is in the nature of support of this, but not directly.

EXAMINER HOLSTEIN: All Mr. Lee has asked for at the moment and all I will consider at the moment is a request to identify a document. You can't object to that.

MR. TIPTON: My statement then relates to orderly [3412 procedure, a clarifying question.

EXAMINER HOLSTEIN: All right.

MR. TIPTON: That is that he has quoted from excerpts from what has been marked for identification as 77A and also I know that there are quotations throughout the presentation from what is marked as 77B. Therefore, I would think that it would be appropriate to make a determination as to whether the items are offerable as Exhibits at this time, whether to let the quotations go in and then have to make a motion to strike or something along this line.

EXAMINER HOLSTEIN: Well, I can't do that until I examine the material closely. I think that the best procedure here will be to let it go in. I agree with you that there are so many references and cross references back and forth that it would be difficult to make that kind of determination at the present time. It is marked for identification. Mr. Lee has already quoted at length from what has been marked for identification as 77A and I know that in the event that 77A is ruled not admissible, that those quotations will have to be ignored, but I don't know how else to handle this since it is quite complicated because of the cross references back and

forth. Mr. Lee, perhaps you can tell me at this point, in the balance of the testimony which you are reading from Exhibit 77, will you quote excerpts from the Hearing record?

[3413] THE WITNESS: Yes.

MR. CHERNAUSKAS: Mr. Examiner, I am going to object to this line of testimony from here on in. He is going into the–

EXAMINER HOLSTEIN: Excuse me.

MR. CHERNAUSKAS: The witness is going into a prior record and taking excerpts of testimony from that record of witnesses and drawing conclusions from them. I notice that the great bulk of his testimony are quotations of the testimony of those witnesses. Now, actually, that record was composed of the testimony of a considerable number of witnesses and I imagine, I don't know what the actual record contained, but I imagine that it contained conflicting testimony and opinions on the topic, and I would say that the best evidence of why location differentials, nearby location differentials are in the order would be the decision of the Secretary in explaining why he put them in there.

THE WITNESS: I have not excerpted from the record only certain parts of the testimony on nearby farm location differentials, but went through the record and took all of the information on nearby farm location differentials that appeared in the record. I didn't excerpt it.

EXAMINER HOLSTEIN: What you are saying now is that what has been Marked Exhibit 77B consists of all testimony in that hearing record with reference to farm [3414] location differentials?

THE WITNESS: That's right.

MR. CARROLL: Has the witnesses' statement been given a number?

EXAMINER HOLSTEIN: Yes, it is 77. In reading that statement, the witness has made reference to various excerpts from a document which has been identified as Exhibit 77A consisting of a thesis by Dr. Gilbert R. Barnhart. The witness now has asked that this be identified as 26 pages of testimony on the hearing record of the hearing which preceded the issu-

ance of Order No. 4 and the testimony that he is reading from Exhibit 77 will likewise quote excerpts from what has been identified as Exhibit 77B.

It is getting quite complicated. I think we will have a recess for 10 minutes.

(Brief recess.)

EXAMINER HOLSTEIN: The hearing will please be in order. Due to numerous references in Mr. Lee's testimony, not only that part which he has already given, but in the remainder of the material appearing in Exhibit 77, due to the numerous references in that testimony, and excerpts from what have been identified here as Exhibits 77A and 77B, I will reconsider what I said previously about procedure and conclude that it is best to determine whether or not Exhibits 77A and 77B are admissible at this time before Mr. Lee continues [3415] with the balance of his testimony since he will refer in the balance of his testimony to these excerpts which are in these two documents which are under question at the moment.

I might ask Mr. Lee if there are any additional documents from which you will take excerpts or make reference in the balance of your testimony?

THE WITNESS: No, there are not.

EXAMINER HOLSTEIN: At this point, I might indicate to anyone else who has prepared statements of this type that they request that any such documents be identified at the beginning of their testimony so we know what will be offered in the course of that testimony as exhibits.

Mr. Tipton, you entered an objection to 77A is that correct?

MR. TIPTON: Yes, sir.

EXAMINER HOLSTEIN: And Mr. Chernauskas entered an objection to 77B?

MR. CHERNAUSKAS: Mr. Examiner, I think one of the points I made on my objecton is that the best evidence of why a particular provision is in the order would be the decision of the Secretary. However, I am advised now that back in the days when this came out, the Secretary was not issuing decisions explaining or justifying each of the provisions and

so it is not possible to have official notice [3416] of the decision. This is quite irregular procedure to refer to testimony of a prior hearing and ordinarily I would strenuously object to it and in fact, we have always objected to having testimony of a prior hearing incorporated into a present hearing, but in view of the circumstances here, I withdraw my objection.

EXAMINER HOLSTEIN: All right, then, the objection to 77B is withdrawn.

MR. TIPTON: I still have an objection to 77B.

EXAMINER HOLSTEIN: You also objected to 77B?

MR. TIPTON: Yes, sir.

EXAMINER HOLSTEIN: All right, just so we understand, did you state, Mr. Lee, or did you not, I don't recall at the moment, whether the various references that you incorporate in your testimony are being adopted by you as your own testimony here?

THE WITNESS: In the sense that I wish to give a—historical account of the basis for the location differentials, I do.

EXAMINER HOLSTEIN: All right, sir. Whether or not these documents are admissible is not without doubt. I have some question as to whether either one of them is. I have less question on Exhibit 77A, that appears to be for the most part an historical—did you want to say something, Mr. Tipton?

[3417] MR. TIPTON: Yes, sir, I would like to. In regard to 77A, I pointed out one place in which I thought there was very definitely an expression of opinion on the part of the individual who compiled the thesis. I also note that there is excerpts taken from witnesses who appeared at a hearing and this than is further interpreted by the author of the thesis and I also note that on page 4 of what has been marked as Exhibit 77A, that there is very definitely an expression of opinion by the author as to what the witnesses attempted to show. Therefore, I think it is not factual and rather expression of opinion by an individual and we should, therefore, be able to cross-examine that individual that expressed those opinions.

EXAMINER HOLSTEIN: What I am going to do may be a little unorthodox. I think it is still true that Exhibit 77A, al-

though it does contain what appear to be expressions of opinion consists for the most part of an historical discussion as the title indicates of the development of licenses and the order regulating the handling of milk in the Greater Boston Marketing Area. The basic material, as Mr. Lee indicated from which Exhibit 77A came, is Exhibit 77B. Ordinarily, a document as old as Exhibit 77B, which is now some 26 years back, is not of much value in determining what are the present marketing conditions which might or might not justify a proposal –yes, gentlemen, will you please [3418] complete your objections so that I can go on with my statement. I lose my train of thought when I am interrupted.

MR. MAHONEY: I was waiting until all objections were complete before I responded to objection, I wanted to inquire whether you are now making a ruling?

EXAMINER HOLSTEIN: Yes, I am. I thought everybody had been heard that wanted to be. I certainly don't want tc deprive you of an opportunity to be heard, sir.

MR. GEYER: I wanted to be heard before you made a ruling.

MR. MAHONEY: I will defer to Mr. Geyer.

EXAMINER HOLSTEIN: No, you were up first.

MR. MAHONEY: Addressing myself to the question of Exhibit 77B, do I understand the wording of the Agricultural Adjustment Act, it speaks of the differentials customarily applied, I would assume that the word "customarily" is a word of art and design as used in the statute refers to custom and usage in the milk industry and under all of the definitions–

EXAMINER HOLSTEIN: So I can understand what you addressing yourself to, are you objecting or–

MR. MAHONEY: No, I am in favor of the admissibility.

EXAMINER HOLSTEIN: Now I know what to expect. Go ahead.

MR. MAHONEY: That all of the definitions I know of [3419] the word 'custom' whether they are legal or non-legal, speak about the usage over a considerable period of time. Now, Exhibit 77B, as I understand Mr. Lee's statement, is all of the testimony on this particular question of differentials. It was

under oath at that time by people whose minds were fresh. I would submit that it is the very best evidence of what the custom was prior to the inception of the order and that it should be considered at the same time because of the wording of the act.

EXAMINER HOLSTEIN: Thank you. Mr. Geyer.

MR. GEYER: Well, Mr. Hearing Master, my statement is somewhat along the line of the previous one that at the time that this testimony was taken in 77B, the Secretary did not issue a finding of fact other than a one sentence finding to comply with the act and so it seemed also that custom was different than in that I noticed the first witness under 77B, excerpts from the old record, was Mr. Aplin, who was an employee of the Department at that time and the Department was the proponent, I believe, of this part of it, so that it does seem to me that this should be given some weight in your ruling that Mr. Lee, as I see it, is attempting to put into this record for the consideration of the secretary, a complete history of how we got these differentials in the first place and how they became customary or customarily applied as they have since for this number of years.

[3420] EXAMINER HOLSTEIN: All right, sir. Mr. Tipton.

MR. TIPTON: I am sorry if I was confusing in my remarks earlier that I was through. Actually, I was addressing myself to 77A and I didn't realize that you were going to rule on them together. I do have some remarks with regard to 77B.

EXAMINER HOLSTEIN: Go right ahead.

MR. TIPTON: In the first place, 77B includes at the end, I think this is included, a brief rather than excerpts from the decision. As a matter of fact, I think there are two briefs. Another thing is, I understood the witness to have said that he has copied all of the items of this hearing record that were relative to nearby farm location differentials. However, I very distinctly remember having read from the Barnhart thesis a statement made by Dwight Bebe, who was then representing producers cooperative associations in the market, which I do not find his statement in the testimony that is included in what we have marked as 77B.

Therefore, I wonder if it really does include all of the statements relative to nearby farm location differentials that went into that hearing record.

EXAMINER HOLSTEIN: Do you know anything about that, Mr. Lee?

THE WITNESS: I don't know anything about that [3421] testimony you refer to. I didn't come across it in going through the entire hearing record myself. It is possible that I might have missed the statement that he made, but I went through the entire record log for all material on that subject.

MR. TIPTON: That statement was in opposition to nearby farm location differentials, too, I might add.

THE WITNESS: I didn't see it and omit it for that purpose and would just as soon prefer that it would be included in some way. I could even obtain it and add it as a supplement because of my intention that everything on the subject be in.

EXAMINER HOLSTEIN: Mr. Lee, the material appearing at the end of what has been marked Exhibit 77B is entitled "A brief regarding the Economic Advantage of the Dairy Production Adjunct to the Greater Boston Market," by a Mr. Bell, and what appears to be another brief or argument by the Nearby Milk Producers Association. Were both of those documents a part of the hearing record of the transcript as you read it?

THE WITNESS: They were bound with the hearing record, yes. Also, there is a two page government economic brief.

EXAMINER HOLSTEIN: The objections to these two exhibits, of course, are based upon proposition that [3422] expressions of opinion or even of fact must be subject to cross-examination and when they are introduced by way of a document by a person not present, there is, of course, no way in which the offer can be cross-examined in the event that someone doesn't agree with what he said. But keeping that principle in mind, these two documents, 77A and 77B are being offered for the purpose of showing, as I understand it, and correct me if I am wrong, or rather I wish you would affirmatively state if I am right, for the purpose of showing the history and background of farm location differentials rather than to indicate present economic and marketing conditions, is that correct?

THE WITNESS: That is correct.

EXAMINER HOLSTEIN: I think it is obvious that a document that is 26 years old and another one that is 15 or 16 years old could have very limited if any value in proving what our present economic and marketing conditions are with respect to any present proposal which is under consideration. However, for the purpose of showing the background and the history and how farm location differentials came into being, and the reason why they came into being in the first place, I believe that these two documents are admissible.

As I indicated previously, that determination is not entirely free from doubt, but a doubt as to admissibility in a proceeding of this kind must be resolved in favor of [3423] admitting the document. If I am wrong, the Secretary of Agriculture will overrule me and disregard both of these documents.

Now, in fairness to Mr Tipton's representation that as he remembers it, the hearing record in question contained something more on the question of location differentials which is now included in 77B, will you, Mr. Lee, take it upon yourself to examine that record again with specific references to the material described by Mr. Tipton and with his help, if necessary, locate the additional material and make it a part of 77B?

THE WITNESS: Yes, I would be glad to do it with him.

MR. APLIN: We have that hearing record in our office. I could have it sent up and Mr. Tipton or anyone else can examine it. There is an index of witnesses so that it would be easy to find on what pages Mr. Bebe presented testimony.

EXAMINER HOLSTEIN: I will leave it to Mr. Lee, then, to find or to take it upon himself to assure himself that absolutely everything that is in that hearing record which had anything to do with location differentials is included in what would be admitted here in Exhibit 77B. Will you do that, Mr. Lee?

THE WITNESS: I will.

[3424] MR. HALL: Inasmuch as Mr. Tipton is making particular reference to a witness with reference to that particular matter, that it should be his responsibility as well with the record.

EXAMINER HOLSTEIN: I am not going to put the finger on anyone.

MR. HALL: You put the finger on Mr. Lee and that is what I am objecting to.

EXAMINER HOLSTEIN: Because Mr. Lee and his offer is before us and Mr. Tipton's is not. Mr. Lee has also stated that Exhibit 77B contains everything on the question of farm location differentials. That was his honest opinion. Now, his attention has been called to the possibility that it may not, so I believe it is Mr. Lee's primary responsibility. He may have whatever help Mr. Tipton can give him.

MR. TIPTON: I will be happy to assist Mr. Lee.

EXAMINER HOLSTEIN: With that understanding, the objections are overruled, Exhibit 77A and 77B are received in evidence and become a part of the record.

(Exhibits 77A and 77B were received in evidence.)

* * *

The Witness: The first four pages of Exhibit 77B, pages 229-232 of the record, contain testimony by Mr. Aplin who was explaining the proposed new pricing plant which included farm location differentials in place of base ratings. On pages 231 and 232 Mr. Aplin said, concerning nearby and intermediate farm location differentials: "Paragraph 3 there provides that in the case of milk delivered by a producer whose farm is more than 40 miles but not more than 80 miles from the State House in Boston there should be added 18 cents per hundredweight, and paragraph 4 provides that in the case of milk from a producer whose farm is not located more than 40 miles from the State House there should be added 36 cents per hundredweight. These figures are only tentative. They are based on what information we now have as to the difference in the price received by the nearby producers over a period of years as compared to prices received by producers at country stations. We expect evidence to be introduced here today to show whether or not that is the proper differential; that is, whether 36

and 18 cents is a correct amount. The idea is, without regulation over a period of years, producers whose farms are near the market, due to the fact that their milk is accessible to small dealers, and their (3426) milk is rather even throughout the year, have been able to obtain a price greater than the country station price, and the difference is more than the difference between the freight and the country station charges. So that, if we set up a plan which did not give them the same advantage which they would have without regulation it would be unfair to them. On the other hand, if we gave them more than they had without regulation we would be giving it to them at the expense of other producers. It is the desire of the Administration to maintain the relative positions and to set that figure at a point which will do that."

Pages 5, 6, and 7 of Exhibit 77B—I might interject here that I have numbered my copy of the 26 pages consecutively—pages 266-268 of the record, record the testimony of Mr. Wesley H. Bronson of the NEMPA concerning the historical price relationship between nearby and Zone 20 prices and the proposed farm location differentials. Mr. Bronson said, see pages 266 and 267 of the hearing record: "Paragraph 4 of this same section calls for an additional location differential of 36 cents per hundredweight for milk from farms located inside the 40 mile zone. This additional differential is justified by nearness to the market and that in the past producers delivering to distributors at the market have received differentials in line with those proposed in this amended order.

(3427) "Over a four year period of time, 1927 through 1930, producers delivering to Deerfoot Farms averaged to receive $1.16 per hundredweight more for all milk delivered at Southboro than producers averaged in the 191-200 zone for all milk.

"Over a ten year period of time, 1923 through 1932, producers delivering to the J. B. Prescott Company at

Bedford, Mass., averaged to receive $1.04 per hundredweight more than producers averaged for the same period in the 191-200 mile zone for all milk.

"Now, the differential that is proposed in this order would work out 90 cents per hundredweight. I would like to file as exhibits four copies each of the milk comparisons for Deer Foot Farms with the more distant milk for the years 1927, 1928, 1929, and 1930, and for the J. B. Prescott Company. I have four copies here."

Pages 8 through 13 of Exhibit 77B, pages 200-265 of the record, record the discussion concerning farm location differentials by the late John L. Carten, with Mr. Aplin. Mr. Carten argued that the nearby differential should be "at least a cent a quart," and Mr. Aplin emphasized that the purpose of the differentials was to secure for nearby producers the same relative price position that they had before regulation. The following are quotations from Mr. Carten's testimony, pages 261-283 of the record: "Now, we feel that to be protected in our special place in the market (3428) requires two things. We must be protected against seasonal surplus. Our production is even and has always been regulated closely to the requirements of our distributors. Some of them asked distributors, will ask for more or less milk as they want it. In the second place, we must have somewhere near our differential—our consumer differential over the 200 mile zone, and get that much. Now, the methods of protecting us under the old license, we received the Class I price for all our rated milk, but our Associaton is very much opposed to ratings—Federal ratings, I might say. We had bad experience with Federal ratings. * * * We don't want Federal ratings. Under those circumstances, the fairest way would be to pay us on a 10 per cent surplus the year around. Under that, pay us the 90 per cent, Class I price, 10 per cent surplus price. * * * 90 cents is way below anything that Mr. Bronson produced and we have figures here from one of our producers from 1920 to 1930

for the price received for milk shipped to Salem, Massachusetts, to the H. P. Hood Company, and they averaged —it is hard to average them, but it was between—somewhere between $1.20 and $1.30 over the NEMPA price in the 191 mile zone. We should have at least a cent a quart over the equalized price to be protected.

"* * * The trouble with the 1 cent a quart and why we are so insistent on the cent a quart is that, unlike our proposed plan, which we feel is fair, the 10 per cent surplus (3429) the year around, we are at the mercy of a very low equalized price. We haven't any idea, and no one has been able to tell us, what surplus the market is going to carry * * * If we get a cent a quart over the equalized price and the equalized price is based on a 70 or 80 per cent surplus, we don't feel that we are getting any protection at all. We would be better off out of it either as producer-dealers or as some other way. And, another trouble with the one cent differential is that it does not protect us against seasonal surplus. Our production is even and in the past all the ten year figures that we have we received practically—nearly as much in the flush period in the spring as we receive in the other part of the year, and a price differential over an equalized price doesn't protect us in the flush season. We make less milk and get less for it. I think that if it was possible at all we asked for a payment on 10 per cent surplus throughout the year. If that is not possible, we will go along with the license, but we must have at least one cent a quart over the equalized price. I am not satisfied with that, and I don't think it will protect it, but I think probably we would go along with it. I don't think any less would be acceptable."

On pages 12 and 13 of Exhibit 77B, pages 284 and 285 of the record, Mr. Aplin is quoted as follows: "If this order were to go into effect the first of August, as amended, (3430) with a composite price, we can only make an estimate as to what the surplus would be in the

pool. If it should be 50 per cent, it doesn't seem it should be more than that in August, if there were a 50 per cent surplus and the cream market should not go up any between now and then, the composite price in the 200 mile zone would be about $2.04 a hundredweight and this 90 cents added would make $2.95 and that extra 90 cents would be 44 per cent more than the 200 mile zone price so that you would get the same relative position. You would be getting 44 per cent more than the fellow in the 200 mile zone. That is a lower price level now so that if you got $1.10 more added to the $2.50 then and you get $1.10 more with the $2.05 price, now, you would have a bigger advantage than you had then. You would be getting more than 44 per cent more. • • •

"I am just looking here, how, at the figures Mr. Bronson has as to the average price which, apparently averaged about $2.50 in those years. $1.10 more than that would be 44 per cent more. If this price should come out, $2.05, in the 200 mile zone, now, with a 50 per cent surplus you would then be getting 44 per cent more than they do up there. The relationship and percentage would be just the same. • • •

"The purpose is to get them the same relative position they had before."

On pages 14 to 17 of Exhibit 77B, pages 345-348 of (3431) the record, Mr. Aplin continued his description of the proposed new pricing plan. Touching on elimination of base ratings and farm location differentials, he said: "Paragraph F is at the top of page 4. It covers that page and a little bit on the next page. That proposed amendment revises and rewrites article 7 of the order. Article 7 of the order provided for a calculation of the market pool and also provided for the establishment of base ratings. The last four sections of the article were in regard to base ratings, and those four sections are proposed to be removed entirely so that the order, as amended, would contain no reference whatever to any base

rating plan. With that change in the method of paying producers, there was a necessity for changing somewhat the instructions to the Administrator for figuring the market pool. * * * Then, in paragraph 2 he adds to that sum of money the net amount of the differentials which are provided for in section 4 of article 8, those are differentials for freight and differentials for nearby producers which we will discuss when we came to that article. It is necessary to take those into account in figuring the pool so that there will be a sum of money available with which to pay those differentials and so that the pool will balance."

On pages 18 and 19 of Exhibit 77B, pages 355 and 356 of the record, Mr. Aplin discussed the amount and basis of the proposed farm location differentials as follows: (3432) "Paragraphs 3 and 4 of that Section provide for differentials according to the location of the producer's farm. Paragraph 3 provides that in the case of milk delivered by a producer whose farm is located more than 40 miles but not more than 80 miles from the State House in Boston, there shall be added 18 cents per hundredweight. Paragraph 4 provides that in the case of milk delivered by a producer whose farm is located not more than 40 miles from the State House in Boston there shall be added 36 cents per hundredweight. These two differentials of 18 cents and 36 cents are paid to the producer on account of the location of his farm near the market, and the exact amount of these differentials as set up here is tentative.

"We received considerable evidence at Boston yesterday as to the average price which had been received over a period of years by producers near the market as compared with the average price received by producers who delivered to plants 200 miles from the market. The intention was to set up these differentials at such an amount as would allow producers near the market to maintain the same relative position compared with producers distant

from the market that they have held over a period of years without any government regulation. If it is shown, as it has been, that producers whose farms are near the market have received without regulation consistently over a period of 10 years or longer a difference (3433) in price which cannot be entirely accounted for by the freight rate or the country station allowance, we would be placing those producers in a relatively poorer position as compared with distant producers if we set up a plea which did not give them the same relative price. On the other hand, if we should give them a differential so large as to put them in a relatively better position then they had been without government regulation, it would be unsatisfactory because that extra price could be paid to them only at the expense of other producers. So, the intent was to keep them in a relative position and to give them a differential which will enable them to do that."

As we have seen, the object of the differentials was, as Mr. Aplin said, to keep the nearby producers' price in the same relative position as it had been in prior to Federal regulation. As times have changed and as inflation has occurred the nearby and intermediate differentials have remained unchanged. And we urge continuation, under any circumstances of consolidation or separate orders, of the existing farm location differentials, even though a case might be conceived for raising them. If the nearby price were set today at 144 per cent of the Zone 21 price, it would be, say, 144 per cent of the 1962 average price of $4.42, or $6.36 a hundredweight. This would require a nearby farm location differential of $1.40, assuming the present city plant (3434) differential of 54 cents.

Pages 20 and 21 of Exhibit 77B are photocopies of pages 93 and 94 of the Economic Brief in the record concerning nearby differentials. USDA reported on a study of seasonality of production and the farm location differential plan which would accomplish the purpose for

which the rating plan in Order No. 4 was intended. The Department had this to say in the Economic Brief: "A study of the comparison of returns to different types of producers under the proposed plan and those under the rating plan effective in Order No. 4 reveals that the two are perhaps not radically different. In the study, a sample of approximately 15 per cent of the producers in the market was taken. These producers were classified as even or uneven. Even producers were defined as all those producers whose deliveries in the quarter of the year in which their daily deliveries were lowest were at least 70 per cent of their deliveries in their highest quarter.

"It was found that only around one-fifth of the producers in the market could be called even under this definition. These even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors. (See Table 38.)" That was in the record, not my table. "Only in the nearby zones was there a preponderance of even producers so that, as a group, they showed even deliveries. Nearly (3435) two-thirds of the producers located within 40 miles of the market were classified as even. The average of their low-quarter deliveries as a group was over 70 per cent of their high-quarter deliveries. Over 50 per cent of the producers located between 40 and 80 miles were classified as even, and they, as a group, had an average of nearly 70 per cent. No other zone group had an average of 62 per cent. It is proposed that these two groups of producers—that is, those located within 40 miles of Boston and those located between 40 and 80 miles—be given location differentials of $.35 and $.18 per hundredweight, respectively.

"Even without consideration of these special differentials the study indicated that even producers under a pool without rating would receive an annual average price of about $.025 per hundredweight higher than the

average producer, whereas in a pool with rating—as existed in Order No. 4—the even producers would receive only $.11 per hundredweight higher. The higher price received by even producers under the pool without ratings arises because they deliver relatively less milk in those months when the composite price in the market is low.

"It is thought that the proposed plan, which gives consideration to these producers located nearby the market who are preponderently even and who as a group have very uniform deliveries, and which returns a price higher than the (3436) average to the other even producers, accomplishes the purpose for which the rating plan in Order No. 4 was intended."

Milk production by nearby producers still is more even (less seasonal) than production by "distant" producers. Most of the distant producers are in the Boston Market. For a quick check on the difference in seasonality of production by the two groups of producers, the monthly receipts in 1962 by distant producers in the Boston market and by nearby producers in the five markets combined, I have expressed their daily average for each month as a percentage of the daily averages for 1962. The analysis is presented in Table 7 of this exhibit. It shows that production by the nearby producers in November was 92 per cent of May-June production, while that for the distant producers in November was 79 per cent of May-June.

Turning again to the photocopies from the hearing record made in June-July 1937 on pages 22 and 23 of Exhibit 77B, is the two-page brief by Ellsworth W. Bell, Extension Economist, Massachusetts State College, entitled, "A Brief Regarding the Economic Advantage of the Dairy Production Adjunct to the Greater Boston Market." In his brief Professor Bell said: "A four year average of the years 1929-1932 shows that 87.6 per cent of the milk produced in Massachusetts was sold as market milk. About

20 per cent of this market milk was sold at retail or, in other words, from (3437) farm direct to the consumer and about 80 per cent was sold at wholesale to handlers in the markets who in turn distributed to consumers. Massachusetts milk production is sold in all markets of the state, the principal being the 'secondary markets'. However, about 15 per cent of the milk used in the Greater Boston market is supplied by Massachusetts dairymen

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"From data published by the Bureau of Agricultural Economics in 'Milk Production Trends' in 1932 the average price per 100 pounds of milk sold by dairy farmers in Massachusetts was $2.81 compared with $1.55 per 100 pounds in Vermont or a differential of $1.26 per 100 pounds.

"Assuming a distance of 200 miles from Boston as average for the Vermont production 36 cents freight plus 23 cents station charge plus 3 cents can charge would give amount equal to 62 cents as tangible differentials accruing to the economic advantage of the nearby dairymen in Massachusetts due to location. The difference indicates however an additional amount of 64 cents. (62 cents plus 64 cents equals $1.26) This 64 cents per 100 pounds is less tangible but nevertheless exists due to peculiar advantages existing for disposal and sale of the milk at the higher market price.

"Therefore, it is recognized that freight, country assembling expenses, container services, refrigeration and other charges are not required to the same degree with respect to milk produced nearby for fluid sale. In addition, it is (3438) recognized by sellers more remote from market that sellers near to market must receive an additional amount commensurate with their current opportunities of sales which are natural and economic to their location. This is particularly necessary when a definite plan is established to provide a means whereby the various groups in the milkshed will cooperate on an

orderly plan to share the fluid sales of the market at a fair price.

"Evidence is apparent that the majority of sellers are desirous of adopting such an orderly procedure through a regulated plan of equalizing the sales use of milk among the various shippers. It is further recognized by the majority of sellers that adequate location differentials must be allowed to those sellers near to markets thereby making it unnecessary for any group to cut their offering price in order to obtain its share of the market proceeds of fluid sales.

"It is therefore necessary in the efforts to establish a workable plan designed to stabilize market conditions in the Boston area that the dairy industry in the near to market area be provided for in its true and natural location advantages. If these advantages now enjoyed are duly considered and fairly provided for the proposed plan has a better than reasonable chance of succeeding in its intended purpose."

Pages 24-26 of Exhibit 773 are a photocopy of the (3439) brief by the late John L. Garten, Jr., representing Near By Milk Producers Association. The following quotations can be found in Mr. Garten's brief: "I—Mr. Aplin observed at the hearing that 35 cents is a differential of 44 per cent over the composite price expected in the 200 mile zone under the new License which is the same percentage shown by Mr. Bronson's ten year average differential from 1922 to 1932. If 44 per cent of the 200 mile price is the fair differential for local producers then whenever the composite price changes the 35 cents per hundredweight will become unfair and our producers will swarm to the office of the Market Administrator to remind him of it and to demand an adjustment. It will greatly facilitate the administration of the License to give the near by producers the flat 45 cents they insist on and let that amount ride unchanged with any composite price.

"II—The 46 cent per cwt, or one dollar differential over the 200 mile zone which our association asks is less then either of Mr. Bronson's figures, $1.16 for Beerfoot producers, and $1.04 for Prescott producers. If Mr. Bronson had taken a 10 year average from 1920 to 1930 the differential would have been even more, between $1.20 and $1.30 per cwt * * * It is unfair to local producers to start a 10 year average with 1922.

"III—The five directors of the Near By Milk Producers Association represent a fair cross-section of Essex and (3440) Middlesex County dairymen. It may interest the AAA to know that when they met to discuss the License, two directors were in favor of the License, two were opposed, and one was undecided. After a long discussion they reached a unanimous decision on two points. All five directors agreed to support the License if the 40 mile producers received at least 46 cent differential. And all five agreed to oppose the license with every means in their power if 40 mile producers received less than a 46 cent differential. It is the hope of our association that the License to be voted on will either pay 40 mile producers on a 10 per cent surplus the year around, or pay a flat 46 cent differential. If it does either we can promise the support of our members to the License and the support of the many Essex and Middlesex County producers outside our association who listen to our opinion with respect."

In the early days of the Boston Order, some concern was expressed that the farm location differentials might serve to stimulate production in the nearby and relatively high-cost areas. Twenty-five years ago, the 46 cent differential represented about 25 per cent of the basic blended price. In 1961, it represented slightly over 10 per cent of the basic blended price. Table 8 of this Exhibit shows the trends in the number of Boston producers with farms located in the nearby differential areas, in the proportion of producers, and in the total pooled milk received from such areas.

(3441) Over the years there were two major expansions of the Greater Boston marketing area as well as a few minor ones, which brought in additional nearby producers as well as additional Class I sales. The major expansions occurred with the combination of the Merrimack Valley and the Greater Boston marketing areas, effective July 1, 1959, and again when 26 cities and towns were added to the Greater Boston marketing area, effective September 1, 1960. In these instances, I have shown figures for the month immediately before, and the month after, expansion of the marketing area. The figures pretty well speak for themselves. They indicate a steady and continuous decline in the number and proportion of producers with farms located in the nearby differential areas, and in the proportion of total pooled milk received from these areas, except as interrupted by expansions of the marketing area. They do not indicate that nearby producers have been "over-paid" for their milk, or that they have been encouraged to increase production. The slight upturn between September 1961 and September 1962, in the proportion of producers and proportion of total pooled milk received from farms located in the nearby differential areas does not indicate an increase in production in those areas. It reflects primarily the producers whose milk was formerly received at the Hood plant at Manchester, New Hampshire, but who were displaced from their local market and transferred to Hood's Boston (3442) plant, effective July 1, 1962.

From the base rating times before and after the advent of Federal regulation to the present, producers' money and producers' money along, has been involved in the (illegible) of returns to nearby and distant producers.

Our Association is strongly opposed to removal of farm location differentials in New England Federal order markets, and urges that they be continued at existing rates.

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[3981] [By Mr. Tipton]

Q. No, sir, it is not in that connection. You did testify to the effect that nearby producers because they had more evenness are compensated, nearby farm location differential. However, I am asking you in relation to producers up country which had even production also, should they not be compensated on the same basis then? A. They should be if the order is providing a base rating plan, which they do not.

Q. Well, by providing for a nearby farm location differential then, you would not compensate up country [3982] producers that had just as even production as those producers in the nearby area, is that correct? A. No.

Q. No, is that not correct? A. That is correct.

Q. You also made a statement that the higher prices have been calculated into the land values. Do you contend that this constitutes a reason as to perpetuation of the nearby farm location differentials? A. Yes, it is one of the justifications for nearby differentials.

Q. Then you think it is the purpose of the nearby farm location differentials to perpetuate the value of the land in the nearby area? A. That is a farm value, I didn't say land.

Q. Well, we will include farm values then. A. I believe that that is one of the bases for that that warrants continuation of the price structure which we have had for many years, yes.

Q. Does the farm values in these nearby areas, make up some of the basis of the cost of production in the nearby area? A. Farm values are an element of the cost of production, yes, and then nearby as well as all other areas.

Q. Then do you contend that the cost of production [3983] is higher in the nearby areas? A. I didn't testify as to what costs were on farms in the different areas.

Q. I know, but you have stated here that they have higher land values and you have developed now that is a part of the cost of production in nearby areas. Then is this part of the justification for the nearby farm location differentials that well, that they do have the higher cost of producton? A. That reason has not been given by me as a justification for the nearby differentials.

Q. Then you don't think it is justification for nearby farm locations differentials? A. I want to give the matter more thought.

Q. Does that mean you will give an answer to that later? A. Not necessarily.

Q. Would you give an answer to that later?

MR. CHERNAUSKAS: He said not necessarily.

MR. TIPTON: I know. I ask him if that meant that. Now I am asking if he would.

THE WITNESS: I will give it further consideration, yes. Whether I will be able to testify on it, I am not sure.

By Mr. Tipton:

Q. Later on you will make this statement apparently [3984] they are acceptable if they apply to a relatively small proportion of the milk but otherwise they constitute an unwarranted burden on the pool. Apparently they are acceptable to whom, to you or to—

That is, in the fourth paragraph on the first page, the second sentence. A. No, I was thinking of any opponents of the nearby farm location differentials. I was thinking of apparently the acceptable to opponents of farm location differentials, some people who might then opposed to them, otherwise.

Q. Well, you were not referring to the CDS? A. I didn't have CDS, no.

Q. Just in general? A. Yes.

Q. Then in the last paragraph on the first page you make the statement that "such disparities were swept under the rug in a complete consolidation of the orders."

What do you mean by "swept under the rug"? A. Simply that if there were a consolidated market order there would be no individual market prices to consider having disparities.

Q. In the second to the last paragraph of the fourth page you make a statement concerning the reduced prices concerning the amount that prices would be reduced to various producers and the amount that would be increased [3985-3986] in various producers. Were you talking about a specific period or was this an average or what was the concept here and to

what producers were you referring to? A. In the next to the last paragraph on page 4, did you say?

Q. Yes, sir. A. I was referring there to the analysis in table 5, the bottom section of the table which shows those prices, those price differences.

Q. I see. That was for 1962? A. 1962.

Q. I see. So when you are talking about though, for example, that to reduce the price about 26 cents to nearby producers, that would vary, would it not between various markets as to how much the price would actually be reduced in nearby producers. A. I think you are talking about the five market comparison there.

Q. Yes, I am. For example, you say that in the five market consolidations the affect of eliminating farm location differentials would have been to reduce prices about 26 cents to nearby producers. I think I am now beginning to understand the paragraph. You are talking about comparing the five market consolidation with nearby differentials and without? [3987] A. Yes.

Q. I am sorry, I did misinterpret the paragraph.

In the last paragraph of page 5 you make the statement that "if farm location differentials were not kept in the consolidated market, the New England zone 21 blend price would have been about $4.67.9 cents, which is 44.8 cents above the New York-New Jersey price."

Now my question is, you contend that this 44.8 cents per hundredweight is the difference between the New York-New Jersey price would be a substantial difference and might create shifts of milk between the two markets, is that correct? A. I made the statement of what the difference would have been and now you are asking me what?

Q. Well, if this difference might cause milk to shift between the two markets? A. The difference would be approximately twice as great as it was in 1962 actually and this very well might lead to shifts of supplies.

Q. But isn't that difference somewhat behind even when you have here nearby farm differentials because what you are in effect doing is perpetuating the nearby area that is higher

than they would receive under a more competitive type pricing. Is that true? A. I am not concealing anything. It is a fact that the price in the zone 21 without farm location differentials [3988] would have been higher and by that amount.

Q. All right. Let me ask it another way.

Are you familiar with the amount that the Connecticut market takes out per hundredweight in order to obtain an aggregate amount of money to pay nearby farm location differentials? A. Yes. And the values and rates are set forth in table 2.

Q. In Table 2 it is shown for all producers as 45 cents, is that correct, for the period of 1962? A. Yes.

Q. And the differential is 46 cents, is that correct? A. The value per hundredweight of all of the differentials in Connecticut was 45 cents. The rate to the nearby producer was 46 cents.

Q. The rate that they received was 46 cents? A. Yes.

Q. And the amount that was deducted from all the milk in the pool was 45 cents. If the nearby farm location differentials were deleted from the Connecticut market, there would be a net loss of approximately one cent, is that correct? A. Yes.

Q. So what advantage does the nearby farm location differential give to the nearby producers other than a one [3989] cent gain in their price, anything? A. I didn't mean to imply there was any substantial advantage in that regard.

Q. Well, is there any substantial advantage in that regard? A. I said no.

Q. Oh, there is no substantial advantage? So the Connecticut nearby farm location differentials could be removed? A. No.

Q. And there would not be a substantial change in the prices that the Connecticut producers would receive, is that correct? A. A substantial change to nearby Connecticut producers?

Q. Yes. A. That is correct.

Q. If there would not be a change we recognize that there would be a one cent change approximately. If this would be

the only change, why would you, or would you have an objection to the deletion of the nearby farm location differentials in the Connecticut market? A. I would be in favor of keeping the differential in the Connecticut market on the basis of principal as in all of the other markets. There happen to be more [3990] nearby producers in Connecticut which affects the rate substantially but the principal would remain the same whether it is a Connecticut market or a Boston market that we are talking about.

Q. Just so we understand, the deletion of the nearby farm location differential would not affect the Connecticut price to nearby producers of a very substantial amount, and by that I mean one or two or three or four cents, something like this? A. The rate makes that obvious.

Q. Continuing that line just a moment then, would you anticipate that if the nearby farm location differential was removed, that there would be an increase of supplies in milk into the Connecticut market? A. No.

Q. On page 9 of your statement in quoting that excerpt from Exhibit 77B you make the statement that "over a four year period of time, 1927 through 1930, producers delivering to Vermont farms averaged to receive $1.16 per hundredweight for all milk delivered at Southboro that producers, averaged in the 191-200 mile zone for all milk."

Updating that figure from 1927 to 1930 to say 1960 through 1962, and assuming that we did not have federal regulations, what would you think that the difference might be? I am not talking about the actual prices but the [3991] difference between the actual prices? A. I would not want to speculate on what that might be, Mr. Tipton. It involves the utilization of the milk of the nearby distributors and I don't think—I don't know if you assume conditions of federal regulations or not, but that would be important, too.

Q. No, I said without federal regulations? A. Without federal regulations. It is conceivable that the utilization of the nearby milk would bring about such prices in excess of the 21st zone price plus handling and freight, yes.

Q. Do you think it would? You said you think it was conceivable. Do you think it would? A. Certainly if the preponderance of the receipts were by small dealers having small percentages of class I, I do.

Q. Well, tell me—then I will ask the question maybe a little more specifically. How much more do you think the Hood Company would pay for milk from producers in the nearby area as compared to milk from producers in the 21st zone? A. I don't know.

Q. Would they pay any, do you think? A. I would not want to attempt to answer. I think that they might, yes.

[3992] Q. If they might it would be a very small amount do you think? A. I think the present farm location differential is relatively small.

Q. But you have testified, not you, your organization, or a representative of your organization has testified that because of the transportation differentials being slightly too high that there is dropping of nearby producers, is that correct? A. Yes.

Q. And that is because apparently the handlers are not willing to pay the additional amount for the nearby milk as compared to what they would pay for and receive in the upcountry milk and delivery, is that correct? A. It was not and still is not a question of whether they would pay in the form of class prices, higher prices. The advantage of the nearby differential was before regulation and conceivably could be again one of the utilization and the kind of plan which might be in effect in the market such as the base rating plan which would be designed for the purpose of establishing equitable returns to different groups of producers.

Q. Well, before federal regulations why did the handlers pay 46 cents per hundredweight for nearby milk as compared to upcountry milk after adjusting for cost of transport? [3993] A. I was not in the market at that time. The nearby producers did receive according to a price series that were determined for a period of years before regulation blended prices which were higher than the NEMPA price in the zone 21 by the amounts given, and they might possibly, if the

whole truth could have been known by statistics at the time, might be even larger differential.

Q. Well, do you think that the handlers paid this because this milk had some additional value to them as compared with upcountry milk, or was there some other reason? A. I have already explained why the producer received the higher prices on account of supplying handlers who did have a large share of the fluid milk market at that time.

Q. Was it because the milk from the nearby area had more value to them? A. I didn't say that.

Q. I am asking you. A. I don't wish to get into controversial milk quality or things of that kind.

Q. If the milk didn't have additional value to them then why would not a handler go to an alternative source and buy the milk? A. Some did. I don't know. I merely say the facts are that the nearby producers were determined by [3994] survey to have received those higher prices.

Q. But you don't know why? A. I offered the possible explanation, yes, that they were supplying handlers who had a larger share of the milk market.

Q. Could you think of a reason why the handler, if he were to determine that additional or another supply of milk, an alternative supply of milk, had the same value to him delivered at his plant would pay for—would pay more for nearby milk?

MR. MAHONEY: I will object on the grounds this is extremely repetitious.

EXAMINER HOLSTEIN: Well—

THE WITNESS: Milk was being paid for on an over classified basis.

EXAMINER HOLSTEIN: Objection overruled.

THE WITNESS: Milk was being paid for on an over classified basis at that time. To the extent that the prices in that period could be analyzed the nearby producers were receiving from the handlers who received their milk prices which were higher than those to the upcountry producers by an amount which exceeded the great cost of the handling charge.

MR. TIPTON: Yes, but my question didn't refer to that. As a matter of fact I would like to have the [3995] question read back if I may.

EXAMINER HOLSTEIN: Read the question.

(The question referred to was read by the reporter.)

THE WITNESS: I am not saying he paid more for fluid milk. You mean in the way of class price he would pay a higher class price?

By Mr. Tipton:

Q. No, I am not referring to he or any specific time, I just asked a question involving alternative sources and alternative costs. I was not referring to a period of time or a specific handler in the question. A. They could have been identical prices on a classified basis, I don't know. I am not saying that because I didn't inquire into the background underlying the blended price series which were determined for those years.

Q. If a handler had milk delivered to his plant, in the city and part of that milk came from producers in the nearby area and part of that milk came from more distant sources, would that handler be inclined to pay more for the upcountry milk than he paid for the nearby milk that was delivered to his plant? A. I don't think you meant what you said in your question.

EXAMINER HOLSTEIN: Read the question.

(The question referred to was read by the reporter.)

[3996] MR. WHITNEY: I am talking about both of them f.o.b. the plant.

Is that f.o.b. the city plant in both cases?

MR. TIPTON: Yes.

THE WITNESS: He paid the city plant blended price for all the milk if that answers your question.

MR. TIPTON: May I have the answer read?

EXAMINER HOLSTEIN: Read the answer.

(The answer referred to was read by the reporter.)

MR. TIPTON: No, sir, that does not answer the question.

EXAMINER HOLSTEIN: Can you rephrase it again?

Did you understand the question?

THE WITNESS: Not thoroughly.

EXAMINER HOLSTEIN: Mr. Lee said he didn't understand the question so there is no use trying to get an answer to this question. He does not understand it.

Say you don't understand it if you don't.

MR. TIPTON: I really can't think of a way of saying it much more explicitly than what I have.

Maybe just for clarification if I make a couple comments on his answer, the handler would return the blend price to the producer but I was talking about the price the handler paid to the producer.

EXAMINER HOLSTEIN: To whom?

MR. TIPTON: Under federal regulations. He pays [3997] a class I price for it in other words. We will start from that point.

By Mr. Tipton:

Q. The question is, will he pay more for the milk from nearby producers delivered directly to his plant as compared to milk from up country sources that are delivered directly to his plant?

MR. MAHONEY: I would like some clarification. I don't know whether he means this question be directed to a handler who has no idea where the milk is coming from or whether the handler in fact knows whether it is nearby milk or upcountry milk.

MR TIPTON: Let's assume the handler knows his–knows it is the nearby milk and up country milk and exactly the same quality.

THE WITNESS: Under the hypothetical circumstances that you have drawn, I think the answer is you pay the blended price for all the milk, which included that from nearby as well as the up country milk.

By Mr. Tipton:

Q. That is all the handler would pay, is the blended price for that milk, he would not pay the Class I milk if he was under Federal regulations? What would the handler pay for that milk? Would he pay more? The handler does not pay the blend price for the milk. The cost to the [3998] handler is what he has to pay. That might be the Class I price. The only thing I was asking for was the difference between the two. A. I don't know what the handler would have paid. The handler today and then would pay the established class prices.

Q. No more, no less? A. I think you are trying to–

Q. I will ask the question again in another sense and see if we can get the answer.

Assume for the moment if you will that there is not a federal regulation in effect and that there is not a state regulation in effect, it is completely free. The handler located in Boston has received milk from producers that are within forty miles of the State House in Boston. He has also received milk from producers that are 200 miles from Boston. He has this milk now in his plant in the city. Is it exactly the same quality, he knows what portions of the milk came from the nearby or from the producers of within forty miles and he knows what milk came from the up country sources and where it came from. Will he pay any difference for these two volumes of milk?

MR. HALL: I think that question is objectionable on the grounds that it calls for a great deal of speculation. Maybe Mr. Lee can speculate on all these hypothetical [3999] questions that Mr. Tipton has included in his question.

EXAMINER HOLSTEIN: No, I think that is a fair question, Mr. Hall. Mr. Tipton wants to know why a handler should pay more for milk which comes from forty miles from his plant than he does for milk which comes 200 miles from his plant, all other things being equal–

THE WITNESS: It is conceivable that the handler had an arrangement with the cooperative association which we will assume the nearby producer belonged to and that in the absence of federal regulations would pay more than he might be able to procure fluid milk of the same quality from some up country supplier that might wish to supply the milk at a discount.

By Mr. Tipton:

Q. Now assume that we are at the end of the period of this contract or the agreement with the producer and association and that is it is time to renegotiate this. Would your answer be the same, that he would renegotiate the price possibly higher? A. I don't know. I don't know whether he would or not.

Q. In Table II, that is in this exhibit you show some computations relating to the value of farm location differentials in 1962. In this table under Worcester you show that producers in the nearby area contribute toward the nearby farm location differential amount of 34 cents [4000] per hundredweight. However if your proposal were adopted that the three markets of Boston, Worcester and Springfield were adopted, that the contributions of the nearby producers under Worcester would decrease from 34 cents to 9 cents, is that correct? A. I have stated the amount in my testimony but-

EXAMINER HOLSTEIN: That is what is shown on here.

MR. TIPTON: That is not necessary.

By Mr. Tipton:

Q. Then this would have the effect of causing up country producers under the Boston market to pay an increased proportion of the nearby farm location differentials, is that correct? A. Yes, it would.

Q. Do you represent producers in the up country area? A. Yes.

Q. Do you represent producers in the nearby area? A. Yes.

Q. About what proportion in each of the areas? A. I don't know.

Q. Do you have any idea? A. No.

Q. On page 14 in the first full paragraph which is an excerpt from Exhibit 77B there are stated several reasons as to why the differential of 46 cents was apparently [4001] justified or paid or what have you prior to federal regulations. Could you identify now what items of those, if any, would cause a differential to be paid under present conditions without federal regulations? A. I think the point of Professor Bell in his second sentence went on to say, "In addition it is recognized by sellers more remote from the market that sellers near to market must received an additional amount commensurate with their current opportunities of sales which are naturally economic to their location."

Q. Well, I had specific reference to the first sentence and the items listed in the first sentence. A. I think we will concede that those are similar. I will agree that they are similar.

Q. That those are similar to what? A. You asked me to name any one of those factors which today would be a factor for a difference which is in excess of them and I say not one of them. It is the second sentence which contains the germ of Professor Bell's thought in that paragraph.

Q. So none of the items in the first sentence would constitute a reason for justification of the 46 cent differential, is that what you are saying?

EXAMINER HOLSTEIN: I think he said it once, Mr. Lee, didn't you?

[4002] THE WITNESS: Yes.

MR. TIPTON: I didn't understand he had said it. He said similar and I didn't follow what he meant by similar.

THE WITNESS: I would not want to speculate on exactly what he had in mind on other charges but–

EXAMINER HOLSTEIN: No, that is not Mr. Tipton's question. Mr. Tipton's question is which one of these items in the first sentence, first full paragraph on page 14, would have a reason for justification today for the differential.

THE WITNESS: I have answered that. The justification for a location differential today is the same as it was–turning to nearby producers, would exceed these–

EXAMINER HOLSTEIN: Mr. Tipton is entitled to an answer to that question. Which ones of those items, they are specifically set down here–one, freight, two company assembling container services, three, refrigeration and so forth–are any of those valid today?

Is that what you meant?

MR. TIPTON: Are any one of those a reason for justification of the 46 cent transportation differential?

THE WITNESS: No.

EXAMINER HOLSTEIN: That question is answered, we can move on.

MR. TIPTON: I think that completes my cross examination.

[4003] EXAMINER HOLSTEIN: Mr. Whitney?

By Mr. Whitney:

Q. In order to clarify the record a little bit, in response to Mr. Tipton's question with regard to Table II I believe, and

he used the example of Connecticut and the point was made that location differentials resulted in maybe an extra cent for nearby producers, and I think he also asked the question that if location differentials were thrown out, or words to that effect, would you expect a change in the volume of milk available from country stores, country sources or something to that effect. Now my question would be if location differentials are eliminated in Connecticut for example, would not the 21st zone price, if milk was purchased in that area, be substantially higher under the Connecticut order? A. Yes.

Q. And that price would tend to attract more milk from those sources? A. That is correct. At the time I was thinking about the nearby differential being extended to those producers in the area that you have in mind.

* * *

[4006] By Mr. Sykes:

Q. Is it the general purport of your testimony as set forth in Exhibit 77 that prior to the inception of federal regulations there was a higher price paid to the nearby producer? A. Yes.

Q. Did you find any evidence to the effect that any computations were done in terms of which arrived at a certain basic price to which these people added a certain figure in order to arrive at a nearby price? A. No.

Q. Is it then your contention that the handlers never in fact did pay any higher price in terms of a specific differential? A. That is right.

* * *

Testimony of E. L. Tipton

E. L. TIPTON was called as a witness and, having been previously duly sworn, resumed the stand and testified further as follows, direct testimony.

Examiner Holstein: Mr. Tipton has handed me a document consisting of 19 pages of written testimony, plus several tabulations. The text matter will probably be referred to in cross examination, and the tables, of course, will not be read into the record, I presume.

You merely wish them to be included as exhibits; is that correct?

The Witness: Yes, sir.

Examiner Holstein: The entire document, including the text and the tabulations, will be identified, marked for identification as Exhibit 55.

(2126) (Exhibit No. 55 was marked for identification.)

Examiner Holstein: Go ahead, Mr. Tipton.

The Witness: I might add, in the identification of it, that there are 19 numbered pages, and there are some of them that are 8a and 19a, so there are a few more pages than 19, actually.

This statement is given in support of Proposal No. 52, as contained in the Notice of Hearing, except that our position is that the farm location differentials should be eliminated irrespective of the proposal to merge the Orders.

Farm location differentials have been a subject of much discussion since their inception in the New England Federal Orders.

The farm location provisions of the New England Orders are simple from a mechanical standpoint. The money to pay the nearby and intermediate producers the rates specified is deducted from the total value of all the milk classified prior to the computation of the uniform price. But while this is simple from a mechanical standpoint, it introduces two inequities that are inconsistent with the Order program:

(1) It transfers money from upcountry producers to producers located closer to the marketing area.

(2) It establishes artificially low values (or prices) for milk at upcountry points, and this serves as an (2127) effective deterrent to the entrance of milk supplies which otherwise might compete for outlets in the marketing area.

The Agricultural Marketing Agreement Act of 1937 provides for "individual handler pools" or "marketwide

pools", under Section 608c (5)(B)(i) and (ii). These sections provide and specify uniformity of prices to producers as determined by either of the two methods.

The rest of Section 608c(5)(B) provides for adjustments of the uniformity of prices, as determined by either method, in accordance with any of the following provisions:

(a) volume, market, and production differentials customarily applied by the handlers subject to each Order;

(b) the grade and quality of the milk delivered;

(c) the locations at which delivery of such milk is made, and;

(d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

Authority under the Act for nearby differentials could conceivably fall under (a) or (b). Under (a) the prices to producers may be adjusted for volume, market and production differentials customarily applied by the handlers subject to such (2128) order. If handlers customarily applied plus differentials for milk from nearby producers, this section of the Act authorized the retention of these differentials in the Order provisions.

However, there is no mention that if the handlers customarily paid these differentials the cost could be transferred from them to producers through a pool adjustment. I must emphasize again that the section explicitly states "customarily applied by handlers". Under (b) the Act authorizes adjustment for the grade and quality of milk delivered. Although it is conceivable that in 1937 the quality of milk from nearby producers may have been generally better than more distant supplies, the Secretary did not mention this item in the decisions

instituting the nearby differential provisions in the Southeastern New England and Connecticut Orders, and certainly it cannot be stated that there is any difference in quality under present marketing conditions.

We support the premise that handlers should pay for milk according to its value. If milk from nearby areas has additional value, the user of that milk should pay for the additional value of such milk, and that value should be returned to the producer who supplied that milk.

Producers near the market do receive compensation for their location. The price received for milk delivered directly to a city plant is higher than the price for milk delivered to a country plant in the 21st Zone by:

(2129) (1) the cost of transporting the milk from the 21st Zone to the city plant; and,

(2) an additional premium in an amount equal to the additional upcountry receiving and transferring cost as provided in Section 1001.42 of the Boston Order.

We are not proposing to eliminate these location advantages to nearby producers supplying city plants.

The Act does not specify that differentials customarily applied by handlers be continued indefinitely. The present rates were established in 1937 for the Boston Order and were incorporated in the New England Orders at the inception of each of the Orders at the same rates of 46 and 23 cents per hundredweight. The Secretary is now faced with the task of determining whether a differential price would be received by producers in the farm location differential areas had not the Federal Order provisions perpetuated the payments, through pool adjustments.

I. Basis for inclusion as contained in the decision applicable to the Southeastern New England and Connecticut Orders

The following are excerpts from the Decision dated October 21, 1958 (23FRS225) Docket No. AO-302 relating to the Southeastern New England marketing area states:

"Historically, dairy farmers in the States of Massachusetts, Rhode Island, and Connecticut, because of their location with reference to the large population (2130) concentrations of New England have disposed of a substantially larger percentage of their production for fluid uses than have dairy farmers in the upcountry area. Hence, nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market.

"Under the marketwide pooling herein proposed the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk in the milkshed rather than according to the utilization of his milk. Under a regulated market, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation and has assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources. The distant producer also benefits from an established Class I price, and by the fact that he gains a larger share of the fluid market than is likely without marketwide equalization.

"The use of a nearby differential will return to nearby producers a somewhat greater share of the Class I price than they would otherwise obtain through marketwide pooling. Moreover, such a differential will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without (2131) marketwide equalization.

"The scheme of nearby farm location differentials and the amount thereof is identical with that employed in adjacent Federal Order markets. The differential as herein proposed will provide for equitable distribution of pool proceeds among all producers and will promote orderly and stable marketing in the entire New England area. The adoption of nearby farm location differentials was proposed and generally supported by interested parties at the hearing."

The decision relating to the promulgation of the Connecticut Order contains a statement similar to that just read.

In both of these decisions a differential is justified based on the higher Class I utilization and the resultant higher prices paid to producers for milk from dairy farmers located in the areas nearby to these markets.

Also, in both of these decisions the rate of the differential is justified by the Secretary, as it is the same rate as applied in adjacent markets (Boston, Worcester, and Springfield).

There was no mention of the additional value of nearby milk or even an attempt to measure what the rate should be based on the higher utilization rationale. It appears that this should be necessary in order to determine the rate customarily applied by handlers.

(2132) It does not seem feasible that handlers would pay nearby producers a higher price than they would be willing to pay upcountry producers, adjusted for transportation cost, unless the nearby milk had some additional value to the handler receiving the milk. With or without Federal or State regulation handlers will tend to purchase milk of equal value at the cheapest source. If that statement is true, it then follows that prior to Federal regulation handlers paid nearby producers an additional amount of money because the handler receiving the supply determined that that supply of milk had some additional value over other supplies he might obtain.

One of the major considerations in promulgating Federal Milk Marketing Orders for the Southeastern New England and Connecticut marketing areas was the fact that local supplies were becoming homeless because of imports of unregulated cheaper priced milk.

This is certainly an indication of the unwillingness of handlers to pay higher prices for nearby producer milk. Yet, when the decision was made the Order provided a differential payable to local producers, based on the supposition that handlers customarily applied such a differential, although it was demonstrated in the record and recognized in the decision that handlers were dropping local supplies in favor of more distant supplies.

I am also unable to bridge the gap between the situation that existed prior to the promulgation of the Boston Order and (2135) the way the provision was written into the Order.

The proponents of a farm location differential at that time established the rate for the differential as a rate which handlers in the city plant area were paying for milk over and above prices paid for milk in the 21st Zone, plus 54 cents established as a proper transportation differential at that time. It was established that these handlers were paying or applying such a differential. However, when the provision was incorporated in the Order, it did not require handlers to continue paying the differential but rather required such payments to be deducted from the total pool value, in other words, paid for by upcountry producers.

As I have said earlier, it does not seem feasible that handlers would pay a differential for nearby milk unless such milk had additional value over their alternative sources of supply.

II. WOULD HANDLERS CUSTOMARILY APPLY A DIFFERENTIAL UNDER TODAY'S CONDITIONS?

This is the heart of the question that the Secretary must decide in regard to whether the differentials should be deleted or retained.

There are many reasons why supplies from farms in nearby areas could have had additional value to the user thereby justifying the handler's willingness to pay an additional sum for such milk, prior to 1937.

Many of the smaller handlers initially experienced cost (2134) in excess of the basic cost of an upcountry supply of milk, plus the normal cost of transportation, receiving and transferring, because of the minimal quantities involved. The method of transportation from country supply stations was by rail. The original license (No. 15) provided for a transportation allowance or a difference between the 191-200-mile zone price and the base price f.o.b. Boston of $0.7103.

This amount was composed of 23-1/4 cents per hundredweight as a country plant handling allowance, three cents per hundredweight for can service, and 44.78 cents per hundredweight for freight from the 20th Zone at less-than-carload rates. (Source of information is a thesis prepared for the Market Administrator under Federal Milk Order No. 4 and presented as partial fulfillment of the requirements for the degree of Doctor of Philosophy, Department of Government, Harvard University, entitled "The Development of the Licenses and Order Regulating the Handling of Milk in the Greater Boston, Massachusetts Marketing Area", November 3, 1933-June, 1946, Gilbert R. Barnhart.)

(2135) I would like to make an insert here.

What is the number of the exhibit that contains the historical study on transportation differentials?

In Exhibit 25, November 1933, the city plant differential is shown to have been 61.77 cents, which is to the

same period that I have just referred you here, and shown that Barnhart's thesis says 71.3. And I have not been able to reconcile yet as to which one of these is actually correct, but I have talked to Mr. Lee, and he is checking out the figure that is in Exhibit 25, and possibly will find out then which one of these is actually the correct rate, as to what the city plant transportation differential was in license 15.

Examiner Holstein: Does this record show what license 15 was? Mr. Tipton, can you state for the record what license 15 was?

The Witness: It was the original license regulating milk marketing in the Boston milk marketing area.

Back on the statement.

(2136) Mr. Tipton: If the handler's cost in purchasing milk from a plant in the 191-200-mile zone as compared to purchases direct from producers nearby delivered to the city plant exceeded the $0.7103 per hundredweight differential he could logically pay nearby farmers the additional amount and still have operated in a rational manner in that he would have equated his alternative prices.

As of August 1, 1937, the differential was established at $0.5447 per hundredweight (see Exhibit 25) which reflected carlot transportation rates. A handler who did not need a carlot could experience a cost in excess of the 54-cent differential. If this occurred again, the handler could pay a premium for nearby milk to equate the cost of purchases from upcountry sources and from nearby sources delivered direct to his city bottling plant.

This same principle works in reverse. That is, if the zone location differential exceeds the actual cost, handlers may not be willing to pay the nearby city plant price and will purchase supplies from more distant sources. The decision is made to a great extent on the basis of which is the less costly source of supply.

Class prices established under the Order are minimum prices. If nearby milk had any additional value, that

is additional to the place utility value compensated for by the transportation and country plant differentials, handlers would (2137) be paying premiums for such milk. Instead of having a premium situation, we are presently experiencing a situation whereby handlers in the city plant zones are discontinuing purchases of supplies from nearby local producers and are purchasing from more distant sources. The local nearby milk ends up being used for manufacturing purposes. This has occurred in part because the transportation differential permits a greater allowance than is necessary to equate the price of upcountry and nearby milk when delivered to the same city plant. Thus, handlers do not pay premiums for nearby milk, and secondly they will not continue to purchase such supplies when a cheaper source is available.

I think these two situations clearly prove that handlers are not willing to pay more for nearby milk and therefore do not "customarily apply" a differential to such milk under today's circumstances.

The cooperatives that I am representing are all located up country and they supply a considerable volume of milk to city bottling plants. The milk that is delivered to an upcountry plant during one day is available for bottling the following morning. The regularity of delivery is just as dependable as deliveries direct from producers in the nearby areas. There is no more variation in quality between upcountry and nearby milk than there is between supplies within each of the two areas.

There is not a logical reason for handlers to customarily (2138) apply a differential for nearby milk and they are not and will not do so.

III. The Nourse Committee Report

The report to the Secretary of Agriculture by the Federal Milk Order Study Committee which was pro-

duced through the facilities of the U. S. Department of Agriculture and dated April, 1962, contained a section beginning on pages 11-4-32 entitled "Special Location Differentials to Nearby Producers". I would like to quote from some paragraphs included in this section.

"Precedents for nearby differentials were established during the period of collective bargaining before there were any Federal Orders. Various advantages have been claimed for nearby milk from the viewpoint of handlers —such as more desirable seasonality, earlier and more dependable arrival at city plants, easier and more economical supervision of producers and quality and the possibility of direct hauling from the farms thereby saving the expense of country plant operation. However, the major purpose of nearby differentials apparently has been to compensate nearby producers for sharing market Class I sales with more distant producers in a market-wide pool. This principle seemingly was founded on the belief that in the absence of regulation, a higher percentage of nearby milk would be sold for fluid use.

(2139) "Producers in areas with a long history of nearby differentials have based their production decisions on them and capitalized their value into land and facilities. Consequently, the differential payments are no doubt regarded by the participants as valuable "market rights".

"On the other hand, the manner in which nearby differentials are applied has a decided impact on the inter-market relationships. Their use and effect may need careful re-examination in the light of present conditions of increased mobility of milk supplies. For the payment of special nearby differentials out of pool funds depresses the uniform price to producers outside the differential zones and thus tends to limit the extent of the supply area and maintain higher fluid utilization under

an order than would prevail otherwise. At the present time, this effect is so small in some instances as to be negligible. In others it is very significant.

"Under the Boston order, nearby differentials are paid on only about 6 per cent of the pooled milk and the uniform price is depressed less than three cents per hundredweight by these payments. Under the New York-New Jersey order, slightly less than 20 per cent of the pooled milk qualifies for the nearby differentials and the uniform price is depressed about six cents per hundredweight.

(2140) "On the other hand, under the Federal Orders for Worcester, Springfield, Southeast New England and Connecticut nearby differentials are paid on 65 per cent to more than 90 per cent of the pooled milk and uniform prices are depressed from about 30 cents to more than 40 cents per hundredweight. In 1960, 90 per cent of the pooled milk under the Connecticut Order qualified for the 46-cent differential, and 3 per cent for the 23-cent differential. The total amount paid in nearby location differentials was equivalent to 43 cents per hundred pounds of all pooled milk and the uniform price to producers outside the differential zones was depressed to that extent. Thus, the attraction of the high-blended price resulting from a high Class I utilization under the order is substantially reduced with respect to producers in the outlying areas.

"In circumstances where a high percentage of milk qualifies for the nearby differentials the producers who participate derive little net gain except for the pool tightening effect of the lower blended returns in the outer zones. Thus, order provisions for nearby differentials of this magnitude can and do effectively limit access to the pools."

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(2141) Pages III-22:

"The committee questions whether the special location differentials for nearby producers now provided for in several of the orders are justifiable under present conditions especially where high percentages of the pooled milk are used in Class I. It therefore recommends that the justification for such differentials be reexamined, and that where appropriate, they be either reduced or eliminated."

These statements set out very clearly our position and reasoning. I will now develop some of the points more thoroughly.

IV. Milk subject to nearby farm location differentials

Table I of Exhibit No. 55 contains data pertaining to the number of producers located in various designated areas under each of the Orders. During 1961, 6.7 per cent of the producer farms supplying milk to Boston handlers were located in the nearby area of Boston. Less than 1 per cent were located in the intermediate area and the remaining 92.7 per cent were not in either of the nearby areas. In the Connecticut market the proportions are just about reversed.

Approximately 90 per cent of Connecticut producer farms were located in what is designated the nearby area, almost 3 per cent were in the intermediate area and about 7 per cent (2142) were more distant from the market. The Southeastern New England Market Administrator does not report the number of producers in the nearby and intermediate areas separately, but rather reports the total number of producers in both areas. The number in the intermediate area, according to the Southeastern New England Market Administrator's office, is very small, and I have included the total under the

number of nearby producers and treated their figures as if there were no milk from intermediate zoned farms.

The proportion of producer farms in the Southeastern New England market that are located within the nearby area as specified in that Order varies considerably because of the entering and exiting of country supply-type plants.

Table I of Exhibit No. 55 shows that about 57 per cent of the producer farms were located within the nearby area and about 43 per cent from distant sources. The proportion of producer farms located in the nearby farm locations differential area from which milk is received by Springfield regulated handlers reflects the exiting of all country supply-type plants.

During August, 1962, about 92 per cent of the milk came from nearby farms, almost six per cent from intermediate area farms, and only about 2 per cent from distant producers.

The Worcester Order does not designate any intermediate area. During 1961, about 63 per cent of all producer farms were located within the nearby area and the remaining 37 per cent (2143) were not in a farm location zone.

Table II of Exhibit No. 55 reflects the amount of milk received by handlers from farms in each of the farm location differential areas. I will not cover these in any great detail. The proportion of producer farms and the proportion of milk coming from such farms are highly correlated in the Boston and Connecticut Orders. Southeastern New England producer farms located in the nearby differential area accounted for a larger proportionate share of the milk receipts of handlers than is indicated by the proportion of farms located in the farm location differential areas. The Worcester market statistics reveal the same type correlation as the Southeastern New England Order.

Under all five of the Orders, about 36 per cent of the producer farms are located within what is presently

the nearby area of the Order regulating the handler to which they are delivering, slightly over one per cent are in the intermediate zone area, and about 63 per cent are not in the differential zoned area, as established by the Order regulating the handlers to which they are delivering.

The proportion of the total milk supply is quite different. Milk from farms subject to the 46-cent differential under each one of the present Orders represents about 44 per cent of total producer receipts under all five of the Orders. Milk receipts from producer farms located in the intermediate area are slightly over one per cent which is roughly equivalent to (2144) the same proportion as the number of farms in this area. Milk delivered from farms not subject to a farm location differential under the present regulations represents about 55 per cent of total producer receipts by handlers regulated by the five Orders. This compares to about 63 per cent of producers located in such an area.

V. The impact of the deductions to pay nearby farm location differentials

Table III of Exhibit No. 55 reflects the total deductions to pay farm location differentials and the reduction in the blend price to pay such differentials.

In preparing this table, I added together the total deductions as reported in the blend price announcement of each of the Orders. It was necessary to estimate the deduction applicable to the Worcester Order from December 1961 and August-November, 1962.

The cost per hundredweight to producers whose farms were located in areas that did not receive a farm location differential is shown in the second column. The cost under the Boston Order was only 2.9 cents per hundredweight during 1961, compared to a cost of 42 cents to Connecticut producers.

The impact of these deductions can be shown better by referring to Table IV of Exhibit 55. Here I have computed the actual change in the pay price to producers under the separate Orders if farm location differentials would not have been in (2145) effect. In August, 1962, Boston producers receiving the 46-cent differential would have had their price reduced by 43 cents, producers receiving the intermediate differential would have received about 20 cents less, and producers whose farms are in locations at which no differential is applicable would have received about three cents more.

Connecticut producers whose milk is subject to the payment of a farm location differential at the 46-cent rate would have received only about 2 cents less per hundredweight had no farm location differentials been payable in August, 1962.

Producers receiving the 23-cent differential under the Connecticut Order would have experienced an increase of about 21 cents per hundredweight, and those whose milk was not subject to any farm location differential would have received about 44 cents per hundredweight more. The effect to producers in the three similar areas described under the Springfield Order would have been identical.

Producers receiving the 46-cent differential under the provisions of the Southeastern New England Order during August, 1962, would have received about 20 cents less had the differentials not been in effect. Those producers that received the 23-cent differential would have actually gained three cents had there been no farm location differentials payable, and those in distant zones would have received about 26 cents per hundredweight more.

(2146) Worcester producers who received farm location differentials during August, 1962 would have received about 11 cents less had there been no differentials payable. Those in the distant area would have received about 35 cents more.

VI. The use of farm location differentials to align producer prices rather than to compensate for a higher utilization

When discussing price alignments, I think it would be more proper to compare alignment of the use value per hundredweight of milk than the announced blend prices. In this connection, I prepared Table V of Exhibit No. 56. In computing the blend that would have occurred, as shown in the second column of the Table, I have added the amount per hundredweight that was deducted from the blend price to pay the farm location differentials. This, then, more nearly reflects the use value of the milk in each of the pools.

This reveals the true magnitude of the malalignment of returns to producers in accordance with the utilization of all milk received by all handlers selling milk in the entire marketing area.

The average price of all the milk in the Connecticut pool in August, 1962 was 70 cents per hundredweight over the average price of Boston milk. If you adjust the Connecticut price for the take-out/pay-back plan, the difference was about 53 cents per hundredweight. The (2147) Southeastern New England milk was about 51 cents greater than for Boston. Worcester milk had an average price of about 48 cents per hundredweight over Boston, and Springfield 29 cents over Boston although the blend price was 12 cents below Boston's blend price.

As a practical matter, Connecticut producers received approximately 45 cents more per hundredweight in 1960 than Boston producers, after adjusting for the distance the plant of delivery is located from the market.

The figures cited show conclusively that whatever degree of price alignment there has been among the New England orders has been maintained through adjustments in returns among groups of producers rather than on the basis of the value of the milk.

This, we think, is wrong by any standard of measurement, and should not be abetted by the Federal Government.

The objective of the Agricultural Marketing Agreement Act of 1937 in authorizing marketwide pools was to return to all producers delivering to all handlers selling milk in the marketing area the use value of all the milk. We propose to accomplish this by regulating all handlers selling milk into the New England marketing area which, as I have already demonstrated, covers what is now regulated by five Orders and by deleting the farm location differentials which have substantially altered returns among producers.

(2148) We have effectively demonstrated that conditions have changed substantially. Handlers will not today customarily apply a differential to nearby milk in excess of the receiving and transportation differentials, and there is no justification for paying farm location differentials through a pool adjustment.

VII. The effect of our proposal on producer prices

As mentioned in earlier statements, I have made some computations to help illustrate the effect of our proposal on the prices payable under the Order to certain groups of producers. Table VI of Exhibit No. 55 reflects a close approximation of what the blend price would have been for selected periods had the orders been merged. I have included computations showing what the blend would have been with and without farm location differentials.

The figures shown under the column entitled "Blend Price of One Order with Farm Location Differentials" were derived by determining the proportion of producer milk pooled under all five of the Orders that was pooled under each of the Orders.

The percentage figures were then multiplied by the 21st Zone uniform price for each respective Order. The sum of these products represents the figure shown. Table III of Exhibit 55 shows the total value of all money deducted to pay farm location differentials and the rate per hundredweight. By adding the rate per hundredweight, as determined by combining the total amount deducted under each of the five Orders and dividing that sum by the total amount of producer milk pooled under each of the five Orders, to the figures shown under the (2149) column entitled "Blend Price of One Order with Farm Location Differential", I have arrived at the figures shown under the column entitled "Blend Price of One Order without Farm Location Differentials".

This latter column is representative of the effect of our proposal to put the entire marketing area under one Order and to delete the farm location differentials from the merged Order. I recognize that this price is not an actual price that would have existed under our entire proposal, as we are also supporting other changes that will also have some effect on the blend price, but it was impossible for me to measure the effect of these changes. The change of the basing point for determining the zone location of country plants in itself will have an impact on the blend price, but I do not have all the information necessary to calculate this effect. In any event, it will be very minor.

With only two exceptions the proposal will provide a higher 21st Zone blend price than is now provided by each of the Orders. The two exceptions are for October and November, 1962, for producers under the Southeastern New England Order.

Table VII of Exhibit No. 55 will better assist in analyzing the changes in prices payable to producers in different areas. I have computed the price changes that would have occurred to producers had our proposal been in effect for selected months.

(2150) In all the months shown, producers now receiving nearby farm location differentials would have experienced lower prices, ranging from about only 15 cents for producers so located under the Boston Order during October, 1962 to 53 cents for producers similarly located under the Southeastern New England Order. The Southeast New England price was the highest price of all the blend prices during October. Producers whose farms were located in the 46-cent farm location differential received, during October 1962, about $1.36 per hundredweight more than Boston producers delivering to plants in the 21st Zone. When this difference is adjusted by the transportation differential, the difference is still 82 cents per hundredweight. We maintain that there can be no justification for any of this difference as illustrated by our entire testimony.

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[2335] MR. LENT: May I ask a clarifying question?

EXAMINER HOLSTEIN: Yes, Mr. Lent.

By Mr. Lent:

Q. Just so I can get it straight in my mind what you are talking about, what do you mean by "make sure"?

As to the dealer changing from nearby to up-state milk.

[2336] A. You know, to try to explain that, Mr. Lent, if you are buying a load of milk up-country, and you are going to drop that load, you have got to have another load somewhere as soon as you can get it. And I meant by making sure that he wanted to get established with the nearby supply as promptly as he could.

Q. May I suggest the words—the context in which you use the words "make sure," I thought you used them in the context that the nearby supply was surer than the up-country supply.

A. No.

* * *

[2155] KEN GEYER

was called as a witness and, having been previously duly sworn, testified further as follows:

DIRECT TESTIMONY

THE WITNESS: In view of the fact, Mr. Examiner, that Mr. Tipton read into the record excerpts from the Nourse Committee report, I would like to read into the record part of a footnote by the late Dr. C. W. Swonger, who was a member of the committee, and the only member, I guess, from New England, commenting on this particular portion of Mr. Lent's and Dr. Spencer's effort that was quoted by Mr. Tipton.

MR. TIPTON: Excuse me. Is that not included in one of the exhibits that are already in? Or are there parts of that–

EXAMINER HOLSTEIN: What is the status of the Nourse Committee report?

MR. CHERNAUSKAS: It is not in evidence.

EXAMINER HOLSTEIN: No. I didn't think that was an exhibit.

THE WITNESS: I don't desire to clutter up the record with it, if it is not already in there.

MR. TIPTON: The report is not, but I thought the entire dissent of Dr. Swonger was in–I am looking for it [2156] now–Exhibit 24.

EXAMINER HOLSTEIN: Off the record.

(Discussion off the record.)

THE WITNESS: No, there isn't enough in that exhibit, Mr. Tipton.

This is the footnote of dissent by Dr. Swonger, which appears at II, Sec. 4 in the so-called Nourse Committee report:

"There is so much that I find objectionable in Part II, Section 4 of the committee's report, that I am forced to submit extensive dissent. It is impossible effectively to present my objections to this section of the report without going into some detail of facts and figures. Besides the narrow regional context in which much of the section is couched, I object to a number of unwarranted assumptions, inferences and conclusions, particularly with respect to the effect of nearby loca-

tion differentials, health regulations, and to some extent the application and effect of compensatory payments or assignment provisions to milk moving in either direction between federal order pools.

"At numerous points and with minor variations in wording, this section refers to the desirability of achieving similar patterns of utilization and of uniform prices, as though they were the same thing, when in fact they are not.

"The reason they are not the same is due to the effect of nearby location differentials of the distribution of the [2157] proceeds of the pools and the widely different variations of the relative proportions of nearby and distant producers.

"'Nearby location differentials' are deeply imbedded in the New England order and in the New York-New Jersey order and have been justified as a recognition of the historical pattern of prices which existed prior to regulation or as compensating nearby producers for sharing a part of the fluid market which they formerly enjoyed with producers more distant from the market. The federal orders did not create such differences in prices, but merely recognized their existence. They have been capitalized into land values, or were in the years prior to regulation.

"It is easy to point out that utilization percentages under the Connecticut order average higher than for New York–New Jersey. The same is also true as between Connecticut and Boston, and by about the same margin. Yet for the year 1961, the simple average of blended price at the Boston 21st zone was $4.52, and at the same zone for Connecticut was $4.56. The same relationship applied as between nearby producers in the two markets. For December 1961, the blended prices to producers in the Connecticut market was 7 cents below Boston at all zones.

"It is true, of course, that there are relatively more nearby producers in Connecticut or southeastern New England, Springfield, or Worcester, than in Boston or New York. The Springfield market has a higher utilization pattern than [2158] Boston but blended prices for 1961 averaged 18 cents below Boston. For the same period blended prices in the New York–

New Jersey market for 3.7 percent milk averaged 20 cents below Boston. But this was a period when the New York-New Jersey Class 3 price was running well below Class II prices in New England and below the level of competitive prices paid for manufacturing milk.

"Apparently nearby differentials are acceptable if they apply to a relatively small proportion of the milk, but otherwise they constitute an unwarranted 'burden' on the pool. In Boston, nearby differentials apply to about 6 percent of the milk in the pool, or considerably less than New York. They apply to a much larger proportion of the milk in other markets of southern New England where the same reason is stated that there are relatively more nearby producers. Yet their effect is the same in Boston or Connecticut—to establish a particular pattern or relationship of prices as between nearby and more distant producers, which is identical in both markets. Elimination of the nearby differentials contained in the Connecticut order would aggravate the price disparities in relation to other surrounding markets. In this connection the report suggests that 'nearby differentials could be maintained, but vary inversely with the percentage of pooled milk used in Class I.' Such a system as suggested would result in serious disproportion of blended price relationships between markets [2159] in New England and New York, both to nearby producers and those located more distant from the market. Reference is made to uniform pattern of nearby differentials used in New England markets. Any deviation of the type proposed would, for instance, depress blended prices to nearby producers in Connecticut relative to Boston or New York and raise blended prices to Connecticut producers in more distant zones substantially above Boston or New York. To create price disparities rather than remove them as between producers similarly located with respect to the market. If we accept nearby location differentials as a fact of life in New England and New York, it follows that 'similar patterns of utilization' would result in wide disparities in 'uniform prices' as between producers similarly located with respect to market and vice versa. We cannot have it both ways. Of the two, it seems to me that approxi-

mate uniformity of blended prices is far more important, and competition tends to achieve this result."

That is the end of the quotation I wish to have in the record from the Nourse Committee report.

* * *

(2162)

For 1938, the blend price for 3.7 percent milk at the 201-210 mile zone for Boston averaged $1.09. For 1930 it was $1.90. For 1940 it was $1.95.

For 1959 the figure was $4.61. For 1960 $4.72 and for 1961 it was $4.52.

The point I am trying to make is that back in those earlier years when the 48 cent and 23 cent rates were established, the 48 cent rate was 23 percent of the blend in 1938, 24 percent in 1939 and 24 percent in 1940. For the past three years, however, the 46 cent rate has been only 10 percent of the 200 mile zone average blend price.

With no change in the rate of the nearby farm location differential, therefore, it is obvious the percentage reward to the nearby producers is much less than half what it was when the rate was originally established.

Nearby farm location differentials are certainly vital, also, to enable the Connecticut handlers to compete with New York handlers in the important supply area of Dutchess and Columbia Counties in New York, where there is competition between New York City and Connecticut handlers for milk supply.

It is certainly our hope that nearby location (2163) differentials will not be discontinued as a result of this hearing and that no change will be made in the present rate.

* * *

Cross Examination by Mr. Tipton:

Q. Is it true that the utilization in the Connecticut market of Class I milk has been much higher percentage-wise

to the total supplies than in the Boston market; is that right? A. For over 50 years, I guess.

Q. And do you attribute any part of that higher utilization to the fact that you have had nearby farm location differentials? I am talking now about after the federal order went into effect in Connecticut. A. Well, obviously without nearby farm location differentials, the Connecticut price at the 200-mile zone, the month that the order went into effect, would have been way higher than the price at any other New England order in that same area and I suspect that the utilization would have gone down but obviously every country plant in Vermont would have been anxious to get qualified for the Connecticut order to secure the higher blend price.

Q. So the nearby differentials have reduced some of the (2164) incentive for plants to enter the market, or for milk to enter the market. A. Have reduced some of the incentive?

Q. Yes, sir. A. Well, the incentive has never been there; so I guess you couldn't reduce it; because the incentive wasn't there to any great degree apparently at the time that the order went into effect. But certainly they have had an effect. Or to put it the other way, as I have already stated, the incentive to get into the Connecticut market would have been very much higher if the order had been written without nearby differentials.

Q. Do you know of any handlers that are buying nearby milk that are applying a premium over the order price or over the blend price paid their producers for such milk? A. You are speaking about in the Connecticut order?

Q. Yes. A. Oh, yes.

Q. And that is actually being paid by the handler; is that not correct? A. Yes.

Q. Could you tell me about how much? First, how much is the premium? A. Oh, well, it varies all over the

lot. There are a lot of small handlers in Connecticut who have had the same producers right in the neighborhood for 30 or 40 years. There (2165) are various kinds of premiums paid. In the case of our own association, the premiums that are paid bear some relation, at least, to services rendered.

Q. Well, could you give me an idea of what is the highest premium that you know of that is paid by a proprietary handler for milk delivered directly to his plant? A. You are talking about ordinary market grade milk now?

Q. That is right. A. Oh, I would expect 15 cents, probably.

Q. And about what proportion of the milk would any premium apply to? A. Oh, any premium would apply to—

Q. Again I am speaking of normal quality milk. A. Oh, I expect 85 percent. That is pulled right out of the air but it wouldn't be too far off. All the handlers buying from our association except two are paying some premium.

Q. But part of this, of course, would be for the service your association is performing? A. That is right.

Q. If the class prices—if it was required that the handlers paid the 46 cents and 23 cents differentials for milk located in these areas, do you think they would continue to purchase milk from these areas to the extent that they do? A. I don't know just how to answer that question, Mr. (2166) Tipton, without a little more explanation from you. You mean if the government should suddenly discontinue the nearby differentials entirely, then do I think that handlers would pick them up and start to pay them?

Q. Yes, I think that is what I mean. A. No, I would expect not. Not to the degree that they are, anyway.

Q. At the last part of the quote in Exhibit 56, the quote from the late Dr. Swonger, you make the statement

that "the advantages of proximity to the market had been capitalized into load values long before federal regulations."

The first question is: What advantage of proximity are you talking about? A. Well, in the first place, it is Dr. Swonger talking.

Q. You adopted it as your statement. A. Well, Dr. Swonger was available for cross examination at the time he put the testimony into the record in the previous hearing. I have no quarrel, however, with and am happy to adopt all of the testimony that he put into the record.

I assume that the advantages of proximity that he is talking about is the fact that nearby producers in Connecticut, well, leaving out 1933, '34 and '35, along in there, I would expect have always enjoyed at least a 70 percent Class I utilization, since classified pricing started. And I assume that is the type of proximity that he is talking about or (2167) proximity advantage that he is talking about.

Q. So you are talking about the advantage to these producers on the prices that they had received by being closer to the market? A. Sure.

Q. You also state that these advantages which we have established as price advantages have been capitalized into the land values long before federal regulation. May I ask what significance you give this in retaining nearby farm differentials? A. We are getting into the area of the trained economist now, of Mr. Tipton, which everyone knows I am not. I can't use any of the technical terms that describe how these things come about, and their effect, and I am not very good at explaining them without the technical terms. But it is obvious that if for many years a certain area—and let's take in this case the state of Connecticut—has year after year enjoyed a certain relative level of milk prices relative to feed costs or labor costs or whatever you want to use, that this gradually

determines the price of farms. And it is easier to see how it works if you work it in the other direction. If you suddenly reduce permanently the price of milk in Connecticut by 50 cents a hundredweight relative to all the surrounding area, and the costs, the out of pocket costs, that go into production, there is essentially no doubt in my (2168) mind that land values would drop very abruptly, that people who have continued to produce milk over the years and have considered that one of the returns they are getting is a substantial, gradual increase in the value of land, would suddenly disappear.

I think that is what Dr. Swonger was inferring when he spoke about their having been capitalized into land values before regulation, and continuing since regulation, I might add.

Q. Then would you contend that it should be one of the purposes to perpetuate these land values, one of the purposes of federal milk regulation is to perpetuate these land values? A. I would like to answer that question yes or no, but I simply can't. I guess my answer is such that you can't characterize it as either. I think that the entire history of these nearby differentials indicates why they were adopted in the beginning and why they have been continued. The findings that were made by the Secretary's staff as late as late 1958 in the case of the Southeastern order, and early 1959, in the case of the Connecticut order, indicate that at that time at least the Secretary was convinced that this was a legal and logical and economically sound way to establish the price pattern in both Connecticut and Rhode Island, and the nearby area, that is, the Southeast New England area. And I don't believe that anything has taken place that has seriously changed that (2169) situation since early 1959. I certainly think that the thing needs to be studied. If the levels are wrong, maybe they need increasing; maybe they need decreasing. But certainly I think it would be

disaster to adopt the proposal that you made, even though your question, I realize, was: Do I think that it should be the purpose of the federal order to perpetuate these land values. I don't think that the purpose—I guess actually my answer, after I have had time to think out loud, is no. I don't think that I could answer yes. I must answer a qualified no, at least, in the fact that I don't think these federal orders should simply perpetuate these land values. I think that excellent economic study has been made of the problem up to now, and I hope that it will continue to be made.

Q. From your last remarks, I gather that you think there should be some attempt to measure what the nearby farm location differential rate should be. A. Yes. The Secretary is bound to consider your proposal before a recommended or final decision is made, and he will certainly have to re-examine them before your organization. You represent a group of responsible cooperatives. They have made a serious proposal to take them out of the order entirely. And I am sure the recommended decision will contain some language as to why they did or didn't adopt your proposal.

[2170] DR. WELDEN: Would it be in order to have Mr. Geyer read into the record Section 608(c)(b) of the Act? Or can that be taken judicial notice of?

EXAMINER HOLSTEIN: The Act is always part of the proceeding, and you may make any reference to the Act that you wish, sir, in the course of your brief or your suggestions to the Secretary after the proceeding is over.

MR. CHERNAUSKAS: Or you may examine on the contents of the Act if it relates to his testimony.

DR. WELDEN: O.K.

EXAMINER HOLSTEIN: What is the purpose for which you wish to refer to the Act, Dr. Welden?

DR. WELDEN: Section 608(c)(b) of the Act provides in Rule II the following language:

"For the payment to all producers and associates [2171] of producers delivering milk to all handlers of uniform prices

for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered, subject in each case only to adjustment"—and skip (a) and (b) and come down to (c): "The location at which delivery of such milk is made."

My only point, Mr. Hearing Master, was to establish that in my opinion there is a firm legal basis for nearby location differential.

EXAMINER HOLSTEIN: That type of reference, then, Dr. Welden, is more properly made in your brief, rather than by a question on cross examination. You are always free to point out to the Secretary of Agriculture that the law sustains a certain position which you take.

DR. WELDEN: O.K., sir.

EXAMINER HOLSTEIN: Are there any further questions?

Does anyone wish to question Mr. Geyer on his testimony with respect to Proposal No. 52?

That appears to be all on that.

THE WITNESS: I have a brief addition I would like to add, then.

EXAMINER HOLSTEIN: Go right ahead.

THE WITNESS: Mr. Tipton started to ask a question and changed his mind, which reminded me that I would like to stress just a little the same paragraph on page 2 that he was talking [2172] about, which sets forth the percentage rates back in the late 30's when the 46-cent nearby differential was originally established.

The reason for putting in that paragraph was simply to indicate that these nearby differentials have not been increased over the years, as we have had inflation, and milk prices, both Class prices and blend prices, have increased.

It seems that if it was economically sound to establish a differential which turned out to be nearly 25 percent of the blend price in the late 30's, a 10 percent nearby differential at the present time would seem to have recognized that the Secretary has been gradually reducing the capitalized value of these nearby differentials over the 25 years or so that the orders have been in effect.

That concludes my testimony.

EXAMINER HOLSTEIN: Mr. Tipton.

By Mr. Tipton:

Q. I would like to go ahead and ask a question on this. When the rate of the 46 cents and 23 cents was originally established, the 23-percent figure that you speak of, was the 23 percent a cause or an effect of the 46-cent differential? In other words, did they establish the 46 cents on the basis that it was 23 percent of the up-country price? A. No. But in considering the level that they would establish at that time, I am sure they took a look at the Class [2173] I and Class II prices. I guess we had four classes at that time. But the various class prices, and the blend prices existing at that time —and I am sure that somebody, in writing a recommended decision, although they weren't very detailed at that time, certainly wrote an economic justification, and must have in the economic justification that they wrote on it have determined that the rate was not excessive in relation to milk prices at that time.

Q. But actually they established what the rate should be, and the percentage relationship was a result of the rate that they established; is that not correct? A. Well, we can only speculate on that. I don't know whether the egg came first, or the hen, in this case.

MR. TIPTON: That is all.

EXAMINER HOLSTEIN: Any further questions?

DR. WELDEN: Is it permitted to reseat the implications of your last statement as to the character of the previous decisions?

THE WITNESS: This is a matter that has come back to haunt me, Mr. Welden. In those days I did not work with the federal order, but I felt very strongly that we were going to have our federal orders and insisted that recommended decision or final decisions must contain a published economic justification for every proposal that was denied and every proposal that was adopted.

* * *

[2249] WILLIAM J. NEWMAN

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT TESTIMONY

THE WITNESS: My name is William J. Newman. I reside at 145 Belvedere Drive, Cranston, Rhode Island. I am employed as manager of Local Dairymen's Cooperative Association, Inc., and appear in their behalf.

Local Dairymen's Cooperative Association, representing more nearby producers in the Southeastern New England market than any other organization, has membership in Connecticut, Rhode Island, and Massachusetts. LDCA's main office is located at 511 Westminster Street, Providence, Rhode Island.

I worked for the New Bedford Milk Producers Association, New Bedford, Massachusetts, from 1946, serving as their manager from 1951, until that association became part of LDCA [2250] on January 1, 1961.

As manager of the New Bedford Milk Producers Association, I filed the application for Federal regulations which led to the hearing that resulted in the Southeastern New England order. Although I only asked for regulations covering the area in which the New Bedford Milk Producers Association operated, I recognized the need for regulations in what is now the Southeastern New England area, and, when shortly thereafter producers marketing milk in other sections of the market reached a like decision, we joined with them in proposing the Southeastern New England Order.

The proposal for regulations in Southeastern New England under one order combined several former independent markets. Unlike the proposals to merge all or several markets contained in the hearing under consideration, the proposal for a SENE order came from practically all the producers marketing milk in the area. These producers agreed that marketing conditions, production patterns and costs, and sales requirements were similar enough to use one order for the Southeastern New England area.

This is not true of the proposed consolidation of all New England markets.

The Southeastern New England market has many characteristics and requirements that justify its continuance as a separate market.

[2251] 1. Although milk is sold in the area by a few large handlers who distribute milk in more than one market, the SENE market is serviced by an unusually large number of handlers, whose limited volume make them dependent upon nearby producers for their supply. See Exhibit 7, pages 13-17, pages 59-63, and page 58.

2. A substantial part of the supply of nearby milk for the Providence market comes from producers located in Connecticut. This milk is attracted to the Providence market by the price advantage that the Southeastern New England market has over neighboring markets because a larger per cent of receipts are sold at the Class I price.

Equalization of blend prices between Connecticut and Southeastern, and to a lesser extent between Worcester and Southeastern could seriously affect the supply of nearby milk for the Providence market. I feel that small dealers will be faced with a definite cost disadvantage in order to get their milk supply if the blend price incentive is eliminated by the consolidation of all markets.

3. The Southeastern area is bounded with the ocean on two sides, and contains miles of seashore. The area attracts a large number of summer vacationists, causing milk sales to reach their peak in the months of July and August. This sharp increase in Class I sales helps all of New England, but especially the Southeastern New England market.

[2252] Nearby farmers have been encouraged to increase milk production during the summer and fall months.

Even though the effect of these temporary sales benefits the Southeastern New England blend price during the summer months, it distorts the blend price advantage that SE has over the other markets. Without this effect, the blend price advantage SE would then have would be justified by the necessity of encouraging milk to move in our direction to meet requirements.

4. For several reasons, location of the market and even production being two, our market uses better than 90 per cent of its direct delivery milk as Class I. Only limited surplus handling facilities are needed in the market area.

LDCA contends that the returns to our members for their milk and the supply of milk for the many dealers who depend upon nearby farmers for supply requirements would be seriously affected by a merger of our market with other markets. This would be done without justification and probably without giving producers in the area an opportunity to make the decision.

We feel that the proposal to do away with nearby differentials is also unjustified, and oppose it vigorously.

EXAMINER HOLSTEIN: No, just a minute–

THE WITNESS: That is the only statement I have like that.

EXAMINER HOLSTEIN: All right. Go ahead.

THE WITNESS: The board of directors of LDCA, after [2253] discussing these proposals with the members at local meetings and the annual meeting, authorized the prepared testimony presented by Dr. Young. Dr. Clarke and Dr. Pierce have also been authorized by LDCA to testify for us, along with the Connecticut producer organizations, in opposition to the proposals to consolidate markets, and those that have to do with differentials.

LDCA endorses the prepared statement on these proposals made by Mr. Geyer in general and particularly to that part which applies to the Southeast market.

That concludes my statement.

EXAMINER HOLSTEIN: Are there any questions? Does anyone wish to question Mr. Newman?

MR. CARROLL: I think I have one.

EXAMINER HOLSTEIN: You almost missed it.

CROSS EXAMINATION

By Mr. Carroll:

Q. Will you explain to me why in your opinion the small dealers would be at a disadvantage under the proposal?

A. In order to import milk from great distances economically you must be able to buy your milk in 450 or 500 jug tank loads, and we have very many small dealers in this particular area who do not have that volume.

I know of my own experience in the New Bedford market, that there were two or three dealers who thought they could do better by going to New York State to buy their milk, and when [2254] they found because of their size volume they could not afford to bring the milk in, they then had to turn around and pay premiums to the nearby farmers in order to maintain the volume.

Q. How much is in a jug? The example you used? A. 40 quarts.

MR. CARROLL: That is all.

EXAMINER HOLSTEIN: Any other questions?

Any further cross examination?

Mr. Smith, did you have a question?

That seems to be all.

Thank you, Mr. Newman.

THE WITNESS: I might say I don't have copies enough of the statement for all concerned, but I do have a few if anyone is particularly interested.

(Witness excused.)

* * *

[3750] WILLIAM J. NEWMAN

was called as a witness, and, having been previously sworn, was examined and testified as follows:

DIRECT TESTIMONY

THE WITNESS: The local Dairymen's Association has inserted five proposals and I will testify on those five proposals.

I line them up according to category and the first proposal is Proposal Number 22, our proposal to increase the nearby differential to the same extent that the transportation differential is lowered, if it is lowered.

In the evidence presented by Dr. Harry P. Young in LDCA's opposition to the elimination of the nearby differential, he pointed out these pertinent facts:

First, that prior to the Southeastern New England order, farmers regulated under state orders or the Fall River order with a dealer pool received $1.68 over the quoted Boston 201-210 mile zone blend price. Producers were paid for their milk on full use value. He also showed that in Philadelphia with a handler pool in 1961 the city plant price was 93 cents over country plant prices, showing that where milk is paid for at use value, the difference between country and city blend prices are almost one dollar apart.

Secondly, Dr. Young presented tables showing the [3751] contributions made by the nearby farmers to the distant producers, as far as use value of milk is concerned, in the Southeastern New England market.

Any reduction in the 54 cents transportation allowance is bound to increase the use value of nearby milk. LDCA contends this increase in use value of nearby milk should be reflected by an increase in the farm location differential.

That is the end of my testimony on that proposal Number 22.

EXAMINER HOLSTEIN: Perhaps we better ask if there are any questions on that proposal before we go to the next one. Any cross examination? Mr. Aplin?

CROSS EXAMINATION

By Mr. Aplin:

Q. Mr. Newman, if there is an increase in the use value, why should it not be paid by the dealers other than the other producers? A. It would be, Mr. Aplin, if we were operating under a dealer pool but under the marketwide pool the nearby farmers do not get the benefit of their increase use value and the only way it can be reflected to them is in an increase in the nearby differential. We feel that the nearby farmers went along with the marketwide pool with the expectation that their use value or true use value rather be reflected in the nearby differentials.

[3752] Q. If the city plant differential of 54 cents is reduced for example to 44 cents, do you think that the association can bargain with dealers who pay any more than the minimum price? Will they recognize that the milk has any value above the city plant class one price if it comes from nearby producers? A. I think that perhaps we will pick up some of this but we still feel that the increase use value should also be reflected in the nearby differential.

MR. APLIN: No more questions.

EXAMINER HOLSTEIN: Any further questions on this subject?

MR. COBB: Yes.

By Mr. Cobb:

Q. If the transportation differential is reduced would that not reflect the fact that nearby producers milk is as much more valuable as up country milk? A. I don't follow you wholly there.

(The question referred to was read by the reporter.)

THE WITNESS: Are you referring to relation to the value of nearby milk to up country milk?

MR. COBB: Yes.

THE WITNESS: Again are you saying if the transportation allowance is reduced that would reflect it cost less to bring up country milk and therefore the difference in values have been reduced that much?

[3753] By Mr. Cobb:

Q. That is right, sir. A. There is no question about it. If the evidence presented has shown that the 54 cents should be reduced, why then there is evidence that the Class I values of the nearby milk and up country milk are not as far apart as they are now.

Q. Well, if that is the case, then that would indicate that perhaps the nearby farm location differential should be reduced rather than increased, would it not? A. We–no, we don't agree with that at all because I think we have already shown that on the basis of the use value in the Southeastern market now that nearby milk is contributing–I don't have these figures but they were presented by Dr.

Young—a considerable amount of money per hundredweight to up country producers. I think in the up country market where 90 percent or better of the milk is used as Class I indicates that nearby milk has a much higher use value than it is receiving in the blend price even with the nearby differential they now receive.

Q. Well, in allocating milk at a city plant to Class I does not nearby producer milk receive priority of assignment to Class I ahead of up country milk? A. That may be true but it is used in Class I rather than up country milk.

Q. Well, an example— [3754] A. I don't think the up country or people of up country plants are transporting milk down to be used for Class II.

Q. Well, then if that is the case then if a city plant happened to have 50 percent of its milk from nearby producers and let's say 50 percent of its milk from up country producers, and let's say it had 75 percent Class I utilization with the exception of this 5 percent set aside, the up country producers then would have all of the Class II milk assigned to them, would they not? A. Yes, and the same thing would be true and a dealer pool set up. We don't feel that these market pools were set up to make it possible for distant milk to take the Class I sales that rightfully belong to the nearby farmers away from them. Again I think you have to consider the use value of the milk in determining the prices to the producers.

Q. Well, let's take the Philadelphia order then. Let's say, and I think you mentioned the Philadelphia order, an individual handler pool, let's say a handler under the Philadelphia order had a 75 percent Class I utilization. Would not all of the producers delivering to that handler regardless of whether they deliver to a city plant or to a country plant receive the same percentage Class I and Class II, receive the same blend price, would they not? A. That is true, that is right, but I think that Dr. Young showed in his testimony that in comparing all [3753] the plants in the Philadelphia market that the producers shipping to the city plants received somewhat around, I think it was 93 cents,

I forgot what the Philadelphia was, around a dollar more than the producers shipping to the distant plants and now we are talking about a market wide situation in these market pools in New England. We feel that the use value must be reflected to a large extent at least in the payment to the nearby farms or else the idea of market wide pools should be abandoned and we move to dealer pools.

MR. COBB: Thank you. That is all I have.

EXAMINER HOLSTEIN: Any further questions on this subject?

Mr. Geyer.

By Mr. Geyer:

Q. Mr. Newman, in a question from Mr. Cobb you said that if the Secretary decided to reduce the zone transportation differential would that not be an indication that Class I milk near the market or milk near the market was worth less, and I believe your answer was something to the effect that maybe it would. My question is, would it not be more correct to say that if someone convinced the Secretary that the 54 cents ought to be reduced that would not necessarily mean that it was sold, that the milk was actually worth less than at the market, would it? A. I think my full answer, Mr. Geyer, was that if the evidence showed that the Class I values between up country milk and city plant milk should be reduced, and I don't think there is any evidence to that extent yet, well, then that would indicate that perhaps the differential between the two values should be reduced.

MR. GEYER: Fine. I guess I didn't hear your answer correctly. That sounds fine to me. That is all I have.

EXAMINER HOLSTEIN: Any further questions on differentials?

Mr. Whitney.

By Mr. Whitney:

Q. With regard to the present circumstance when we have supply conditions of surplus rather than shortage, speaking of the change in the 54 cent differential times at this time, if we were in short supply and were reducing the 54 cent differen-

tial, would not the natural thing be to raise the price in the 21 zone? A. Well, of course I myself feel that many of the causes that are given for the possible need, I don't know whether it has been proven here or not, of reducing this 54 cents has resulted from savings in handling milk up country and I believe that those savings should be reflected in increased returns to the up country farmers.

Q. So in essence it is at this time not only the question of the change but a question of change in relation [3757] to surplus versus short supply conditions?

(The question referred to was read by the reporter.)

THE WITNESS: Well, Mr. Whitney, I have not testified in regard to this 54 cents. I just pointed out the one thing, that any reduction in 54 cents is bound to increase the use value of nearby milk and I feel that that should be reflected in increased nearby differentials.

MR. WHITNEY: That is all.

EXAMINER HOLSTEIN: Mr. Sykes.

By Mr. Sykes:

Q. Mr. Newman, is it a fair inference from your testimony that the use of the nearby location differential is a matter in which the higher Class I utilization of nearby milk can be reflected in a market wide pool? A. That is right, that is my contention.

Q. Would it also be fair to say that if there were no nearby location differential for that or if your organization had known that there would be none, would you feel that the situation would be more fairly handled market-wise by an individual handler pool? A. I feel myself that nearby farmers have no other alternative but to ask and demand for a handler pool if there is no nearby differential.

MR. SYKES: That is all I have.

EXAMINER HOLSTEIN: Mr. Tipton.

[3758] By Mr. Tipton:

Q. You do have the market wide pool in southeast now, is that correct? A. That is correct.

Q. And one of the items for consideration as to what should be any nearby farm location differentials is differentials

that are customary—customarily applied by handlers, is that not correct?

(The question referred to was read by the reporter.)

THE WITNESS: I guess I don't understand the question.

EXAMINER HOLSTEIN: Can you rephrase the question, Mr. Tipton?

MR. TIPTON: Yes.

By Mr. Tipton:

Q. Well, under a market wide pool one of the ways of adjusting the returns of the producers is by making some type of differential for differentials that are customarily applied by handlers, is that not correct? A. Are you referring to having handlers paying different prices for their milk?

Q. No, we have an—we have a market wide pool. A. I understand the market wide pool, the Class I price and Class II price. Now you are talking about differentials.

[3759] Let me just make a statement. We have a market wide pool. You have a total value of milk in that pool as determined by the class prices. Now one of the ways in adjusting the distribution of those proceeds from the pool is by giving recognition to differentials customarily applied by handlers is that not correct? A. What do you mean by customarily applied by handlers?

Q. Well, the differential customarily applied by handlers? A. For instance, name one.

Q. A differential that is applied by a handler over some other price some other handler applies. A. Well, my understanding was under our federal order system all handlers are paid the same price for their milk at the same location. I mean with the exception of this transportation allowance.

Q. They pay the same minimum price do they not? A. Well, minimum prices generally mean the same price, at least under today's conditions.

Q. Well, do you know of any differentials by handlers in the nearby area or in the city plant area in the southeast market that are customarily applying differentials? A. Yes, there are some sections in the southeastern market, we have handlers who pay premiums for milk reflected in actual price paid, quality premium or perhaps reduced [3760] trucking.

Q. But that premium that that handler is paying, he pays the payment of that premium—he bases the payment of that premium on the fact that he himself assumes or makes a determination that that milk has that value to it, is that right? A. Oh, no question about that. In the southeastern market we are in a fortunate position where the premiums are being paid at the end of the line and it reflects again perhaps that the Class I values of milk in that area are a little bit on the low side to some dealers, not to all dealers.

Q. Well, could not the possible solution to your proposal here be to write those premiums into the order to make up the difference for any reduction in the transportation differential rather than trying to increase the cost of up country producers? A. We are not increasing the cost of up country producers because we feel we are contributing more and more to up country producers all the time from nearby milk due to the fact that there is a difference between the use value of nearby milk and the blend price received by them which goes to the up country producers.

Q. Well, I will remove the segment from my question dealing with the increased cost to up country producers. [3761] A. What is that again?

EXAMINER HOLSTEIN: State your question without that qualification, Mr. Tipton.

By Mr. Tipton:

Q. My question is, if these premiums are there and are existent, then would not a possible solution to your proposal be to write these premiums into the order as payable by the handlers rather than increasing the nearby market location differentials? A. I don't know—I don't think it is possible to write them in the order for this one reason, that the same condition did not apply to all handlers buying nearby milk in the market. You try to write prices that reflect general conditions and then you are bound to have some variations on the plus side. You try to keep them as low as possible or else the price in my estimation is too low.

Q. In other words, if you were to write some differential in, some of the handlers would not be willing to pay that

differential? A. Some handlers would not have to pay it. Some of them do but I think that therefore you cannot set up a price that is going to apply to everybody.

Q. What I am saying though is if you were to determine that the average premium paid, and I am just using [3762] figures as an example, that the average premium paid was ten cents or something to this effect and so therefore you could convince the Secretary to write into the order some increase in the price the handlers must pay for their milk in some way, an equivalent to ten cents, now my question is are you saying then the handlers would probably not purchase that milk? A. I guess, Mr. Tipton, you are not fully familiar with the market in question, the southeastern market. That market was make up of a merger of three or four independent markets. The same condition does not apply to all sections of the southeastern market. In the New Bedford area, which is delegated at the end of the line, that is where the premiums are paid because they are down at the end of the line. You get them in this large section and very few premiums are paid, perhaps one or two dealers who demand special exceptionally high quality milk and are willing to pay a little bit extra. Therefore you cannot apply uniformly to the southeastern market a price schedule.

We tried seven cents over and that didn't work. It would have worked in the New Bedford area but it would not work in the other sections. I don't think you can do it in the price schedule, it has to be done on an individual area basis. That is, I think, one of the arguments against merging all these markets, you are going to have more [3763] problems along that line if you apply incorrect pricing to get milk to move where it belongs.

Q. I take it from that answer then that you would object to increasing the price that a handler must pay for his milk in some way to offset any reduction in transportation differential, is that correct? A. As far as regulations are concerned, yes.

Q. Then I didn't get the full reason as to why you oppose that. Is it because handlers would not pay any more? A. All

handlers must pay it. All handlers would not have to pay it, some would.

Q. What do you mean they would not have to? It is written into the order; if they were going to buy milk they would have to pay these, would they not? A. No, they could buy the milk of--out of the Boston Order or one of the other orders or order markets.

MR. TIPTON: I guess that is all.

EXAMINER HOLSTEIN: Mr. W. P. Smith.

By Mr. W. P. Smith:

Q. Mr. Newman, following the general thesis of the questioning of Mr. Whitney, if we could come to a condition while we were in a shortage situation rather than the present surplus situation, would it not be true that the actual cost of milk up country would in effect put this reduction, that part of this reduction in the transportation [3764] differential through the charging of premiums? A. Yes. I imagine that is true. I am not fully familiar and also I have not testified on the 54 cents except as it applies in its effect on the use value of nearby milk.

Q. Mr. Newman, you have been in the general southeast area now for a good many years and I would like to take you back through those years to shortage conditions. Is it not true that the handlers in the southeast area in order to obtain supplies of milk from either northern New England or New York have been charged sizeable premiums during shortage periods? A. Yes, that is true. My first job with the association in New Bedford was to allocate the nearby milk. The H. P. Hood Company came down and demanded its fair share of nearby milk and it was my job to allocate to all dealers in the New Bedford market their share of local milk, and it must have been because up country milk was quite extensively short.

Q. You mean to state for the record that H. P. Hood demanded a share of local milk? A. Well, I call it a demand, yes.

Q. And conditions must certainly have been different in those days than they are now? A. No, the Hood Company has been fair about buying local milk but in those days there was a definite cost advantage to having local milk.

[3765] Q. I meant supply conditions, Mr. Newman? A. Oh, yes.

Q. I didn't mean conditions in regard to the Hood Company, we both realize that their operations are very fair. A. That is right.

Q. Let me ask you this question. Following that experience which you are speaking of now, was it not true that many of the handlers in southeast New England are gravitated into the New York area because of sizeable premiums charged by northern New England handlers? A. I know that they went out to New York, I don't know what reason but I know that is where they went to buy their milk.

Q. Generally speaking, it would be because they could obtain their supplies at a lower price? A. It would seem so.

MR. W. P. SMITH: That is all.

EXAMINER HOLSTEIN: Any other questions?

Mr. Whitney.

By Mr. Whitney:

Q. In order to bring out what I hope will be a little clarification of the record here, these premiums which I have discussed in response to this past testimony was nothing that would be incorporated in any federal order provision, [3766] is that true? A. I didn't hear the question.

(The question referred to was read by the reporter.)

THE WITNESS: It is not incorporated in any federal order provision.

By Mr. Whitney:

Q. Would your proposal be the same if we were trying to amend the provisions under those conditions at this time? A. Would my proposal be the same if we were trying to amend those conditions?

EXAMINER HOLSTEIN: Provisions.

THE WITNESS: Which provisions are you referring to now?

By Mr. Whitney:

Q. These provisions in the current order, under those provisions, sir.

EXAMINER HOLSTEIN: Do you understand the question?

THE WITNESS: No.

EXAMINER HOLSTEIN: The witness does not understand the question. Can you rephrase it?

By Mr. Whitney:

Q. If the conditions that you described in the past were existent today would your proposal be the same? A. No. I think perhaps before I make the answer, you are referring to the time when milk was real short, [3767] is that what you refer to?

Q. Yes. A. No, I think that we would be asking for even a larger differential than we are asking for here.

Q. Now you mean you would want to increase the city plant differential? A. I thought you were talking about nearby differential. I am talking about nearby differentials. Is that what you are referring to? The 54 cent differential?

Q. Let me ask you what do you mean in your proposal by the words "by what ever reduction may be made in the zone price differential for the 21st zone." A. We are referring to the percentage reduction in the 54 cent transportation differential, that that same reduction be applied to the nearby farm location differential.

Q. Is it your concept that we should reduce the 54 cents in which I believe you— A. I want to emphasize many times I am not testifying on the reduction of the 54 cent differential in any way, shape or manner. I am just saying that if there is one that the reduction should be reflected in the increase in the nearby differential.

Q. I understand, but do you understand that when you deal with a differential you have two ends to this affair and I am asking you whether you chose the 21st zone or the [3768] city plants? A. Well, again I will say that I have not started either end but if I were it would be up country to raise that price. I don't know whether it is needed, it should be done or anything else, but I am just saying if it is done of course we would prefer to have it done up country.

Q. Then we do recognize there is no question about alternatives? A. Absolutely, I agree there are two alternatives.

Q. Now if this is to be a reduction of 14 cents for illustration purposes, under your proposal would the increase in

farm location differentials be 14 cents? A. Yes.

Q. Have you made any computation to indicate the difference that this would make when applied to the five separate orders? A. Nearby farmers would lose money if the reduction of 54 cents were made at the city level. We would hope to pick up a little bit of it in premiums.

Q. If your proposal was adopted, have you made any calculations with respect to between southeast and Boston for illustration? A. No, I have not.

Q. In the market where two thirds of the milk is nearby, a great–a flat rate of 14 cents would [3769] have considerably more effect on the resulting price to country producers would it not, than in the case of a market where one third of the milk was nearby? A. That is true.

MR. WHITNEY: That is all.

EXAMINER HOLSTEIN: Any further questions?

Mr. Sykes.

By Mr. Sykes:

Q. Just one question, Mr. Newman. In the time in the southeast area prior to the promulgation of the market wide pool order, were these higher prices that were being received by local producers the result of any computation of distant prices and then the adding of some amount to it or was this just the product of Class I utilization in a handler's plant and reflected in the prices received by the producer shipping to him? A. Prior to the southeast order nearby farmers got returns that reflected the use value of that milk and we feel again that the nearby differential despite the arguments that were given for discontinuance does reflect the added use value of nearby milk over distant milk and it should be continued.

Q. Let me ask one further question then. These handlers that were paying these prices as a result of higher utilization, they did not arrive at the final pay price [3770] to producers, did they, by any computation of any other price than the adding to it of a set figure like a differential? A. No, that is right.

MR. SYKES: That is all.

EXAMINER HOLSTEIN: Mr. Tipton.

By Mr. Tipton:

Q. I have two questions, one immediately following this line of questioning.

Do you mean to say that the handlers in southeast New England before federal regulations were put into effect, that they did not take a look and make any computation of alternative costs of their milk—alternative price I will say of milk of up country sources? A. Oh, I imagine to the extent that milk could be bought for what ever price it might be sold at in other areas they did look at that.

Q. So they did actually make two computations? A. But so far as their computations in their paying of the producers from whom they were buying their milk, that didn't enter into what they decided to pay producers. Whether they would buy the producers' milk, yes, but as far as what they would pay the producer, no.

Q. That was established under state regulations, that they bought it from producers and sold it in the state. That was established by state regulations? [3771] A. Yes.

Q. But they did look at other prices? A. Whether they would buy that milk or not, yes.

Q. Then I have one other question and that was you were talking a few minutes ago in regard to some questions asked by Mr. Smith about premiums paid during short periods. Were you not talking about handling allowances as synonymous there, is that what you are referring to really, a negotiated amount of what they would pay some handler for a volume of milk? A. Your differential of up country milk that they were buying?

Q. No, he asked some questions about premium. I was asking what premium you were referring to? A. I imagine it would be handling alone or having something like that.

Q. Then my next question is, do you know during this same period of time as to what the equivalent handling allowance, or what ever you want to call it, was in Boston, for example? A. No, I am not familiar with what they paid. I know they must have paid some handling allowance in order to continue the competition that existed at that time for nearby milk

because the prices set by both federal and state regulations were somewhat above Boston.

* * *

[2255] WILLIAM T. SMITH

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT TESTIMONY

THE WITNESS: I will try to read very slowly, in the event I say anything of earth-shaking proportions, so that you can get it.

Before I start, I would like to endorse the statement of Dr. Young.

EXAMINER HOLSTEIN: For the record, will you give the reporter your name?

THE WITNESS: My name is William T. Smith. I reside at 562 Reed Road, North Dartmouth, Massachusetts. I am here representing the members of the Fall River Milk Producers Association, Incorporated, 613 Palmer Street, Fall River, Massachusetts.

The association is primarily a bargaining cooperative, but has established some facilities for physically handling milk and performs a function as a balancing plant in the Southeast New England Federal milk marketing area.

It appears in this hearing everyone is going back to the beginning; so I felt constrained to start with my beginning.

I was born and raised on an 80 to 100 cow dairy farm in West Brookfield, Massachusetts. From my earliest recollection I have been in contact with the marketing of milk. My [2256] uncle, who operated the home farm in conjunction with my father, was president of an operating cooperative in the Worcester, Massachusetts, market, which organization was later sold to Mr. Cutting—more recently identified as the operator of Hillcrest Dairy, one of the larger handlers in the Worcester market. My father sold his interest in the home farm, and we moved to a smaller dairy-poultry farm in North Brookfield, Massachusetts, where I had complete charge of the milk production.

I matriculated at the Massachusetts Agricultural College, was graduated with a B.S. degree in animal husbandry from the Massachusetts State College, completed the residence requirements for an M.S. degree in agricultural economics, but did not at that time complete the required thesis.

More recently, I have reactivated my degree work, have taken several more courses, and am now engaged in writing a thesis on "Developing a Method of Pricing Milk Based on Its Total Solids Contents."

I taught vocational agriculture at two high schools in Massachusetts, and since 1941 have been employed as manager of the Fall River Milk Producers Association. I have also served as a district manager for New England Milk Producers Association, and helped organize and served as manager of the Southeastern Massachusetts Quality Milk Producers Association.

I own a herd of purebred Holsteins, one member of which just broke the Rhode Island state record for production [2257] in her class. I don't know whether that gives me any credit or not, but the cow did well.

The Fall River Milk Market has been under Federal regulation continuously since April of 1934. I have appeared at all the hearings concerning Fall River since 1941. I was one of the early proponents of expanded regulation in this area, and in 1955 submitted a proposal in this regard.

The Fall River Milk Producers Association was one of the proponents of the Southeastern New England Federal Order. It was my particular task at the promulgation hearings to develop evidence showing the interrelationship of distribution of milk in the proposed marketing area.

Now I would like to endorse the statements of Mr. Young, Mr. Geyer, and Mr. Newman, on behalf of the Fall River Milk Producers Association.

Statement in opposition to Proposals No. 1 and No. 2:

There have been many changes in the distribution pattern since the inception of the Southeast New England Federal Order,

and the members of the association which I represent are aware of the necessity for the change in regulations to keep step with the changes in the milk industry; however, it is our contention that none of the evidence submitted by the proponents of Proposals No. 1 and No. 2 would solve the problems that have been created by changes in distribution.

It has been shown by the statistics introduced by [2258] several witnesses that the problems as they exist today have not been created by the so-called nearby producers. The number of nearby producers in the Southeast pool has declined from a total of 1,447 in January of 1959 to 1,148 in August of 1962–a drop of 299 producers or 20.6 per cent.

Nearby production declined from 398,150,000 pounds in 1959 to 390,807,000 in 1961, or a drop of 18.4 per cent.

The blend price received by members of the Fall River Milk Producers Association declined from $6.19 per hundredweight in 1958 under the old Fall River Order No. 47, as amended, to $5.60 in 1962 under the Southeastern New England Federal Order. This decline amounts to 9.5 per cent, compared to a decline in the blend price for the Boston 200 to 210 mile zone from $4.53 in 1958 to $4.46 in 1962, or a drop of seven cents per hundredweight, or 1.5 per cent.

This presentation also ignores the fact that the basic Boston blend price climbed to $4.81 in 1959 (an increase of 27 cents over 1958) the first year of the operation of the Southeast Order.

Due to increasing production, the blend price in Boston has declined every year since 1959–$4.72 in 1960; $4.52 in 1961, and $4.46 in 1962. Should every producer in the nearby area cease producing milk, there would be a temporary increase in the basic blend price in Boston due to the temporary increase in Class I utilization of Boston milk, but nothing that has been [2259] advanced by the proponents of Proposals No. 1 and No. 2 would deal with the basic problem of an ever-increasing supply of milk.

Parenthetically, we intend to deal with this problem under another proposal, so we will not develop this point at this time.

The proponents of Proposals No. 1 and No. 2 have ignored the history of milk marketing and certain basic economic

facts of life by their assumption that nearby differentials are not based on real value of the milk involved. They show a complete ignorance of the facts when they attempt to rationalize the pattern of distribution for Boston with that of Southeastern New England.

Evidence has been introduced into this record to the fact that the five largest handlers in Boston receive approximately 70 per cent of the milk from producers. Even though the number of handlers in the Southeast New England marketing area has been declining even more rapidly than the number of nearby producers, there is no such disparity in size of handlers as that portrayed by the figures for Boston.

In 1961 the Fall River Milk Producers Association, Inc., sold milk or milk products to a total of 83 handlers of all sizes, ranging from the largest handler in New England to very small producer-handlers. In 1962 this number had declined to 63. However, the great bulk of milk in the Southeast marketing [2260] area is still distributed by medium sized handlers who depend on locally produced nearby milk for their supply.

Unless a handler has distribution of a minimum of 172,000 pounds of milk per week, it is not economically feasible for him to depend on distant sources of supply. The cost of transporting milk over distance in less than 500-can lots is prohibitive.

We have used the figure of 172,000, which represents a shipment of four 500-can tanks per week as a minimum. This minimum represents a distribution of approximately 12,000 quarts of milk on a daily basis. Even this figure would not put the handler in a preferred position in procuring an up-country supply. He could not economically maintain receiving facilities in the country for such a small amount of milk. It has already been testified to that the great bulk of the milk up-country is controlled by a very few individual handlers.

If Proposals No. 1 and No. 2 are adopted as they have been submitted by their proponents, the resulting blend prices to nearby producers will quickly force many producers out of business. Then the handlers who depend on locally produced

milk for their supply would be at the mercy of a very few handlers who control the supply of milk up-country. I doubt very much if the Secretary could find justification for such a situation

Mr. Beal stated that "our Northern New England dairy [2261] farmers cannot afford to subsidize their southern cousins." We, the "southern cousins," are not asking for a subsidy from anyone; however, our experience with the organization which he represents leads me to state that we "southern cousins" would be most happy to receive the figure for our milk that United Farmers and other Boston handlers who control the up-country supply have charged us for their milk when we have had to depend upon them.

The situation in this regard got so bad prior to the inception of the Southeastern New England Order that we were forced to go outside of New England for emergency supplies to meet the Class I requirements of the handlers who were depending on our association for their Class I needs.

One Boston handler informed me that he would rather separate his milk than to sell it to me at $1.00 per hundredweight over our Class I price, which at that time was 29 cents over the Boston Class I price.

I do not mean to imply by these remarks that that exact situation pertains at the present time, but my experiences over the past 22 years accentuate the belief that history has a way of repeating itself.

Even with conditions over the past three years being relatively good, in comparison to those which would accrue were Proposals No. 1 and No. 2, as presented by their proponents, to be adopted, nearby farmers have been going out of business [2262] Others have found that the only way they could stay in business was to adopt vertical integration and become producer-distributors.

I have made a change in the text, here.

If several of the proposals as they have been submitted were to be adopted, the cumulative effect on the blend price to nearby producers would be a drop of at least 60 cents per hundredweight, or approximately 10.7 per cent, when compared to 1962.

This would mean a total drop of over 20 per cent in the blend price to nearby producers, since the inception of the Southeastern New England Federal Order.

I would like to break in here and say that I arrived at that figure of 60 cents, shall we say, rather hurriedly. So I took the time to develop that figure just a little more thoroughly, in the event that some of the folks here might question my arithmetic.

I don't think it is possible to get an exact figure for the effect of these various proposals on the price to nearby farmers. But what I did was to take the city blend prices for 1931, and weight them by the volumes of milk in the five New England Federal orders. And by using that type of computation, the Southeast nearby or city price would have been reduced by 14 cents.

I think anyone who was familiar with the marketing of milk in New England would agree with me that the use of the city [2263] price is a little bit fictitious, in the sense that except for the so-called smaller orders, there is relatively small amounts of producer milk in the city zone.

So that if I were able to arrive at a correct Class I price, weighting the Class I price by volumes in the various zones, I am confident that the resulting price to producers would have been much less than that by the use of the city Class I price.

To the 14 cents, there is a proposal which would deduct from the present 54 cent location differential 17 cents, and making the location differential 37 cents, or a cut there of 17 cents.

And I have another figure of 23 cents, and for the life of me, at the moment I can't tell you how I arrived at it. But I came up with a total of 54 cents as the computed cut of price were all these proposals to be adopted. Perhaps in a minute I will remember what the 23 cents came from.

I would say that the Fall River Milk Producers Association recognizes that there is a disparity between the city delivered price and the 200 mile zone price, but we would solve that particular problem by raising the price in the 200 mile zone, rather than cutting the city delivered price.

Back on the statement: I have said that this would result in a reduction of 20 per cent in roughly six years to our nearby producers.

[2264] No economist in his right mind would advocate such a drastic drop in price for any group of milk producers. No administrator could justify such treatment. There would be no economic gain to any consumer. In fact, just the opposite would be true, because larger amounts of milk would have to be transported longer distances to meet the Class I demands of consumers in Southern New England.

In the words of Mr. Beal, it is uneconomic to transport a product which "contains about 88 per cent water." Soon the diseconomy would result in an increase in the Class I price or a greater cost of milk to the consumer.

This increase in cost to the consumer might come sooner rather than later if Proposal No. 1 were adopted with the resultant decrease in number of handlers in Southern New England.

I doubt very much if the Department is in a position to answer a charge that it is encouraging monopoly. Surely a situation where five handlers control over 70 per cent of the milk from producers is very realistically approaching a monopoly situation.

Federal orders should develop by evolution, rather than by revolution. Regardless of what one thinks of Darwin, the principles which he espoused are more palatable when applied to the field of milk pricing than those advocated by Karl Marx.

The members of the Fall River Milk Producers Association [2265] are realistic. They recognize that changes in the distribution of milk require changes in federal regulations. They are not happy that the change in the pooling of one country supply plant from one pool to another can effect so great a change in the blend price received by producers in the various pools involved.

When they advocated federal regulation in the Southeastern New England area, they envisioned a pool which would carry enough reserve supply so that it would be self-sustaining. They subscribed to the thesis that prices to producers in the

same supply areas should be equated as nearly as possible. They were not happy to sacrifice so great a cut in the price they received for their milk, but they found solace in the fact that a great quantity of milk which had formerly found its way into "their" market was not being regulated.

While they were not overjoyed at giving more than a million and a half dollars per year to their "up-country cousins," at least they no longer had to defend themselves against the charge of building a wall around "their" market. (More recently, walls have become very unpopular.)

Now at last milk could flow freely. Even the pooling requirements for both distributing and country supply plants we felt were on the low side. We fail to see how a distributing plant with less than 50 per cent Class I distribution in the marketing area or a supply plant with less than 30 per cent of [2266] Class I sales to plants in the marketing area can really be said to be associated with the market. Again we realize that such facts as the decision in the LeHigh Valley case could cause us to review our position.

That is the end of my statement on 1 and 2. I have a very brief statement on 3, which is very similar.

EXAMINER HOLSTEIN: Proposal 3 does not concern the Southeast New England Marketing Area at all.

THE WITNESS: No. Only in a general way. I have about a paragraph.

EXAMINER HOLSTEIN: All right. Go right ahead.

THE WITNESS: We have no objection to the adoption of Proposal No. 3, not because it does not directly affect the majority of our members (we have had members selling in both the Boston and Worcester marketing areas), but because we believe this is regulation by evolution rather than by revolution.

Springfield and Worcester are nearer than Fall River, New Bedford, and Providence to the Boston country supply area. The provisions of all three orders are identical. The majority of the producers are members of the same cooperative, and have established facilities for the handling of the reserve milk which is necessary to support the Class I sales in the marketing area.

The continuance of nearby location differentials as proposed in No. 3 should guarantee the continuance in production [2267] of nearby producers on whom many handlers in Springfield and Worcester depend for their supply. It should not be any more expensive to deliver supplemental milk to those cities from up-country than to Boston.

The transportation differential and country plant handling allowance should be adjusted so that locally produced milk of good quality should be as acceptable as up-country milk. We hold no brief for the construction of powder plants in Southern New England. If it is necessary to squeeze the water out of milk in New England, it should be done up-country.

Now, Mr. Hearing Examiner, there were some statements made that there were no premiums being paid for milk in the so-called nearby area, and that if we could bring proof of such premiums into this hearing, it would change the general thinking of the proponents who made that general statement. So over the weekend I have had my people prepare a list of handlers in the Southeast New England marketing area who we know are paying premiums of one kind or another.

Some of these premiums are a cut in trucking rates over what the rate would normally be, or what it was prior to the inception of the order. Some of them include payments for the installation of bulk tanks, and some of them are based on quality considerations such as low bacteria counts, and so forth.

And I have here a copy of the list of handlers, as submitted by the Administrator of Order No. 14, the Southeast [2268] New England marketing area, as of July 31, 1962.

There were at that time a total of 103 handlers. Some of these handlers represent two or three plants of the same organization. For example, United Farmers of New England, of Cambridge, New York, United Farmers of New England, at Middletown Spring, New York, United Farmers of New England at Shoreham, Vermont.

Since the publication of this list, two of the handlers have gone out of business, so there are to the best of our knowledge now just exactly 100 handlers in the Southeast New England area.

Of those handlers, we can produce information to the

effect that 39 were paying premiums of one kind or another. And I have broken the 39 down into the following categories. I have called those who have distribution of 10,000 quarts or more per day "large" for purposes of this information. For those who have distribution of from two to ten thousand quarts per day, "medium." And for those who have less than 2,000 quarts per day, "small."

There are 15 handlers who are paying premiums of one kind or another in the large category; 10,000 quarts or above. There are 14 handlers from the medium, 2,000 to 10,000, category, paying premiums, and 10 handlers paying premiums when their distribution is less than 2,000 quarts a day.

Now, there may be other handlers for whom we do not [2269] have this information. But I am going to say that at least half of the nearby milk is receiving a premium of one kind or another, which definitely refutes the statement that was made that nearby milk has no greater value than milk in the 200 mile zone.

And there was also a statement made that there are no processing facilities in the Southeast New England area. I am not here to maintain that the Fall River Milk Producers has a very extensive processing facility, but we have handled up to a thousand 40-quart cans of milk a day, and I have done a good part of it myself, and so I have prepared a statement, or a table, showing the monthly receipts of milk from producers in cans and in bulk.

The receipts of milk at our plant from handlers, milk which they would have no particular use for, is Class I. The receipts of milk from producer-handlers, total receipts by months, our Class I sales, Class II sales in such categories as ice cream manufacture or cheese manufacture, where we ship the milk from the plant at Fall River to some other plant; and then we have a term called "Class II disposal." That should be designated as "Disposal in our cheese manufacture."

I would like to present these for identification, sir.

EXAMINER HOLSTEIN: Are you offering the tabulation as an exhibit?

THE WITNESS: I am.

[2270] EXAMINER HOLSTEIN: The tabulation just described by Mr. Smith will be marked Exhibit 58 for identification.

(Exhibit No. 58 was marked for identification.)

THE WITNESS: That concludes my statement.

EXAMINER HOLSTEIN: Does that conclude your statement sir?

THE WITNESS: Yes, it does.

EXAMINER HOLSTEIN: It is now 12:30. We will recess for lunch at this time, and resume in this room at 1:45 p.m., at which time Mr. Smith will be available for cross examination.

(Whereupon, at 12:30 p.m., the hearing was recessed, to reconvene at 1:45 p.m., the same day.)

[2271] AFTERNOON SESSION

1:45 p.m.

EXAMINER HOLSTEIN: The hearing will please be in order.

Mr. Smith is available for cross examination on his direct testimony, including any questions as to the admissibility of Exhibit No. 58.

Whereupon,

W. T. SMITH

the witness on the stand at time of recess, resumed the stand and testified further as follows:

DIRECT TESTIMONY (Resumed)

THE WITNESS: Mr. Hearing Examiner, before we start the cross examination: I made a statement that I had computed a total of 54 cents as the possible reduction in price to our nearby producers if the various proposals which have been submitted were adopted; and I confessed to a lack of remembrance as to how I arrived at one figure.

The 23 cents is my estimation of the cost to our nearby producers of the elimination of the nearby location differential.

And I would like to say one more thing while I am talking.

I didn't go back quite far enough in my introduction of myself. My people came here with Roger Williams, way back [2272] in the time of the Indians. And on behalf of them and the people that have followed since, I would like to say that you have conducted this hearing in as fine a manner as any I have ever attended, sir.

EXAMINER HOLSTEIN: Thank you, sir. That caught me unawares.

Does that complete your statement?

THE WITNESS: Yes, it does.

EXAMINER HOLSTEIN: All right.

Mr. Smith is now available for cross examination, including his last statement.

Mr. Lent.

CROSS EXAMINATION

By Mr. Lent:

Q. Before I start to cross examine Mr. Smith, I would like to say that my mother was a DAR on account of participation of her family in the Connecticut Hill issue.

Mr. Smith, will you please describe the milk supply of the Southeast New England marketing area? A. Well, Mr. Lent, I think that there are enough exhibits of statistics in exhibits which have already been submitted to give a very excellent description of the supply of milk in the Southeast area.

At the time of promulgation, we estimated that roughly 80 per cent of the milk which would be distributed in the [2273] Southeast area would be what would be characterized as nearby milk, and probably some 20 per cent would be required to be shipped in from distant zones.

That proportion has increased on the distant milk to something like 25 per cent now, and the nearby milk, I would guess, is around 75 per cent of the total.

Q. How much of the milk is New England Federal order milk, and how much is under Federal order, and how much is unregulated milk? A. Again I will refer to the exhibits that are already in evidence. I think it would be repetitious for me to break down that information.

Q. Well, there is some in each category, is there not? A. Yes.

Q. And that is not producer milk under the Southeast order, as they use the word "producer" artistically in market order work, is it? A. That is correct.

MR. LENT: That is all.

By Mr. Tipton:

Q. As I recall, you stated that this proposal was in opposition to Proposals 1 and 2. There are other proposals for merging the Southeast New England order with other orders, so it is not in opposition to that type of merger? A. This particular statement was directed to Proposals [2274] 1 and 2. I think that it can be said that the organization that I represent is opposed to any mergers. The statement that I made in regard to Proposal No. 3 was pretty much my own position.

I think the answer was that we oppose mergers of any type.

Q. You made the statement that, "It is our contention that none of the evidence submitted by the proponents of Proposals No. 1 and No. 2 would solve the problems that have been created by changes in distribution."

My question is: What problems are you referring to? A. Well, I recognize that there have been changes in distribution. The Whiting Company, for example has closed their Rhode Island processing plant. The Hood Company closed their plant at East Bridgewater. The White Brothers plant, which was formerly shipping considerable amounts of milk into this marketing area, has ceased to exist, and has been combined into the Whiting empire.

There have been problems that have been created since the inception of the Southeast Order. We recognize that.

Q. Could you define for me more specifically what you mean by "problems"? What problems are you referring to?

A. I think I made the statement that it was my particular job, at the time of the promulgation hearings, to draw out a pattern of the interrelationship of distribution. It is my [2275] understanding that marketing area is delineated in large measure by the interrelationship of distribution, the competition between distributors, and it is definitely established that there has been a change in that pattern of distribution from what existed in 1958-1959.

Q. Later in your statement, you say, "Due to increase in production, the blend price in Boston has declined every year since 1959," and then you give some figures.

Is that solely and wholly–

Or let me ask you first: What do you mean by "increasing production"? A. Increase of milk in the Boston pool, without a correlating increase in Class I distribution, has resulted in a lower blend price to producers in the Boston pool.

Q. So you are talking in terms of receipts of milk in the Boston pool. Is that right? A. In comparison with distribution in Class I channels.

Q. You mentioned, here, that the basic blend price in the Boston market climbed to $4.81 in 1959. This has dropped. I guess that is the implication. I do not know whether you would say that or not, but it has dropped since 1959.

This reason for the drop has not been solely because of an increase in production of the producers that were delivering in 1959, has it? A. Well, in the first place, the increase which I commented [2276] upon in 1959 was due to the so-called "southern cousins" subsidizing the so-called "northern cousins." That was the money which came out of the fact that Southeastern New England became regulated, Southeastern New England and Connecticut. And of course a great deal of the milk which had come into these marketing areas as unregulated milk made efforts to get regulated. That is, the handlers of that milk got themselves regulated.

As to whether or not increases of production were solely responsible for the decrease in blend in the Boston pool, it cannot be said that it is solely, but it is definitely established that it is largely responsible for the decrease in the blended prices.

Q. Again you are talking about receipts rather than production, per se? A. Well, that is correct.

Q. Did you make a statement that unless a handler has distribution of a minimum quantity—and I think you used 172,000 pounds of milk per week—it is not economically feasible for him to depend upon distant sources of supply—in this case you were referring to producers up-country, were you not? A. Well, not necessarily. What I stated there was that in order to get a competitive price for his milk landed in the city, he had to avail himself of the cheapest methods of transportation; and the cheapest transportation into the area is in terms of 500 jug or can tank loads of milk. And unless you can [2277] buy milk in that volume, you can't avail yourself of the most reasonable price.

It is far more reasonable for a local handler to buy milk of local producers than to buy milk in less than that quantity. And there are very few handlers down here who are in a position to buy milk in that quantity.

Q. Then speaking of the handlers' alternative sources of supply, local milk in this case might have an additional value. Is that what you are saying? A. No question of it. It bothers me that they aren't smart enough to see it. They should be up here hollering their heads off.

Q. Then do you subscribe to the thesis that a handler should pay for milk according to its value? A. When you use the term "value," you are getting into pretty deep philosophical terms. There are all kinds of value, use value, place value, intrinsic values.

I don't think I want to answer as to paying for milk according to its value. If you will tell me what kind of value you are referring to, I will try to answer your question.

Q. Well, I am referring to the same kind of value that apparently Congress had in mind when they used the term in the Act.

EXAMINER HOLSTEIN: Well, we are about to get into a legal discussion. Mr. Smith asked you to tell him what your [2278] concept of value was. I think that is a fair statement. Now you are merely referring to what Congress said.

MR. TIPTON: Well, I will ask him to define for me his concept of value.

MR. CARROLL: May I have a clarification for a moment?

Does this question refer to value as contemplated under the Act, or does it refer to value which is fixed by the order? So that I can understand the answer.

EXAMINER HOLSTEIN: That appears to be the point of the question between Mr. Tipton and Mr. Smith.

MR. CARROLL: Could I have the question read back?

EXAMINER HOLSTEIN: The last question is the pending question. The other one was apparently withdrawn.

MR. CARROLL: What is the pending question?

EXAMINER HOLSTEIN: The pending question is from Mr. Tipton, as to what Mr. Smith's concept of value is.

MR. CARROLL: Without regard to the Act?

EXAMINER HOLSTEIN: That was the question.

THE WITNESS: In this particular question what I meant to connote was that in terms of the average handler in the Southeastern marketing area, nearby locally produced milk has a greater value to him than milk which is produced two or three hundred miles away and on which he cannot depend unless he pays rather an uneconomic price for it.

By Mr. Tipton:

[2279] Q. Well, if the order were to require a higher price payable by a handler and returnable by producers who supplied that milk from areas now specified as nearby areas, do you think handlers would continue to purchase that milk? A. There is no question but what some handlers would be forced to pay that additional price. It doesn't answer the question of equity as between handlers, but from the very nature of their operations, they would have to pay, and are now paying, a higher price.

Q. It would depend on his alternative sources of supply, would it not? A. That is right.

Q. Is it not possible for more than one handler to join in getting their supply of milk from up-country? In other words, one tanker to service two handlers? A. Yes.

Q. Is that being done now to any extent? A. I am not aware of it being done at the present moment. There have been times in the past when that type of operation was carried on. But it is not an economical way to handle milk and there are additional charges to the handlers involved from those that I have described in the receipt of one 500 gallon jug of milk on an additional basis.

Q. Additional charges to what? A. To make one, two, or three stops, you have to pay [2280] for the privilege.

Q. Additional charges of what? A. Over the charge for receiving one 500 jug tank load of milk on a regular basis.

Q. But not over his alternative cost of, say, having procured it from producers? A. Well, I don't know what the alternative cost would be. In the average handler's operations the same man who goes out to pick up the milk comes in and processes some of the milk. He makes a charge for trucking the milk, so that it becomes a pretty economical method of arriving at his supply.

Q. Do you know how many handlers under all five of the orders have plants up-country? A. I am not aware of the figure. It is in the record. It is in the exhibits which have already been submitted.

Q. And you would call this a very few number of handlers? Is that your connotation? A. I think the record shows that it is a relatively small number, and becoming smaller all the time.

Q. I know you added some additional comment and some additional description of how you arrived at the 60 cents per hundredweight, but I did not get any period of time you were referring to. What period of time are you referring to? A. What I did, Mr. Tipton, was to take the blend prices for the year 1961 and to weight them according to the total pounds [2281] of milk in the five New England pools, and then by dividing by a factor I arrived at weighted city Class I price of $5.55, as compared to a price in the Southeast New England pool of $5.69, or for the year 1961, we would have received 14 cents less on the city blend price.

Now, I made the statement that that could not be considered accurate, because it did not take into consideration the tremendous volumes of milk which would be assigned to Class I from up-country sources. If that were done, it would have lowered the blend considerably.

Q. So the figure that you are talking about for 1961, if the orders would have been merged, and the nearby farm location differentials deleted—the price would have been 60 cents less. Is that what you are saying? A. That is correct. And the additional change between the 200 mile zone—in other words, if the 54 cent differential were lowered to 37 cents. That further factor in there.

Q. You also make the statement that there would be no economic gain to any consumer; in fact, just the opposite would be true, because larger amounts of milk would be transported longer distances to meet Class I demands of consumers in Southern New England.

If the transportation differential reflects the cost of transporting milk, would this necessarily be true? A. I think you will agree with me, Mr. Tipton, that it [2282] is not economic. In fact, you made the statement, and Mr. Beal also made the statement, that it was not economic to haul a product which contains 88 per cent water over great distances.

And the further that product has to be hauled, the greater is the diseconomy. So that irrespective of the transportation allowance, it would result in a diseconomy, which again the consumer would have to pick up in the form of higher prices.

MR. TIPTON: I would like the record to state that I did not state that, or if I did, it was certainly not my intention. And the statement that Mr. Beal made was entirely related to a different matter.

This involved hauling milk to the market and having it manufactured into water extracted at the market. This was the diseconomy we were referring to, and not in this context that you are using it here.

I think that is all I have.

EXAMINER HOLSTEIN: Any further questions?

Mr. Adams.

By Mr. Adams:

Q. Mr. Smith, you stated the 54 cent differential had given you some trouble, as I understand it, in following the order, at Fall River. A. I didn't state that, Mr. Adams; but I think the marketing picture in Worcester and Springfield illustrates that there [2283] is a lack of balance in the present 54 cent differential that needs adjustment.

Q. Have you had any local producers out of the market? A. We have had local producers out of the market, and I have submitted some evidence to that effect. But to say they were out of a market because of the 54 cents is carrying it beyond any point that I would be willing to make. A good part of our producers are out because of handlers going out of business.

EXAMINER HOLSTEIN: Mr. Garelick.

By Mr. Garelick:

Q. In answer to a question from Mr. Lent, you mentioned there was some unregulated milk coming into the market? A. At the time of the inception of the Southeast Order; not now.

Q. I thought Mr. Lent was asking about current supplies. A. Well, I misunderstood him, then.

Q. If your answer was in regard to the supplies at the time of the promulgation hearing, then I withdraw my question.

EXAMINER HOLSTEIN: Any further questions? Mr. Carroll.

By Mr. Carroll:

Q. Your organization do I understand to be a cooperative association of farmers producing milk? A. That is correct.

[2284] Q. And in addition to the production of milk, what activities does your organization engage in? A. Well, we maintain a small balancing plant and provide a home for homeless producers. We have had, as I mentioned, sizeable quantities of milk, up to a thousand jugs of milk a day, this past year.

Our biggest problem came when Devine's Milk Laboratory was sold out to the Deary Brothers, and we had without very much notice as much as 350 jugs of milk from that one source alone per day.

Q. I take it, then, that aside from the small plant that you testified to, in the main you are engaged in selling raw milk in bulk to handlers in the Southeastern Order area? A. The great bulk of our milk, of the milk of our producers, moves directly from their farms to the farms of handlers regulated under the Southeastern Order.

Q. You mean plants, do you not? A. I am sorry. If I didn't say plants, that is what I meant.

Q. Now, what territory do your members in the main reside in? Are they in the immediate vicinity, or in the confines of this order, or do they serve in other markets as well? A. On occasion some of our members have sold their milk in Boston and in Worcester, but by and large, the membership delivers milk to handlers regulated under the Southeast Order.

[2285] Q. Now, I take it from your testimony that the majority of those handlers are either medium sized or small, according to your definition. A. Well, not only my definition, but I think that there are enough statistics in the hearing record already to indicate the truth of that statement, that they are relatively small, in terms of the giants that we know of in Boston and New York and Chicago and other markets.

Q. Are there any of those so-called giants in this market? A. I don't know as I should call them giants. There are some here, yes.

Q. And who are they? A. Well, of course, the giant of them all is the H. P. Hood Company. They are pretty much spread over New England.

Q. Now, I direct your attention to Exhibit No. 7, page 58. A. O.K.

Q. And I direct your attention to that part of the table which is captioned "Southeastern New England, Class I Sales on Routes in the Marketing Area, Per Cent of Total," and I direct your attention to that line in its entirety, whether it is for the three or the five largest handlers.

Now, for example, the City of Providence, Rhode Island: Would the concentration of the three largest handlers have a tendency to be greater than this, average, in the City of Providence, in your opinion? [2286] A. Well, let me ask you for clarification: You are referring now to page 58 of Exhibit No.

7, and in that column which says, "Class I Sales on Routes in the Marketing Area by the Three Largest Handlers," and then going down to Southeastern New England we find a figure of 33.5 per cent as being the figure referred to—is that the figure you are talking about?

Q. Yes. A. And your question is: Do I think the three largest handlers in Providence, Rhode Island, would have more sales than 33 per cent?

Q. Of that market. A. You are talking now about strictly the City of Providence?

Q. Yes. A. Yes, I would say that the three largest handlers in Providence would have considerably more than 33 per cent of the sales in the City of Providence.

Q. Would you say it would be more than 50 per cent? A. It would have to be purely a guess. My guess is that it would be in excess of 50 per cent.

Q. Now, did I understand from your testimony that you felt that the proposals would foster or tend to foster a monopoly? A. There isn't any question in my mind that if these proposals were adopted, it would have a very adverse effect upon [2287] local producers, and the first people who would feel the effect would be the handlers that received their milk from local producers. They would be forced to pay either more for their milk or go out of business.

Q. Now, it is a fact, is it not, that so-called "up-country" there is a tendency to shift the bulk tank deliveries of milk? A. The tendency to shift the bulk tank delivery is pretty universal throughout New England. It reached its peak in the State of Connecticut, and I think it can be said that Rhode Island was perhaps second, and Massachusetts third.

It is beginning to really speed up in the up-country area, yes.

Q. And does that trend have a tendency to centralize the control over supply in those areas, on the part of the handlers who are purchasing their milk in the up-country areas? A. Yes, I would say so.

Q. I direct your attention to Exhibit 7, page 50. You will note at the base of the exhibit, for size group No. 8, be-

tween 1960 and 1961 there was a decline in the size of plants in that category; and in the size grouping No. 1, there was a substantial increase. A. Yes.

Q. Now, is that in part due, in your opinion, to bulk tank operations? [2288] A. It could be.

Q. So that the plants themselves are tending to become larger? A. Yes.

Q. And more centralized? A. Yes.

Q. Now, then, directly or indirectly, the handlers who were presently servicing the Southeastern Order area, who are medium or small size—will they be required to purchase supplemental supplies from the handlers who are the primary sources of up-country milk? A. As the supply of milk locally produced goes down, and the information which has been introduced into this hearing record indicates that that has taken place, the handlers who are operating in the Southeast New England area will become more and more dependent upon outside supplies of milk; and if those outside supplies of milk are controlled by a relatively few handlers, which has been indicated by the record, then the answer is "Yes."

Q. And is it a fair conclusion from your testimony that you believe that it is possible to alter the Federal order marketing scheme so as to have a tendency to increase monopolistic tendencies within a market? A. I made the statement categorically that if the proposals which have been submitted, these various merger proposals, [2289] are adopted, there isn't any question but what it will tend to increase the trend toward monopoly.

Q. And I direct your attention to Title VII, Section 608C, subparagraph 18, of the Act, which authorizes the promulgation of these orders, and direct your attention to that part of the subsection which requires that orders be made in the "public interest."

And I ask you whether or not it is in the public interest, in your opinion, to foster such a trend. A. No.

EXAMINER HOLSTEIN: Is that all?

MR. CARROLL: That is all.

EXAMINER HOLSTEIN: Did you have something, Mr. Chernauskas?

MR. CHERNAUSKAS: Yes.

By Mr. Chernauskas:

Q. Relating to this concentration of supply in the up-country area, is it not true that the various cooperatives are amongst the largest handlers handling the up-country supply? A. I wish you would spell out what you mean by the various cooperatives. There are very, very many different types of cooperatives in the up-country.

Q. With regard to the source of supply in the up-country area, who handles the greatest quantity of milk, or who controls the greatest quantity of milk? The cooperatives, as a group, [2290] individually and as a group, or proprietary handlers? A. Well, if you are asking me the question individually, it is proprietary handlers. If you are asking me the question in combination, it would be the cooperatives.

EXAMINER HOLSTEIN: Does anyone else have any further questions?

If not, that is all

Thank you, Mr. Smith.

Mr. Chernauskas, did you have another one?

MR. CHERNAUSKAS: Yes.

By Mr. Chernauskas:

Q. You made reference to certain premiums which are being paid to nearby producers. Can you give us a little more detail on the types of premiums being paid? A. Yes. I will be glad to. I was perhaps a little vague in my presentation.

We call a premium anything which results in the handler paying more money than would be required under the provisions of the order, or in a producer receiving more than he had customarily received prior to a certain period of time.

And I group those premiums under three general headings. The No. 1 premium has been the great reduction in trucking rates, which has resulted in considerable increases in return to nearby producers.

No. 2 has been the premium which handlers have given [2291] to producers to encourage their installation of bulk tanks.

And No. 3 is the general qualification of premiums which are dependent upon certain quality considerations, such as bacteria count below a certain figure, and that sort of thing.

Q. Well, going to the trucking rate premium, does your co-op truck the milk? A. No. We contract with private truckers to truck the milk, both to us and out from our plant.

Q. And your organization pays this premium? A. No. The milk which is brought to our plant is paid for by the individual producer. But let me expand on that just a little bit.

For many, many years, under the Fall River Order, which was the oldest continuous order in the United States, the order recognized certain zone locations in the so-called nearby area, and there were certain established charges for hauling milk in these various locations.

These charges are no longer being adhered to, and milk is being hauled for much less money than was true even five years ago, in spite of what everybody tells us are increased costs of transportation.

Q. Well, by your statement with regard to premiums, do you mean to imply that these premiums are paid only to nearby producers, and not to up-country producers? [2292] A. I was referring to the premiums being received by nearby producers. But of course, I have no way of knowing from my own knowledge as regards premiums to up-country producers. I think the record shows that some cooperatives pay a so-called 13th check. There is no question but what there are premiums of various kinds being paid in the up-country area, too.

MR. CHERNAUSKAS: That is all.

EXAMINER HOLSTEIN: Mr. Garelick.

By Mr. Garelick:

Q. You spelled out three different types of premium costs that reduce trucking rates. Trucking was mentioned as

one. Would you say that is the biggest factor, trucking rate? A. I think it is the most widespread type of premium being paid in the nearby area, and probably results in more money being received by nearby producers. The bulk tank premium, I have to confess, is being withdrawn in various instances, so that it is not now as convenient as this lower trucking or additional premium for delivered.

Q. This lower trucking rate which you classified as a premium—is this mostly as between handlers today, or as between truck rates, say in 1958, against trucking rates today? A. I think it applies both ways. Certain handlers, in order to attract a supply of milk, even today, are going out to the nearby sources of supply, in other words, the nearby producers, and offering considerations for trucking.

[2293] The thing that I answered Mr. Chernauskas on was that we are getting milk brought to our plant for considerably less money today than was true five years ago.

Q. But there is no premium involved there, is there, when you hire trucking? A. I consider it a premium if the producer is getting the same service for less money than he formerly had to pay, yes.

Q. You do not think it is a reduction in cost; you think it is a premium? A. There isn't any question but what the bulk handling of milk has resulted in certain savings, but I think that there are monies being passed along which are even greater than can be shown to be savings in cost. In fact, the truckers tell us that their costs are increasing.

Q. Now, you said you thought part of it was a comparison from 1958 to the present. Do you think that is the biggest change, from 1958 to the present, rather than as between handlers at the present? In other words, when the Federal order on trucking rates went down, that was the biggest change, was it not? A. Yes. And of course the point that I tried to bring out was that we have seen a very decided change in the supply picture from 1958 to the present time.

Q. We are just talking about trucking. A. I think that the change in supply has been a considerable factor. I mean by that the fact that premiums still exist [2294] in the face of increased supplies indicates to me that there is greater value for the locally produced milk.

Q. All right. Now, these differences in trucking rates—are most of these differences in trucking rates as between handlers hauling their own milk, and haulers, or as between one handler hauling his own milk and another handler hauling his own milk? A. Well, the greatest difference, of course, would be as between handlers hauling their own milk, which becomes a part of the picture of their operations, and the traditional hauling rates that the individual hauler charged.

Q. So that in other words what you are saying is that some producers have found that by shifting to a handler who hauls his own milk, they get a greater return than by shifting to a handler who hires an outside hauler to haul milk? A. That is correct.

* * *

HORACE B. WILDES

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT TESTIMONY

THE WITNESS: I am Horace Wildes, a dairy farmer of Little Compton, Rhode Island, and Dairy Committee chairman of the Rhode Island Farm Bureau Federation, an organization of some 175 Rhode Island farmers actively interested in securing conditions favorable to a sound agricultural economy in our state and in our country.

We do not intend to encroach upon the specialized field of the milk producer cooperatives; but our membership, which includes members of all the locally active producer co-ops, as well as some independent producers, does have some fundamental opinions which I would like to present relative to proposals in this hearing.

1. Proposals for Consolidation of Orders:

Farm Bureau's approval of marketing orders is limited by the condition that they be kept small enough to be fully responsive to the needs and interests of the areas so regulated.

In the New England area there is undoubtedly some feeling of unity, as reflected in the close interrelationship of the five New England orders; however, we believe that there are, [2305] and will continue to be areas with sufficiently different economic characteristics to require individual treatment. We are also concerned that under present referendum procedures, the producers of any one area cannot be assured full opportunity to determine whether or not to consolidate with other areas.

Rhode Island Farm Bureau Federation therefore is opposed to Section I in general, and to Proposals Nos. 1, 2, and 4 in particular.

EXAMINER HOLSTEIN: By Section I, Mr. Wildes, you mean that entire category which has to do with mergers?

THE WITNESS: That is right.

EXAMINER HOLSTEIN: Go right ahead.

THE WITNESS: That is our statement on consolidation. If I may go on, now–

EXAMINER HOLSTEIN: Go right ahead, sir.

THE WITNESS: 2. Proposal No. 52 and others to delete or reduce nearby farm location differentials:

Rhode Island Farm Bureau Federation is opposed to any reduction in the level of farm location differentials. Furthermore, in the event of a reduction of zone differentials, we support Proposal No. 22, to assure that the effective differential price shall remain unchanged.

In support of this position, may I point out that ample evidence is available and has been presented in these hearings (testimony of the Local Dairymen's Cooperative [2306] Association, by Harry P. Young, Table I(a) and (b)).

I think that has an exhibit number, but I don't remember what it is.

MR. CHERNAUSKAS: 46 is the table.

THE WITNESS: Exhibit 46.

I will start that sentence again and leave out that reference.

In support of this position, may I point out that ample evidence is available and has been presented in these hearings to show that the present level of differentials has not caused prices either high enough for local producers to stimulate their production, or low enough for distant producers to prevent their production from increasing.

In direct opposition to Proposal No. 52, I feel impelled to support the principle of location differentials. It is unfortunate that their economic justification is so often unrecognized. Mr. S. W. Beal in his testimony states flatly "there is no sound economic justification for nearby market differentials"; yet one of the early lessons in any study of economics describes the natural pattern of production that surrounds any urban area.

In this pattern the products that are most perishable, bulky, or otherwise difficult to transport assume positions nearest to the center. This is the economic rule which makes the establishment of a dairy farm within the relatively expensive [2307] nearby areas a sound investment.

But milk is a peculiar product in that it is marketed in two forms: fluid, and manufactured into various condensed products. So while some farmers are locating close to the center, with an eye to the fluid market, others adapt themselves to distant, less expensive areas to produce mainly for a manufactured milk market.

If we then introduce a marketwide pool allowing all these farmers to share equal portions of fluid and manufactured markets, this whole long established pattern will be thrown into chaos unless a system of differentials is used to normalize the situation.

Nearby farms which can supply fluid milk as economically as any, could not survive on an unadjusted blend. They would have to be abandoned, to the detriment of the local economy, and their operators relocated in the artificially more attractive distant areas.

Contrary to the opinion that appears to be popular in Northern New England, we do not feel that the nearby farm location differentials can properly be regarded as a burden to

anyone. Rather, they are designed to prevent a serious dislocation of production which would cause inefficiency and ultimate higher costs to consumers.

EXAMINER HOLSTEIN: Cross examination? Are there any questions?

[2308] Mr. Tipton?

CROSS EXAMINATION

By Mr. Tipton:

Q. You made the statement that nearby farms who can supply milk as economically as anywhere would have to go out of business, or something to that effect. Will you help me get the statement correct, so that we can go from there? A. I think I said, "Nearby farms which can supply fluid milk as economically as any could not survive on an unadjusted blend."

Q. What do you mean, then, that they could not survive? What would happen? A. I mean on a blend that was not adjusted by the use of location differentials, the nearby farmers would lose the natural economic advantage of being close to the market, where they would expect to have a high percentage of Class I sales. And under those conditions, being in a more expensive area than more distant places, they naturally would be uncompetitive.

Q. Then what do you mean, that they may supply milk as economically as anyone? If they cannot supply milk at a blend price, then how can they supply it as economically as anyone? A. I think some of the testimony that has been given here has shown that locally supplied milk does have greater value, especially to the small handlers, than distant milk has.

Q. Are you through? [2309] A. I feel that to some extent explains what I mean.

Q. And I take it you think that that producer should receive that additional value? A. Yes.

Q. Do you think that handler should pay for that additional value, the handler that got the additional value? A. If we are still talking about these farm location differentials, as I understand it the handler does not have any additional costs on that arrangement.

Q. Yes, but if it has additional value, do you not think the handler should pay for that value? A. I don't know that I follow you too deeply into this business.

EXAMINER HOLSTEIN: You mean you do not understand the question?

If you do not, Mr. Tipton will rephrase it.

THE WITNESS: Well, as I said in my introduction, I don't pretend to go into the specialized field of the cooperatives. I try to answer questions as well as I can, but I admit that I can get in too deep.

I think my point here is, if I haven't made it clear, that I feel that local producers are efficient to the extent that they can supply milk competitively, as long as they are assured a high percentage of Class I sales, which is the condition under which they went into business, and on which they [2310] naturally assume to remain in business.

But if we establish a marketwide pool and then do not use location differentials to assure them this high percentage of Class I sales, or at least an equivalent of that, their natural economic situation is completely destroyed.

I don't know if that answers your question, but I tried to make myself clear.

By Mr. Tipton:

Q. I think you have the contention that local milk has additional value and the producers that produce that milk should receive some benefit because of this additional value.

Now, my question to you is: Who should pay for that additional value? Should the handler pay for that additional value, the handler that used that additional supply of milk and obtained the additional supply of milk for it? A. Not necessarily. The point is that milk in the distant areas is considered to have a lower value, in that it is normal for it to be kept there except as it is needed in the urban areas.

It is normal for it to be kept in the distant areas until it has been converted into manufactured form for more economical transportation. And if we used the marketwide blend without differentials, the tendency would be for that milk to come in and displace local milk, causing that to be manufac-

tured, which to me seems an entirely abnormal economic situation.

[2311] Q. Why would deletion of nearby farm differential locations encourage up-country milk to come to the market? A. Because it would give them a higher price for it.

Q. It would give who a higher price? A. It would give the distant producers a higher price, as I understand it.

Q. What existing producers? A. Distant producers.

Q. Distant. I am sorry.

That would encourage them to ship it to the market, because they got a higher price? A. Yes.

MR. TIPTON: I think that is all.

EXAMINER HOLSTEIN: Any other questions?

Mr. W. T. Smith.

By Mr. W. T. Smith:

Q. Mr. Wildes, you used the words in your original presentation about nearby farmers being as economically able to produce milk as those in some distant areas. I think you corrected the effect of that statement later on in your discussion with Mr. Tipton. But would you not agree that if you had changed the wording to "as efficient," substituting "efficient" for "economic," it might have carried more meaning in the sense that you tried to present it? A. Yes, I could accept that.

They would have to be abandoned, to the detriment of the local economy, and their operators relocated in the artificially more attractive distant areas.

Contrary to the opinion that appears to be popular in Northern New England, we do not feel that the nearby farm location differentials can properly be regarded as a burden to anyone. Rather, they are designed to prevent a serious dislocation of production which would cause inefficiency and ultimate higher costs to consumers.

* * *

(2312) Q. Now, one more question, Mr. Wildes.

I think it might help the record if you gave us just a little more of a picture of your own operations. I

think the record could well show that you represent perhaps one of the best operated dairy farms, certainly in my experience, and I have been on at least a thousand farms in New England.

But my question is this: In your experience, is it not true that farmers in the nearby areas, those whom we call nearby producers, have built their operations, especially in terms of finance, around a blend price which they would expect to receive with the operation of nearby differentials? A. Yes. That would be the only condition under which I could see that a man would want to establish a dairy farm in this area. There would be no other way to justify the additional expense of being close to the market.

Q. I was referring more, Mr. Wildes, to those who have already established in the nearby area. They have built their operation on the present expected price; is that not so? A. Yes.

Q. And if those prices were to be depressed by the elimination of such factors as nearby differentials, by the pooling of great volumes of milk into one pool, what effect would that have on the individual farmers located in the nearby area? A. Well, I think I have pointed out that they could not survive if the situation changed that much. Many of us now are (2313) at a point where even our own operation, which he describes as exceptionally good, is reaching the point under present conditions where we may have to decide whether to stay in or not. It is not as profitable as it was a few years ago.

Q. All right, Mr. Wildes. Assuming that you and all the other nearby farmers were to go out of the production of milk, what effect would that have on the handlers in the nearby areas who are dependent on that supply? A. I think the previous testimony has brought out, and I would go along with it, certainly, that especially the smaller handlers would find it very difficult to replace that supply of milk. Of course, in our own case, we sell

to Hood, which probably wouldn't bother them so much. I don't know so much about that, really.

Q. Let's carry this one step further.

All the farmers have gone out of business, and nearly all the small dealers have gone out of business. What effect would that have on the consumers in these Southern New England cities? A. Well, you certainly would reduce the competitive situation in the market if you eliminated all the small producers. And generally speaking, when you reduce competition, you are tending to an unfavorable condition to the consumer.

Q. In what sense, Mr. Wildes? A. Well, we think of competition as the main element in (2314) our economy which keeps costs down to the consumer. So that as you eliminate it, of course, we would expect costs to go up.

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[1770] DR. HARRY P. YOUNG

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT TESTIMONY

THE WITNESS: My name is Harry P. Young. I am an economist for the local Dairymen's Cooperative Association, Incorporated, whose address is 511 Westminster Street, Providence, Rhode Island.

With respect to my qualifications, I came to New England on September 1st, 1915, and I have been intimately associated either as a participant or a well informed observer of all of the New England milk marketing programs that have been under way since that time.

In my participation in the New England milk marketing discussions and controversy, I would like to note that it started in Vermont, in opposition to a prevailing doctrine in that state [1771] that fluid milk in the southern New England markets ought to be priced in relation to its value for manufacture in-

to butter and cheese, that my position was that that was an absolutely absurd theory and completely unsatisfactory and unworkable, and that that still is my opinion as to any future proposals of that nature.

Proposals No. 1 and No. 2 would consolidate Southeast with the other four orders in New England. Proposal No. 4 would consolidate Boston, Worcester, and Southeast into a single order.

The Local Dairymen's Cooperative Association is opposed to the merging of Southern New England with any other order. Specifically, we appear in opposition to proposals Nos. 1, 2, and 4. We are opposed on principle to the consolidation of independent markets into larger ones unless the evidence is clear that producers in each of the affected markets approve of the mergers; and unless it can be shown that there is a need for the merger from the standpoint of economic benefits to all producers involved.

There is nothing in the functioning or operation of the Southeast order that indicates a need for merging with other orders. The need just does not exist.

We have prepared a number of tables which illustrate the functioning of the Southeast Order from its inception, on January 1, 1959, to date.

[1772] We have offered these tables as an exhibit. They are offered in connection with the testimony we now offer, and with other testimony we shall present on other proposals.

I would like to go over these tables, indicating briefly their purpose.

Table I(a) gives the number of producers by states, 1959 to 1961. The number of producers are shown for the nearby area that is in the farm location differential zones in Connecticut, Massachusetts, and Rhode Island. The total nearby producers, you will note, has gone down from 1,447 to an average of 1,229 in 1961, a decline of 218, and in August, 1962, the number was 1,148, or a total decline for the entire period of 299.

For New Hampshire and New York, the number of producers has increased by 12, and for Vermont by 206. The

total producers has increased from 703 in 1929 to 921 in 1961, an increase of 218; and in August, 1962, the number was 1,074, indicating a further increase of 153 producers.

Table I(b) gives the receipts from producers in thousands of pounds. Going down to the third line across, the total nearby receipts has declined from 398 million during 1959 to 390 million in 1961, a decline of 7,343,000 pounds, and a further decline in nine months of 1962 of 1,283,000.

* * *

[1780] For the five year period, 1954 to 1958 inclusive, the percentage Class I utilization of milk from Rhode Island registered producers, shown in Column 1 of Table 8, Exhibit 46, averaged 91.3 per cent. The average for May was 85.6 per cent, and for November 93.8 per cent.

The next column shows the average utilization for the SNE order of all milk delivered from farms to city plants for the years 1959 to 1961. The deliveries and utilization at city plants include that of over 100 producers from distant areas whose milk was bulk tank trucked from farms to city plants.

The data by months for each year are shown in Tables 6(a), (b), (c) and (d). The average for the first nine months in 1962 is 89.6 per cent. This compares with the average for the first nine months, 1959 to 1961, of 90.7 per cent.

The effect of the imbalance can be seen by a study of Table 10, Exhibit 46. The most striking comparison is between Springfield and Southeast.

For the year 1931 Southeast had a weighted average Class I utilization of 73.4, Springfield had 71.8 per cent.

Nevertheless, with the same class prices and with difference of only 1.6 per cent Class I utilization, Southeast had an average blend price of $5.67. Springfield had an average of $5.37, or 30 cents less.

[1781] The disparity comes about because Springfield has no country plants. The 71.8 per cent utilization is the average at city plants as well as the market average. Southeast, on the other hand, has had a number of country plants. In 1961 (see Table 6(c), Exhibit 46), SNE had an average Class I utilization of deliveries at city plants of 90.5 per cent, and of

deliveries at country plants of 37.8 per cent. The 73.4 per cent Class I is the weighted average for deliveries at both city and country plants.

At the bottom of the page in Table 10, Exhibit 46, this same condition is shown from April to September in 1962 for Southeastern New England, as compared to Connecticut, Worcester, and Springfield.

Southeast had an average Class I utilization of 71.4, Connecticut had 77.2 per cent Class I, Worcester 72.0, and Springfield 72.8. With the lowest Class I utilization, Southeastern New England had an average blend price of $5.46, which was 10 cents higher than Connecticut, 12 cents higher than Worcester, and 26 cents higher than Springfield.

The difference came about due to an average utilization in Class I at city plants in Southeast of 89 per cent, and at country plants of 36.7 per cent.

The payment of farm location differentials on large quantities of nearby milk reduced blend prices to producers. It was the purpose of LDCA to limit the farm location differential [1782] area to include only those producers whose milk had been delivered directly to city plants, primarily for Class I use, and over an extended period of time. We expected there would be country plants and bulk tank deliveries into Southeast. This process results in Class II milk being manufactured in country plants where volume plants and other factors reduce costs. This process as we see it, unless it is abused by attempts to manipulate prices, is economically sound and to the financial advantage of the producers involved.

I have no criticism or objection to the manner in which this problem was handled in Connecticut, Worcester, or Springfield, however, Southeast has maintained a balance in the supply and the demand for nearby milk. And I would like to add: which suits us better.

Southeast should carry the surplus associated with Class I sales, but we object to having added to our burdens the Class II volumes in the farm location differential areas of Connecticut, Worcester, and Springfield.

* * *

[1788] Q. * * * What producers were you saying got the Boston blend price plus the 25 cents or 20 cents? A. The producers delivering to unregulated plants supplying Southeastern New England.

Q. Then part of the million dollars was because of the [1789] fact that the Boston pool was carrying supplies that were necessary and a part of the Rhode Island market prior to the promulgation of the Southeastern New England order. Is that correct? A. Do you mean the Rhode Island or the Southeastern market?

Q. Well, I am talking about the area, say, that is now included under the Southeastern Order. A. The answer is yes.

* * *

[1793] Q. I did not understand: What causes the nearby milk to be manufactured as opposed to manufacturing upcountry? A. Could you clear that up a little? What do you mean, what causes the nearby milk to be manufactured?

Q. Well, I did not understand what your philosophy was about. [1794] A. Our philosophy is that the nearby milk in the interest of all producers in the pool should be used as Class I milk to the fullest extent possible. And if it is not being used as Class I milk, then in our philosophy it is either being overpriced in relation to the price of the distant milk, or there is too much of it. Now, I don't want to quarrel with Mr. Ken Geyer or anyone else on that, but that is our philosophy.

MR. TIPTON: Thank you. I did not understand what your philosophy was.

I think that is all I have now. Thank you.

* * *

(2321)

The Witness: I would like to state that I have a few copies of my statement reserved for those who have not previously had one.

Examiner Holstein: Your statement is already in evidence as Exhibit 45, is it not, sir? Is that what you are referring to now? This is the statement that you

(2322) gave, part of which you gave, during our Boston session; is that correct?

The Witness: Yes, 45 and 46.

Examiner Holstein: 46 being the tabulation?

The Witness: The statement on Exhibit 45 begins on page 9 and is headed "Delete Nearby Farm Location Differentials."

Before going into this statement, I would like to put into the record the manner in which the payments to producers, to nearby producers, prior to federal regulation, was carried on. And the statement that I make covers the period from somewhere after 1916 until the advent of federal regulation in New England markets.

Nearby producers were given ratings, and for these ratings they were paid the Class I price, with the stipulation if there were enough Class I sales to cover the ratings of nearby milk.

Now, for instance, in the larger dealers that purchased both nearby and differential milk, the nearby producers were paid the Class I price for their rated milk, and that amount of Class I was deducted from the total Class I sales, and the remainder was used in the computation of the Class I price paid up country, or far distant producers.

Under this system the dealer did not pay the cost of the nearby location differentials. That was entirely a producer (2323) set-up, just as it has been under federal orders.

Proposal No. 1, paragraph 1, would substantially alter and reduce the farm location differential payments.

Proposal No. 52 apparently comes as an afterthought to delete the payments from all five New England orders entirely.

Our opposition to these proposals will be presented from the facts of the case in the Southeastern New England market. This evidence, however, applies in principle equally well for all the New England orders.

These payments are provided for in Sections 1014.62 (a) and (b) of the New England order.

Subsection (a) provides for payments of a 46-cent differential to producers whose farms are located in Rhode Island, roughly east of the Connecticut River, and in Massachusetts east of the western boundary of Worcester County and south of the Massachusetts Turnpike.

Subsection (b) provides for a secondary area, and for a 23-cent differential. However, very little milk has ever been delivered from this area. The area described in Section 1014.63(a) covers the location of nearby farms from which historically milk has been delivered to city plants in the Southeast milk marketing area.

Milk from the farms in this area has always been paid for at prices higher than prices for distant milk. The excess amounts are considerably above the cost of transportation and (2324) handling from the distant points to the market.

In the early history of the markets, nearby producers who were members of the NEMPA were given bases, and for these bases they were paid the Class I price.

The difference between the Class I and the net price from 1920 to 1930 averaged 53 cents; and for the entire period from 1920 to 1936 the average difference was 51 cents. Transportation and handling allowances were about 63 cents, or a total differential of $1.20 to $1.25.

Mr. Bronson, at a public hearing in 1936, testified total differentials in one location of $1.04 over a ten-year period; from 1923 to 1932, and to $1.16 at another location from 1927 through 1930.

At the same hearing, John H. Carton, Jr., representing the nearby milk producers' association gave evidence of an individual producer member who had received over the lean year period of 1920 to 1930 from $1.20 to $1.30 cents over the NEMPA average price in the 191 to 200-mile zone.

Average prices paid producers from 1954 to 1958 for milk from the nearby areas delivered to Southeast city plants are shown in Table 2, Exhibit 46.

Average prices paid to Boston producers in the 201 to 210 mile zone are also shown.

The differences for the five-year period immediately preceding the advent of the Southeast New England order, 1954 (2325) to 1956, inclusive, averaged $1.66 cents.

The differences between prices paid Rhode Island and Boston producers are shown in Table 11, Exhibit 46. The average difference is $1.69. A number of unregulated or non-pool plants from distant areas in Vermont and New York prior to 1959 were regular shippers to Southeast markets.

Prices paid to producers at these plants were usually about 20 cents over prices at neighboring Boston plants. Therefore, producers whose milk was shipped to Providence or other markets in Southeast New England had received about $1.48 less than producers in the nearby areas. These distant producers were willing or even eager shippers at substantially lower prices than prices received by nearby producers.

This practice continued right up to the advent of the Southeast New England order on January 1st, 1959.

The proposed order provisions on farm location differentials and zone prices varied somewhat. Those finally incorporated provided for total price differentials of $1.07. That was made up of zone differentials of 61 cents in the 21-cent zone over the Boston price and a nearby farm location differential of 46 cents.

It promptly became apparent that the extra 7 cents differential over the 41 in other New England orders was tending to reduce rather than enhance Southeast's producer blend prices. The differential was reduced to $1.00 on September (2326) 1st, 1960. The reduction has tended to decrease the relative blended price in Southeast New England Order. (See Table 4, Exhibit 46.)

It is apparent that nearby producers, under natural marketing conditions, when no artificial price regulations were in effect, have received substantial price differentials over prices paid distant producers. These differentials are in excess of the costs of transportation and handling of the distant milk. They are in part due to the fact that smaller distributors cannot afford the very high cost per unit of milk in volumes of less than about 35,000 pounds, or about 16,000 quarts.

Distant milk is for the practical purposes of comparative costs unavailable to them.

It was necessary to work out provisions in the SNE order that would provide for equitable sharing of the proceeds from the sales of Class I milk with distant unregulated producers whose milk sales in SNE had been at prices substantially less than Class I prices established by State Control Boards.

There are several methods of accomplishing this purpose. One would have been a handler pool order where the nearby producer price advantage is automatic as is the case in the Philadelphia Order (See Table 9, Ex. 46.).

During the year 1961, producers delivering to about 32 city plants subject to the Philadelphia handler pool order were entitled to blend prices which averaged $.93 over the (2327) 205-215-mile zone average price for about 15 country plants.

Transportation zones account for 48 cents. Therefore, the farm location differential was 45 cents.

There are proposals in this hearing notice to provide exemptions to milk of dealer-owned farms. An exemption for nearby producers of the 1500 quarts per day proposed for producer-distributors could be used with equal equity or legality.

There is of course always the opportunity open to local producers to peddle one's own milk if the Chinese bandits became too aggressive.

We have given all these ideas careful consideration, and we are in full support of equalization provisions, including the nearby farm location differential provisions now in the order.

The statement has been made that the farm location differentials should be deleted because the distant milk is worth just as much as the nearby milk. That misconception warrants examination. The value of milk in these Federal order markets is determined on the basis of its proportionate utilization in Class I and Class II computed at the class prices in the appropriate zone location.

Tables 12 (a) (b) (c) and (d) in Ex. 46 gives the computed use value of milk delivered to city plants from the farm location differential area, and also the use value of milk delivered to country plants adjusted to the 21st Zone. The (2328) blend prices appear in Columns 3 and 7.

The price reduction from the use value of the nearby milk appears in Column 4 and the price addition above the use value at country plants appears in Column 3.

The percentage of Class I deliveries at city plants is given in Column 1, and the percentage at country plants is given in Column 5.

The date in the tables are by months for the years 1959 through 1962 to date. The use values of milk are computed as the sum of the Class I and Class II values at the city and in the 21st Zone.

The differences between the use values and the blend prices represent the price reductions in the nearby milk use values and the price addition to the use values for the distant milk.

It would appear that the resultant prices have been insufficient to maintain the volume of production in the nearby areas and sufficient to slightly simulate volume in distant areas. However, none of this statement is to be interpreted as dissatisfaction with these equalization provisions. The process of some sharing of the proceeds of

Class I sales that have been supplied by nearby producers results in the manufacture of necessary surplus in country plants where it economically belongs. The whole operation of the SNE order, including the equalization procedures, has been successful and it is worthy (2329) of continuation.

We earnestly urge that Southeast be continued as a separate order for the reasons outlined in this testimony.

• • •

(2330) This part designated by the appellants.

Cross Examination by Mr. Tipton:

Q. Dr. Young, on page No. 10, the fourth full paragraph, beginning "Milk from farms in this area has always been paid for at prices higher than prices for distant milk," would you, under present marketing conditions, anticipate the handler's buying milk from producers in the nearby farm location differentials would pay more for their supply of milk than the equivalent quality and quantity and what have you from up-country sources? A. I wouldn't expect it, no. I might add they never have.

Q. Handlers in the nearby areas have never paid more for a supply of milk than up-country producers? A. That is the general rule.

Q. On Page No. 12, you make the statement that distant milk is for the practical purposes of comparative cost unavailable to them. Do you mean to say that up-country milk delivered to their plant is more costly than milk which they purchase (2331) from nearby producers? A. Yes.

Q. And to what extent, or how? To what extent is it more costly? A. It is more costly because of high transportation costs if the milk is procured in medium-sized or small loads, and it is more costly because of handling

charges and other charges if they buy it from cooperative associations in small lots.

Q. I know of several instances in which small handlers have grouped together and purchased supplies. Maybe one truck comes in from up-country and delivers the supply to several handlers. You contend that this is more costly than if they purchased it direct from producers? A. Are you testifying now, or asking the questions?

Q. I am asking the question. A. I don't know of any such instances.

Q. Well, what is the cost of producing these small quantities of milk directly from producers, then? A. There is evidence in this hearing record that the cost of transporting milk is usually by trip, and that is my experience in getting milk transported. And the cost per hundred pounds, then, is in inverse ratio to the size of the load.

Q. Were you through? I am sorry. (2332) A. Yes.

Q. But before you can say that the mere distant supply is more costly, we must have what is their present cost of procuring the nearby supply; right. A. Well, their present cost of procuring the nearby supply is the Class I price under the order, as a rule.

Q. Oh, they have no cost of producer procurement, inspection, health regulations, all of these type things that go with procuring the supply; is that right? A. I presume there is, of course, some cost of receiving milk. How much, I don't know.

Q. Well, do you have any idea of what the cost over the order price is of buying milk up-country in these lots that you are talking about? A. I have heard quotations on temporary supplies or variable supplies up as high as 75 cents to $1 over the Class I price delivered in the market. Now, regular production is less than that. I don't think I have at hand any accurate information on what is being paid by dealers who purchased milk regularly from up-country sources. Whatever the mark-

up is, it is usually a matter of confidential relationship between buyer and seller. But I am sure that it is more than the cost of inspection and this, that, and the other on nearby milk.

Q. If you had two dealers that were located in relatively close proximity to each other, which I assume we have in Rhode (2333) and these dealers could use on a regular basis a tankload of milk, and this tankload of milk were delivered to these two dealers, half of it to one dealer and half of it to another dealer, would you expect the cost of that milk to be far in excess of the cost of locally procured milk?

Q. That, of course, would have to depend on the circumstances and the volumes and the methods of agreement on how the milk is to be delivered. And I might offer a conjecture, it would be that relationships would be very apt to become strained in the course of operating that kind of a business. But you have no figures as to what you think the procurement costs might be? A. No, I don't.

Q. It could very well be equal; is that right? A. What is that?

Q. It could very well be equal; is that right? A. I don't think so, no, sir.

Q. If you haven't done any figures or compiled any figures on this, then how can you make the statement that distant milk is for practical purposes unavailable? A. Well, we have the example before us of a dealer who had a supply of milk that he was picking up in the vicinity of Brookfield, Vermont. And before the order, he had a very unique trucking arrangement that reduced his cost of milk very substantially. And after the order came into effect, this (2334) dealer dropped that supply and started acquiring a local supply paying a premium over the local price for that local supply. And he made no secret of the fact that it was going to cost him less money; that he was doing this in order to acquire his supply of milk at lower cost.

Another dealer acquiring milk from a number of producers in eastern New York, in Delaware County, continued this for some time, but then abandoned that procedure in favor of the purchase of local milk.

And those, I think, are excellent examples of the lower costs in general to small or medium-sized dealers who purchase milk directly from local farmers.

Q. When was this dealer paying this premium that you were talking about? A. The order started in 1959. Now, this is purely out of memory. I believe that he began to acquire a supply of local milk early in 1960, or the latter part of 1959.

Q. Could not this premium have been in order to obtain a supply of milk, getting it away from some other handler? A. Well, it was get the milk that he didn't have. Some other handler was buying it; that is true.

Q. Did he continue paying it, and does he pay it now? A. I think it has faded out.

Q. Beg pardon? A. I think it has faded out largely. I don't think (2335) that the premiums are continuing, at least not at the same rate.

Q. This handler would have been acting on the basis of the alternative cost; is that right? His alternative of buying it from local producers or buying it up-country. A. I think so, yes.

Q. And he made the determination that the local producer milk had some additional value for it, and they would be compensated for it. A. Well, if you buy milk, you will find out a man doesn't shift unless he is given a little incentive. And I would say that he felt that in order to avoid the high costs up-country, it was worth while spending a little money down here to make sure he got a supply.

* * *

DAVID CLARKE, JR.
Economist

[2524] REDIRECT TESTIMONY

THE WITNESS: Farm Location Differentials:

Arguments involving the justification for farm location differentials have received substantial attention. In general, there appears to be a consensus regarding the origin of these added payments in excess of the uniform pool price and without regard to transportation cost differences which are made to producers located near the market.

These differentials developed in response to the need for some compensation to induce "local" producers to accept the provisions and consequences of marketwide pooling. From the standpoint of this discussion, however, there is no need to raise questions as to whether such payments are justified, or whether their absolute magnitudes–i.e., 46 cents per hundredweight and 23 cents per hundredweight, respectively–are the correct differentials to be used. It is sufficient to note here that they have become "deeply embedded" in federal order markets in the Northeast.

Farm location differentials–sometimes called [2525] "nearby differentials"–are paid out of the pool and are applicable to the uniform price to producers located relatively near the market area, and reflect factors other than the cost of transportation.

In the notice of recommended decision which followed the promulgation hearings in Connecticut, the following statements were made:

"Milk received from the nearby area has long represented the major part of the total Connecticut supply. The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the most distant zones which customarily has been used for fluid purposes. Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This his-

torical pattern of pricing has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated markets. The differentials adopted will reflect more representative values with respect to the milk of both nearby and distant producers since the nearby producers will share in the higher priced Class I market to an extent somewhat greater than otherwise would be the case under market-wide pooling.

"In addition, the use of a nearby differential will assist in providing appropriate price alignments for direct-[2526] delivery producers, which will permit Connecticut handlers to continue to compete in the purchase of milk on reasonable terms with dealers in adjacent markets. The amounts of such differentials are very similar to those employed in other New England Federal Order Markets and are in reasonable alignment with the schedule employed in the New York-New Jersey market. Such differentials were proposed and generally supported by both producers and handlers at the hearing. *Their employment will tend to promote orderly marketing in the milkshed.*" (Emphasis added.)

In a later section of the aforementioned recommended decision, the following statement is made:

"The nearby differentials effective in markets surrounding Connecticut make rather certain the necessity of some differential payment in Connecticut at this time, whether determined by the bargaining process or pursuant to the regulation. Although in some markets nearby differential payments are arrived at through bargaining, the proximity to Connecticut of other markets where fixed differentials are in effect suggest that a more uniform price situation among competing markets will prevail and orderly marketing promoted if such differentials for Connecticut producers are determined on similar terms through the order."

Certainly, if such historical pricing patterns, supported by the need for orderly marketing, were overriding [2527] considerations as recently as the latter part of 1958, similar conditions can be expected to prevail today.

Two important aspects of this problem require consideration. First, to the extent that these added payments to local

producers have been used to "compensate" nearby dairymen for the loss of Class I sales through marketwide pooling, the decision to enter into such pooling arrangement is irreversible. Once the decision has been made to pool milk utilization on a marketwide basis, and, as a result, to require nearby producers to "share" the market for Class I sales, it is difficult, if not impossible, to return to the situation which existed prior to the time the decision was made.

Second, to the extent that nearby producers have enjoyed enhanced returns through these devices, these returns—like those resulting from favorable location, patent rights, "good will," tariff protection, and similar devices—become capitalized in the cost structure of the firms or industries so advantaged. In the process of this capitalization procedure, the effects of the enhanced returns rapidly become dissipated. In either of the above two circumstances, the removal or substantial reduction in farm location differentials will have the effect of penalizing participating producers by adversely affecting price-cost relationships. This is, in fact, tantamount to depriving such farmers of property rights without due process [2528] of law.

In considering the need for, or desirability of, substantial changes in the farm location differential, it is also necessary to take into account the differential effect this will have in the different markets involved. In Connecticut, for example, a high proportion of the total fluid milk receipts is received from farms located within the area in which the 46 cent differential is applicable. As a result of this fact, the complete removal of the farm location differential would have a very minor effect upon prices received by producers within the normal milkshed for that market, at least in the short run.

On the other hand, the removal of this order provision (or a substantial reduction in its magnitude) would effectively increase by a substantial amount the net returns to farmers located near or beyond the current milkshed limits.

The situation in the Boston milkshed is quite different. Here, a relatively minor amount of the total receipts for the Boston order receive the nearby differential. Therefore, the

suspension or reduction of this differential in the Boston market would result in a rather substantial reduction in the net returns to nearby producers, but would have only a minor influence upon returns to producers serving the Boston milkshed from relatively distant sources.

Under these circumstances, it seems apparent that any [2529] major alteration of the farm location differentials would have the effect of a substantial alteration in intermarket price alignment in the peripheral areas where markets compete for supplies. Such adjustments would not only apply to the competing New England markets but, probably more importantly, from the standpoint of the Connecticut market, would substantially alter the relationships between that market and New York-New Jersey.

Such alterations could be expected to yield profound impacts upon the orientation, organization, structure, institutional arrangements, and economic well-being of the dairy industry in the entire Northeast.

In Connecticut, for example, such an alteration in order provisions would result in the substantial increase in the attractiveness of the Connecticut market to distant producers. As a consequence of the expected increased flow into the Connecticut pool, returns to producers currently within the farm location differential zone would undoubtedly be drastically reduced and would have the effect of forcing some dairymen out of business, while leading others to curtail production in favor of alternative farm enterprises.

The net impact of this proposed change could very well be to alter the nature of the Connecticut milkshed from one involving direct shipments to a country-plant type of operation.

It is impossible to predict the impact of the combination [2530] of the proposals for market consolidation and a reduction in the farm location differentials without having advance knowledge of the specific terms of the consolidated order that might be effectuated, but there is little reason to expect any substantial salutory effects from such a change, at least over the long run, in terms of either prices received by producers or in prices paid by consumers.

In conclusion, I would like to summarize and restate the propositions which seem to me to be important in the consideration of the proposals to merge existing orders and to reduce the farm location differentials—particularly in their possible effects upon the present Connecticut and Southeastern New England markets.

It is my basic contention that, during the period of time they have been under federal regulation, these orders have operated well as separate markets which are highly integrated with the other New England order areas. Further, I believe they can be expected to continue to operate successfully as separate markets, at least in the immediate future.

Conditions within the fluid milk industry constantly change —it is highly dynamic in nature. Changes that have occurred in recent years have had the effect of reducing the "local" nature of the market forces affecting this industry. This means that individual geographic areas can no longer be treated independently (if, in fact, they ever could).

[2531] Interdependencies and interrelationships among markets tied through economic forces must be recognized and provision made for appropriate alignment of prices and other order terms. Among the New England markets in particular, these interrelationships have been well recognized and provided for through the process of the integration of order prices and classification provisions.

On the other hand, complete merger could have the effect of making uniform all of the provisions of the order, including those in which specific differences have been designed to meet more closely the needs arising from different conditions affecting the marketing of milk in different localities.

On the other hand, the merger of some of the current New England orders may be desirable, if not now, at some point in the future. It is suggested, however, that before this is done, substantial study ought to be given to the re-examination of the objectives of large regional orders.

In my opinion, this cannot properly nor adequately be done by the mere extension of the terms of a particular order to a much broader geographic area. As stated earlier, Congress

specified and the Market Orders Division has applied a market-by-market approach to milk price regulation. Should this approach be changed, program goals and the provisions by which these goals may best be achieved must, of necessity, be re-evaluated.

[2532] Available evidence indicates that the farm location differentials are largely a matter of "equity rights." As such, they involve "negotiation." In each case, the points to be negotiated are the size of the differential, and the area to which it is to be applied. These depend upon local conditions, and it is not likely that these conditions will be the same for every area.

Furthermore, once a farm location differential becomes a part of the price structure, the benefits that accrue become embedded in the cost structure. To remove or reduce the amount of such differentials would penalize participating producers by adversely affecting price-cost relationships. In many ways, this involves depriving such farmers of property rights without due process of law.

[2533] EXAMINER HOLSTEIN: Does that complete your presentation?

THE WITNESS: That completes it.

EXAMINER HOLSTEIN: During the next recess, will those persons who previously indicated their desire to testify during the Hartford session—and I am referring to those persons who wish to testify and who do not plan to take any other session of the hearing either in any of the other cities or in Boston—will they during the next recess come up here and give me their names, so that we can make arrangements and hear their testimony before tomorrow evening?

We will have a ten minute recess at this time.

(Short recess)

EXAMINER HOLSTEIN: The hearing will please be in order.

Let's come to order, please.

Dr. Clark has concluded his testimony on nearby differentials. Are there any questions in cross examination?

Mr. Lent.

Take the microphone, Mr. Lent.

MR. LENT: I do not think I need it, but I will take it.

RECROSS EXAMINATION

By Mr. Lent:

Q. Dr. Clark, on page 22 of Exhibit 61, you said, at the bottom of the first main paragraph: "This is in fact tanta mount [2534] to depriving certain farmers of property righ without due process of law."

And then at the end of your statement, on page 25, yo said, "In many ways this involves depriving such farmers of property rights without due process of law."

Do you mean the same thing by those two statements? A Yes, I do. The meaning would be the same as if we eliminate the words "in many ways."

Q. Would you agree that federal orders do not specify market rights of producers as such? A. Yes, generally I woul agree to that.

Q. Would you agree that such market rights as are created however, are not absolute or permanent? A. Yes, I think generally I would subscribe to that.

Q. Would you agree that the conception of rights must be of reappraisal continually in the light of changing conditions? A. Yes.

Q. And now on page 23 of Exhibit 61, just past the middle of the page, there is the sentence about changing the nearby farm location differential in the Connecticut order "would substantially alter the relationships between that market and New York-New Jersey."

Does that jibe with your statement that the conception of rights must be reappraised continuously in the light of changing conditions? In other words, would not that last [2535] statement apply to New York-New Jersey, as well? A. Obviously it would, yes.

Q. So that you did not mean in the quotation, page 23 of Exhibit 61, that the New York-New Jersey pricing arrangements were necessarily unchangeable, did you? A. No.

MR. LENT: I would like to say for the record that in connection with these questions I am not taking a position on behalf of anybody as to changing the New York-New Jersey nearby farm location differentials.

EXAMINER HOLSTEIN: The record will so show.

Is that all, Mr. Lent?

MR. LENT: That is all.

EXAMINER HOLSTEIN: Any further questions?

Mr. Tipton:

By Mr. Tipton:

Q. Dr. Clark, on page 20 of your statement, you make the statement that these differentials developed in response to the need for some compensation to induce local producers to accept the provisions and consequences of marketwide pooling.

You are familiar, or I assume you are familiar, with the fact that we have marketwide pooling in the New England orders, are you not? A. Yes.

Q. And you are familiar with the Act which sets up the [2536] basis for marketwide pooling provisions. Is that not correct? A. Familiar with the Act that sets up the basis for marketwide pooling?

Q. Yes, sir. A. You are referring to the Agricultural Marketing Agreement Act?

Q. Yes, sir. A. Yes.

Q. And under the section which deals with marketwide pooling, it specifies, or it says, "Providing for payment to all producers and associations of all producers delivering to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered."

And then it makes some specification for adjustments. One of the specifications for adjustments then is for differentials customarily applied by handlers.

In your estimation, are any of the 46 cent and 23 cent differentials being pretty customarily applied by handlers? A. Are at the present time being customarily applied by handlers?

Q. Yes, sir. A. To the best of my knowledge, they are not, at the present time.

Q. Are there not two types of pooling available under [2537] the Act, one being marketwide pooling and one being individual handler pooling? A. That is correct.

Q. And is there any provision that you are aware of that would allow for individual handler pooling in conjunction with marketwide pooling? A. I am not sure that I know what you mean by individual handler pooling in conjunction with marketwide pooling.

Q. Well, in your statement, you say that producers are to accept the responsibilities and consequences of marketwide pooling.

Maybe I should ask you what you are implying by that statement.

MR. GEYER: Mr. Hearing Master, if I could interrupt for just a moment: Mr. Tipton read a part of the Act which apparently suited his purpose. But would it not be a much more orderly procedure if he would read to the witness the other subject in either case, to adjustments, and read the other adjustment other than the one that he mentioned?

EXAMINER HOLSTEIN: Well, no, I am not sure that it would. I think it would be up to the witness to explain any other qualification to his answer, if there are such. Mr. Tipton can refer to only one requirement, if he wishes; but the witness is free to refer to any other appropriate provision which he thinks should apply to his answer.

[2538] By Mr. Tipton:

Q. My last question was: What do you imply by the last portion of the sentence that I was referring to, on page 20? A. And the question is the one that reads: "These differentials developed in response to the need for some compensation to induce local producers to accept the provisions and consequences of marketwide pooling."

Well, what I had in mind here is that apparently historically producers located relatively close to the market had generally enjoyed a higher percentage of Class I utilization, either because of favorable relationships with local distributors or

alternatively because of the fact that they were possibly in a better position to go into a producer-dealer type of operation and thereby increase their Class I utilization.

Now, this particular advantage, under marketwide pooling—they were more or less asked to relinquish, and as a compensation for relinquishing this advantage, the differentials were encompassed in the order. This is my understanding of the material quoted at the hearing.

Q. On page 21 you make some quotations from a recommended decision. Was there any change in the decision from the recommended decision? A. I can't answer that. I am aware of the fact that it was brought to my attention this morning that it would have been [2539] more proper to have used the notice of final decision. However, the copy of the materials that were available to me in my office happened to be the recommended decision. I am not aware that any changes or any substantial changes were made in the wording of these particular sections.

Q. Have you read the entire decision? A. I believe it is a fair statement to say I have read the entire notice of recommended decision.

Q. It is not a fact that one of the reasons for promulgating the Connecticut order was because the local supplies of milk were being replaced by unregulated cheaper priced milk? A. That is my understanding, yes.

Q. In the recommended decision that you have quoted, here is a statement, "The differentials adopted will reflect more representative values with respect to milk of both nearby and distant producers," et cetera.

In what sense did you use the word "values" or what does the word "values" in this usage connote to you? A. Well, first of all, I would like to clarify that I did not use this in any sense. This is a quotation.

Q. Yes, but I am now asking you: What does this connote to you? A. Well, values generally mean worth.

Q. Then the way this is used, it would connote to you that the nearby milk has more worth than the up-country milk? [2540] A. This would carry that connotation.

Q. If it does have more worth, then would not this worth generally be expected to be reflected in the price? A. I would expect that would logically follow, yes.

Q. And if it were to be reflected in the price, then would not the person who received this value or worth normally be expected to compensate for the additional value and worth which he received? A. I think, Mr. Tipton, you are trying to put words in my mouth. I did not say that this milk had any greater worth. But I was merely making the quotation.

Q. Well, would you say that it does not? A. I don't know that I can make that judgment. It would depend upon what other differences might be involved. If the milk were of generally higher quality, more regularly available, more dependable, or in some other sense, I suppose it would have a greater value or worth.

Q. But you are generally familiar with present marketing conditions. And do you think that these conditions give nearby milk additional value or worth over up-country supplies of milk? A. Well, I would suspect that would depend upon local conditions. If I had a milk supply, for example, that I couldn't get to during some parts of the year, because of weather conditions or something of this type, I suppose local milk would have a greater worth.

[2541] Q. But you do not know whether any of those conditions exist here or not? A. Well, I understand that certain parts of Northern New England are hard to get into, and sometimes the electricity breaks down, and sometimes the roads are impassable, and so on, which would have a bearing on this.

Q. Are not these same type conditions applicable, or could they not be applicable, to nearby supplies of milk, as well as up-country milk? A. Presumably they could, yes.

Q. On page 22 of your statement, you indicate that the nearby producers have enjoyed enhanced returns through certain devices, namely, the nearby differentials. And then you go on to say that these have been capitalized into the cost structure of the firm or industries so advantaged.

Is an example of one of the things you were saying that they are capitalized into the land values, to be specific? A.

Well, in my experience in milk marketing, they would be capitalized into many types of things. Land values is one of the things. And on the basis of the mechanics to which the farm location differential operates, I would expect that these enhanced returns would be capitalized into land values.

On the other hand, capitalization takes place in many respects—I have seen these values become capitalized into the value of a cow in certain of our West Coast markets, for example.

[2542] Q. Do you know of any of the stated purposes of the Act that would have the direct purpose of perpetuating these capitalizations? A. Of perpetuating the capitalizations?

Q. Yes. A. Not necessarily.

Q. I think you mentioned earlier, either in cross examination or possibly in your statement, something concerning the fact that you were in favor of free flows of milk and free marketing conditions, speaking very generally, but I think this was one of the things that you did state along this line at least.

In this connection, then, is it not true that the nearby farm location differentials or the impact of the nearby farm location differentials have the impact of preventing some of the normal free flow that would exist without the nearby farm location differentials? A. I expect there is an opportunity to use these for this type purpose. However, as I indicated in the statement, the question of the justification of the differentials, whether they are right or wrong, is I think entirely aside from the issue being considered right now.

The fact that they are here and have become capitalized in the price structure and have been used to align prices at the peripheral areas between competing markets—and to the extent that it has enhanced returns to certain producers—these [2543] values have become capitalized.

I don't mean to imply that as a result of this these capitalized values need to be continued in perpetuity, but if you manipulate them, you are dealing with differential equities.

Q. At the bottom of page 22, you make the statement: "As a result of this fact, the complete removal of the farm lo-

cation differential would have a very minor effect." And you were speaking of the Connecticut market.

If it would not have any impact, or I guess I cannot say "any," because there is a slight difference, very slight, then what is the purpose of the nearby farm location differential in the Connecticut market? A. The only purpose that I am aware of are in those sections which I quoted.

Q. Let me ask you what sections you were quoting that you are referring to now. A. I am talking about the quotes from the recommended decisions, which appear on page 21.

Q. Could you point out more specifically in 21, or page 21, in those quotes, what you are referring to? A. Well, to the best of my knowledge, it is pretty much the entirety.

Q. Well, since there would not be any change, or very little change, in the relationship of the price of nearby milk to additional markets, whether the Connecticut market had a [2544] nearby farm location differential or whether it did not have a nearby farm location differential, then I suppose you are referring to the relationship between up-country prices. Is that right? A. Yes, that is correct. And you will note that the quote that you made also contains the qualifying phrase, "at least in the short run."

Q. If the nearby farm location differential provisions were deleted from the Connecticut market, then the up-country price would be higher than what it is now, obviously. A. That is correct.

Q. Then would not this give an opportunity of a more full opportunity for your attraction theory to fully operate? A. I think that is entirely a matter of how the net FOB farm prices are aligned in these peripheral areas, which is a function of the class prices, the utilization, and the farm location differentials.

Q. Well, if the nearby farm location differentials were deleted from the Connecticut market, and the nearby farm location differentials were deleted from the Boston market, then the Connecticut up-country price would exceed the Boston price by a considerable amount. Is that not correct? A. In those peripheral areas, I would expect that is correct, if I followed your reasoning.

Q. And if the Connecticut price exceeds the Boston price [2545] in up-country areas, then it would give an incentive for milk to move to the Connecticut market. Is that not correct? A. That is correct, yes.

Q. But whether the milk actually moved to the Connecticut market or was pooled in the Connecticut market might depend upon other factors, such as the availability of outlets and so forth to become qualified under the Connecticut market. Is that not true? A. I suspect.

Q. On page 22 you speak of the effect of penalizing participating producers' relationships.

What producers are you talking about? A. The ones who currently received the farm location differential.

Q. Does it not have just the same effect in reverse, that it presently penalizes up-country producers who are paying the nearby farm location differential? A. Again, I must go back to the original point. And that is that it was not my purpose and it is not my purpose to justify the use of farm location differentials, but merely to point out that once they had become embedded, as they have become embedded, there are these various problems, and the removal or alteration of these differentials will cause distortions in the whole orientation and organization of the markets involved.

Q. Do you think that the special location differentials [2546] for nearby producers now provided for in several of the orders, or in the New England orders, are justifiable under present conditions, especially where high percentages of the pooled milk are used in Class I? A. Again I would have to answer the same as I answered your previous question.

Q. What was that? A. That it is not my purpose to attempt to justify the use of farm location differentials, but to point out the effects of the change or removal of them.

Q. Then would you recommend that the justification for such differentials be re-examined, and that where appropriate they either be reduced or eliminated? A. If there are overriding considerations above and beyond the types of effects that would be caused by this, yes.

MR. TIPTON: That is all I have.

EXAMINER HOLSTEIN: Is there any further cross examination?

Mr. Carroll.

By Mr. Carroll:

Q. I understand, Dr. Clark, that you have not, in your direct testimony, given any justification for this differential, and I have a series of questions, and I want to state that at the beginning, so that there will not be any confusion between us.

But in a free market, without Government price fixing, [2547] and in the field of milk specifically, is there not, by the natural laws of economics, generally given some priority in terms of pricing for sources of supply that are relatively closer to markets than other sources of supply? A. This is my impression. However, I am not very familiar with many of the free markets that you talk about.

Q. And is it your understanding that in the government scheme of price fixing, the function of the location differential is to re-establish to some limited extent the natural priority that would have existed in the absence of price fixing? A. That is my understanding of why this came about in this form, yes.

Q. Now, in regard to your statement, on page 25, in the second full paragraph, and the second sentence, you make the following statement:

"Furthermore, once a farm location differential becomes a part of the price structure, the benefits that accrue become embodied in the cost structure."

MR. LENT: Mr. Hearing Officer, it is not the second sentence but the third sentence. And the word is not "embodied." It is "embedded."

MR. CARROLL: I will accept that. I will accept those changes. It is the third sentence, and the word is "embedded," and not "embodied."

By Mr. Carroll:

[2548] Q. Now, will you tell me what you meant when you indicated that these beneifits are embedded in the cost structure? How does that occur? A. Through capitaliza-

tion, either in terms of land values or in some other tangible property right.

Q. Does that have a bearing upon the cost of the individual producer that you have been talking about? A. Yes, it does.

Q. And what bearing upon cost does it have? Would it tend to increase cost? A. It would tend to increase cost.

Q. Is that an operation of basic economic principle, or is that limited just to farm location differentials? A. I think that would be a basic economic principle, as set forth in these terms: that if I were a prospective milk producer, and were faced with alternatives, buying land in an area that would provide an adequate return, as opposed to an area outside such an area that did not fall within such a location zone, I would be willing to bid more for land of equal quality, equal in all other aspects, than for that which would provide this extra return.

Q. And would that be true of the other elements of production? The animals, and the other elements that go into this? A. Well, not necessarily so. In this particular example, I more or less pinned the factors upon which this added return [2549] were to accrue to the land.

Q. That is by way of illustration? A. By way of illustration, as a general economic principle.

MR. CARROLL: That is all.

EXAMINER HOLSTEIN: Mr. Lent.

By Mr. Lent:

Q. Did you ever hear of any such thing as a nearby cow? A. Yes.

Q. What is the difference between a nearby cow and an up-country cow? A. In the sense in which I answered your question in the affirmative, it is a matter of fact that in the State of California producers located nearby Los Angeles distributing plants are able to obtain more favorable contracts and thus a higher Class I utilization, than producers that are located in the central valley or any other place.

In this particular instance, the value, the added return, is capitalized on the basis of the cow, and in terms of what are locally known as shipping rights, which are transferred with the cow.

Q. You do not think individual cows have individual characteristics? A. Just as the fact that if you have that particular market outlet you are eligible to participate in higher Class I utilization.

[2550] I should also explain that this phenomenon results from the fact that we do not have either individual handler pools or marketwide pools, but rather individual plant pools.

Q. Or individual cow pools? A. Well, we haven't got quite that far yet.

MR. LENT: My questions are subject to the same qualifications I put in the record before.

EXAMINER HOLSTEIN: The record will so show.

Are there any more questions?

Mr. Pelley.

By Mr. Pelley:

Q. With respect to the development or origin of the preferential values that nearby producers had become accustomed to, is it not true that before the federal order, the state order in Connecticut gave preferential allocation of local-produced milk? A. I am not sufficiently acquainted with the operation under state control in its latter years to answer that question.

Q. In answer to Mr. Carroll's question a moment ago, you had indicated to Mr. Carroll that these values had developed before governmental regulation. Now, did you mean state governmental, or were you limiting that answer to Federal Government regulation? A. I would expect that this type of situation would exist prior to any form of regulation that involved marketwide pooling.

[2551] Q. I was referring specifically to your answer to Mr. Carroll and wondering whether you were referring, in your answer to him, to federal regulation, as opposed to state regulation and limiting your answer to state regulation. A. I was not limiting it to federal regulation, nor to state regulation, for that matter, nor to government regulation.

In other words, it is conceivable that a market could be organized without either state or federal regulation, and operated with a marketwide pool with devices which provided special incentives or special differentials to nearby producers for

the same purposes as stated in the text of my statement.

Q. Well, do you know specifically whether this preferential preference to local producers had grown up before the institution of state regulation? A. Are you talking about the New England markets?

Q. In Connecticut, specifically. A. I can't honestly say I do know that specifically.

Q. In your study of the decision, the promulgation decision, with respect to the Connecticut market, was it a prime consideration there that unpriced milk was breaking the price in the Connecticut market? A. That is correct.

Q. And so, in absence of federal regulation, was it not likely, in terms of the Secretary's viewpoint, at least, that the preferential value was about to be dissipated by competition [2552] from outside areas? A. Again, I can't answer that question. I just don't know.

Q. And if that were true, would it not appear that under a purely competitive relationship, or an absence of governmental regulation, assuming that to be true, the preferential values to nearby producers were about to disappear? A. Well, if I may, I would like to go back and clarify one point.

In your question, I thought you used the term "purely competitive" as synonymous with the absence of government control. I can't make these two considerations jibe, because I don't think the absence of the government control in any way, in the dairy industry, reflects pure and perfect competition.

Q. On that basis, then, if we would throw out consideration of "purely competitive," and just say that on the basis of the case that I gave you as a hypothetical consideration, would not the preferential payment to nearby producers have disappeared, in absence of federal regulation? A. Would they not have disappeared?

Q. Yes. A. I don't think so; for the reason, as I stated before, that historically there seems to have been a tendency for local producers to obtain a higher percentage of Class I sales, than far distant producers.

[2553] And I am not sure I know what would tend to make this dissipate, under the same type of conditions that

existed prior to the adoption of some type of regulation, and particularly some type of regulation which involves the use of marketwide pool.

Q. Would you think that the availability of large quantities of milk at the Boston blend price would have discouraged local handlers from paying the Class I price at the levels prevailing previous to federal regulation? A. Oh, I most certainly do. The availability or access to unregulated milk, under terms of the use of the classified price system, and just the opportunity to get unregulated milk, would tend to provide an incentive for handlers to get out from under regulation.

And to this extent, not only would any preferential treatment disappear, but the effectiveness of any type of regulation would disappear.

* * *

TESTIMONY OF DR. C. W. PIERCE
Connecticut Milk Producers Association

(2639) Advantages associated with nearby milk

The dollars and cents costs of moving milk, while an important item in measuring the values of milk at different locations and therefore the adequacy of Class I zone differentials should not obscure consideration of less measurable values of nearby milk.

(2640) Location advantages of nearby supplies include greater availability at any time when transportation may be interfered with seriously. The nearby milk also is more available for quality supervision, particularly by small processors. Cooperatives make valuable services available to buyers of nearby milk. These include quality supervision of the supply, balancing of supplies and sales during the week, over weekends and over longer periods of time and the keeping of records and handling of payments to individual producers.

Lacking precise mathematical measurements of the values of certain attributes of nearby milk supplies, there

is disagreement as to whether nearby milk possesses any extra value as compared with more distant milk other than the extra cost of moving the more distant milk. No claim is made, however, that the more distant milk supply has attributes enhancing its value. Thus, we can conclude that the advantages claimed to be associated with nearby milk are worth a zero amount or something more than zero.

A measure of the advantages of nearby milk may show up in its salability for fluid use. If the cost of moving milk is equal to or less than the Class I zone differential, and yet nearby milk has continued to be utilized for fluid use, there exists a basis for demonstrating that nearby milk has attributes of real value.

The Market Administrators of Connecticut and (2641) southeastern New England orders have published uti i-zation data of milk received at city plants and at country plants. These were included in Exhibit 7. For selected months these data were as follows:

Month	Market	Per cent used in Class I milk received at City plants	Country plants
September 1961	Connecticut	88.6	51.6
	S. E. New Eng.	95.1	59.0
October 1961	Connecticut	86.5	39.5
	S. E. New Eng.	93.2	38.1
January 1961	Connecticut	79.2	32.5
	S. E. New Eng.	91.2	24.6
March 1962	Connecticut	80.6	28.4
	S. E. New Eng.	92.4	25.2

The comparative utilizations of the milk received at city plants and country plants show the nearby milk has found a ready market for fluid use. This situation could result from a transportation differential under the order

less than the cost of moving milk, or if the differential is adequate or more than equal to the cost, from the characteristics of nearby milk which enhance its value for fluid use. The greater than average Class I utilization of nearby milk is not explained by any increase of fluid milk sales into outside markets.

[2642]

MR. LENT: To help the record, before we pass this point, is that year correct, after the word "January"?

THE WITNESS: No, it is not. It should be January 1962. Thank you.

THE WITNESS: Other Functions of the Zone Class I Price Differentials.

Thus far, this statement after mentioning the several functions of the Class I zone differentials, has been concerned with the differences in values of milk received from producers at different locations. In evaluating the appropriateness of the present differentials or proposed differentials, consideration needs to be given to all of their functions.

TESTIMONY OF STEWART JOHNSON
Connecticut Milk Producers Association

DIRECT TESTIMONY

The Witness: I would like to make three points supplementing the statements presented by David Clark, Jr., Ken Geyer and James Lee opposing Proposal 52, the adoption of which would reduce or eliminate location differentials.

This statement is on behalf of three Connecticut cooperatives; the Connecticut Milk Producers Association, Modern Milk Marketing Association, Cooperative Dairy, and also in response to the invitation of Howard Fedderson, Acting Director of the Milk Marketing Orders Division, Agricultural Marketing Service, United States Department of Agriculture, to present testimony pertinent to the issues at this hearing.

The first of these points concerns a question by Mr. Tipton to Mr. Lee this evening inferring that in the (4063) Connecticut market the retention of the location differential was unimportant because in 1962 it cost the pool 43.4 cents per hundredweight, which is nearly as much as the highest nearby rate of 46 cents. In the first instance, of course, with no shifts in supply, it would cost only 2.6 cents per hundredweight. However, this is quite misleading as to the cost over a period of time.

With the substantial increase in attractiveness of the Connecticut market to distant producers, however, supplies would be expected to shift into the Connecticut market, and quite soon. If enough milk shifted to bring the same price relationship with New York and New Jersey as before, the price to nearby producers would be reduced by the full 46 cents. Thus, the price cut would be a substantial one.

My second point is that the values of nearby milk for which location differentials are paid are separate and apart from the system of charges to dealers; that is, separate and apart from Class I prices, Class II prices, transporation differentials, and so on. Instead, the location differentials represent extra values of nearby milk relative to distant milk which local producers received in the absence of Federal regulations and in the absence of equalization under a marketwide pool.

Because of not making this very important distinction, Mr. Tipton's questions to Mr. Lee and Mr. Sykes this evening and (4064) the question of Mr. Chernauskas to Mr. Sykes on values of nearby milk versus distant milk which were related to charges to dealers are largely irrelevant to the location differential problem.

My third point is that the expected gains to the Vermont dairy farmers from eliminating location differentials might be illusory, and quickly lost, or even more than lost. The chain of events that might lead to this result is as follows: First, producers now under the New York-

New Jersey order would be expected to shift to New England orders if the blend price advantage at distant points under New England orders should increase by as much as 43.4 cents per hundredweight, as shown in Table 3 of Exhibit 77.

If producers did shift from Order 2 to New England orders, the blend price in distant areas under the New England orders likely would be reduced, approaching the Order 2 level and as nearly as it does at present and after a short period of time.

Under the new equilibrium situation, with about the same New York-New Jersey versus New England price difference as now exists, relatively more of the producers under New England orders likely would be members of New York-New Jersey cooperatives than if location differentials had not been reduced.

Wtih New York-New Jersey cooperatives having a (4065) greater share of producers in New England markets, the possibility of merging Order 2 and New England orders would be increased.

If this occurred—a merger of Order 2 and New England orders—and with the 1962 Class I percentage 49 in New York-New Jersey and 65 under the New England orders, the order blend price to Vermont farmers could very well be reduced from present levels under New England orders.

If this chain of events occurred, therefore, Vermont farmers who expected to have a higher price due to the removal of location differentials might instead receive the same or a lower blend price.

Cross Examination by Mr. Tipton:

Q. At somewhere in your statement you make the statement about the extra values of the nearby milk which the local producers have received, going back for a moment to prior to Federal regulation. Those extra values were e

tra values to whom? A. These were extra values received by local producers in the form of higher blend prices.

Q. So it has no relationship, or you contend that actually there is no relationship to the value of the milk (4066) to the nearby farm location differentials? A. There would be a point for location differentials and a justification with the same Class I prices if utilizations differed, and this is an important reason why the blend prices were higher to nearby producers, the percentage utilization in Class I was greater.

Q. Are you talking about now an individual handler pool? A. And before regulation we did by and large have individual handler pools.

Q. Well, if you had an individual handler pool, then each producer delivering to each handler that he delivered or the handler he delivered to would receive the same price based on the utilization of that handler, isn't that correct? A. That is generally correct.

Q. On a marketwide pool the distribution of the proceeds is based on the utilization of all milk by all handlers, is it not? A. That is correct and the location differential is in large part to compensate for the nearby dairymen for the loss of Class I sale to the market by fall.

Q. You also mentioned that the up-country prices that might be increased if nearby farm location differentials were deleted might be illusory and the fact they might be reduced because of additional supplies coming into that market; however, (4067) you did not make any mention of the effect of the deletion of nearby farm deletion on the nearby areas. Would you think there might be some effect there? A. I think there would be some reduction in the nearby areas and this would be offset in the same period of time by some increases in distant areas during that interim period before the prices came down to where they were before.

Q. Sooner or later you are going to reach an equilibrium; in other words, nearby milk going out or smaller

amounts are nearby milk, the price up-country going down somewhat from what it was immediately following the deletion of nearby farm location differentials, would you now have more or less milk in total? A. I think in total you probably have about the same.

Q. But this might represent a lesser amount of milk in the entire area, including what might have come from New York, is that what you are saying? A. I think that the total amount in the Northeast probably would be very nearly the same.

Q. Nearly the same as what? A. As much of a chance it would be greater as it would be less.

Q. The same as what? A. As before.

Q. Would that be as a result or cause of the deletion (4068) of the nearby farm location differentials or because of other practices? A. I think that the deletion of the farm location differentials would have an effect on the geographic location of this production, but as far as the total Northeastern production I don't think that it would have a great effect plus or minus.

Q. Well, there is approximately 45 per cent—the figure is in the record—of the total amount of milk that was pooled under the five New England orders that comes from the nearby areas. Is that about to your recollection what the figure is? A. I don't remember.

Q. Well, assuming for the moment that that is, whatever the figure was, now what kind of a reasonable estimate would you think of this—what would be the change in this relationship, is what I want to ask, if we deleted the nearby farm location differentials? A. Well, if they were deleted, it would tend to reduce the production of milk in the nearby area because the price would be lower. It would tend to increase the price and production in distant areas except as the New York-New Jersey milk rushed in and brought the price down before producers have a chance to respond.

Q. But what would you think would be a proportionate (4069) relationship after we deleted the nearby farm loca-

tion differentials? A. I have no estimate on that.

Q. But it might be substantial, or do you think there would be still a quantity of nearby milk available? A. I think there would be quite a quantity, but it would be less.

Q. Dr. Johnson, isn't one of the purposes of the price setting mechanism in the Act to attract an amount of milk which will insure a sufficient quantity of pure, wholesome milk to satisfy the needs of the area? A. I think that is in the Act, yes.

Q. In your opinion is the present price structure effectuating that purpose? A. I think so. As far as the nearby area is concerned, I don't think that the increases in production in recent years have been as great as in the more distant areas, so that the price certainly under the Connecticut order, including the location differential, has not been high to the point where production has tended to increase and the number of producers to increase; in fact, quite the contrary. There has been a [4070] substantial reduction in both number of producers and in volume of output in the last three years.

Q. I think you have already stated that deletion of the nearby differential would result in a higher price in the upcountry area and also a resultant increase in production. A. That is correct except that the production response occurs slowly and I would expect there would be a flood of New York milk into the market rather quickly to take advantage of this higher price and might reduce the blend rather quickly so that you would have only a minimum production response.

Q. Is it conceivable that there would also be in effect an increase in your encouraging an increase in New York then, too? A. To the extent that the price was raised, but they are a large market of course relative to the New England markets combined so that the effect is to dilute it.

MR. CHERNAUSKAS: That is all.

EXAMINER HOLSTEIN: Mr. Cobb.

By Mr. Cobb:

Q. Dr. Johnson, if the nearby farm location differentials were removed from the Connecticut order and as a result of this there was more milk that did come into the Connecticut

market, would nearby or local producers in Connecticut have a tendency to become producer handlers? [4071] A. I think that the incentive certainly would be greater and there would be more producer handlers than otherwise.

Q. If the difference between the blend price under the order and the Class I price lightened, do you think that this would tend to increase the incentive for producers to become producer handlers? A. It would.

MR COBB: That is all I have.

EXAMINER HOLSTEIN: Mr. Little

By Mr. Little:

Q. Dr. Johnson, in reply to a question from Mr. Tipton I think you stated that one reason for these nearby farm location differentials was to compensate the nearby producers for their pooling under a marketwide type pool. Now would it not be true that as Class I utilization increases the need for these nearby differentials might decrease? A. If it increased sufficiently, why, it could.

Q. On that basis wouldn't it perhaps be more realistic to have some sort of nearby farm differential that would vary as your utilization varied? A. Well, this is the logic of the system in the New York market. I am not proposing it here.

Q. All right. One other question. In your statement on these nearby differentials, the effects that the deletion [4072] could have on the New England pools, the Connecticut pool perhaps specifically, am I right in assuming that you are considering these nearby differentials as somewhat of an effective way to keep New York-New Jersey milk out of the Connecticut order? A. Well, this of course I have not stated as the justification for location differentials. I have stated that they are the recognition of the extra value of the nearby milk.

[4072] Q. Didn't you state that deletion of these differentials would result in milk moving into the Connecticut pool from the New York-New Jersey pool? A. That is correct, and as long as this is not labeled as justification why I think we are completely in accord that the effect of their removal would be that more New York milk would move into the Connecticut pool. With that I agree.

[4123] FRED BRIDGES

was called as a witness and, having been previously sworn, was examined and testified as follows:

DIRECT TESTIMONY

THE WITNESS: The first testimony that I want to offer is on behalf of the Worcester Milk Dealers Council [4124] and is opposition to Proposal 52. I am going to respect Mr. Holstein's request that repetitious material be kept out and make this as brief as possible. I think Ken Geyer and James Lee have pretty much covered the situation but there are a few things that I would like to read into this in addition to what they have said.

It is apparent that the 46 cent and 23 cent farm location differentials were originally included in the Boston order by authority of the Agricultural Marketing Agreement Act of 1937, Section 608(c)(5)(b)(ii), referred to in Mr. Tipton's testimony on January 19th, Exhibit 55. Mr. Tipton argued that the Act did not specify that differentials customarily applied by the handlers be continued indefinitely. Neither does the Act indicate that such traditional differentials paid by handlers to nearby and intermediate producers be discontinued or eliminated.

Mr. Lee in his testimony on Table 2, Exhibit 77, showed the value of the differentials in Worcester and that the contribution by all handlers was slightly over 34 cents. I have gone a little further with that. The monthly and annual statistics as published for the Worcester market show in some months the receipts from nearby and distant producers separately. As Worcester has no intermediate farm zone it is a simple matter to determine the actual financial benefit to nearby producers on account of the nearby differential.

[4125] In 1950 nearby and distant figures were shown for five months, March through July. During that time 83 percent of the total receipts were from nearby producers, 17 percent from distant producers.

In order to pay 46 cents to nearby producers it was necessary to deduct 39.19 cents per hundredweight from the use

value of all receipts. Therefore during those five months the nearby producers actually paid 39.19 cents of the 46 cents themselves and gained only 7.8 cents. During that time there were 3 country plants in the Worcester pool. Receipts from nearby and distant producers were not shown separately for the years 1951 and 1956, therefore similar figures could not be obtained for those years. In 1957 separate figures were shown for only November and December. During those two months there were two country plants, nearby producers delivered 80.9 percent of the total deliveries with a net gain of 8.8 cents per hundredweight.

In 1958 separate figures were shown for the entire 12 months. During that period of a year were two country plants nearby producers delivered 80.7 percent of the total deliveries to pool deliveries. In order to provide a 46 cent premium to 80.7 percent of the receipts it was necessary to deduct 37.1 cents a hundredweight from the total use value.

Thus on a weighted average basis for the year 1958, [4126] nearby producers actually received benefit of 8.9 cents of the 46 cent differential.

In 1959 with two country plants, not the same two as in 1958, nearby producers delivered 76.2 percent of all producer deliveries with a net premium amounting to 10.93 cents of the 46 cent farm location differential.

In 1960 there were two country plants January through August, four additional plants qualified effective September 1, 1960. As a result only 68.7 of this—68.7 percent of the total producer deliveries were made from nearby farms. Thus the deduction to provide the 46 cents was spread over a much larger production resulting in a net gain for nearby producers amounting to 14.38 cents a hundredweight.

In 1961 there were 5 country plants in the Worcester pool from January through May, four in June, three in July and August, four in September, and back to two during October, November and December.

With this movement of country plants, the monthly percentage of nearby deliveries fluctuated considerably during the year. However, for the entire year nearby producers supplied

67.3 percent of the total producer deliveries and 15.03 cents. The monthly net portion of the 46 cents gained by nearby producers ranged during the year from a high of 18.72 cents in January to a low of 8.43 cents in December.

[4127] In 1962 based on an unaudited month statistic and with two country plants, January through June, 5 in July, 4 in August, 3 in September and October and November, back to 2 in December, nearby producers delivered 74.48 percent of the total producer deliveries.

In order to provide the money to pay a premium of 46 cents on 74.48 percent of the deliveries, it was necessary to deduct 34.26 cents from the use value of all producer milk delivered resulting in the nearby producers receiving on a weighted average basis for the year 11.74 cents of the 46 cent differential. This agrees with the figure that Mr. Lee has in his table 2, Exhibit 77.

Although it appears from the order language that nearby producers receive a premium of 46 cents a hundredweight, this is not the case. During the past 12 years they have themselves contributed a large part of the 46 cents so that the actual financial gain to them on an annual basis has been as low as 7.8 cents a hundredweight and never more than 15 cents a hundredweight. It is very apparent that if the proponents of proposal 52 are successful, the result will be an immediate increase in the distant area blend prices based upon 1962 figures of approximately 34 cents a hundredweight and a decrease of approximately 12 cents on milk produced on nearby farms. It seems obvious that if proposal 52 is adopted then the ultimate result will be [4128] greatly increased production in the less populated lower production cost areas in the Massachusetts producers and the Massachusetts producers will be forced out of business. When I speak of the less populated areas I am referring back to Mr. Webster's testimony in Boston on January 15, Exhibit 39, when he gave figures of a population of 654 persons per square mile in Massachusetts as compared with 42 in Vermont and 67 in New Hampshire. To use this indicates that the Massachusetts farms still retain a provisional customer appeal in being in the nearby area. As was brought

out last night in the cross examination there is great advantage in having nearby milk accessible in emergency cases.

That is all on that.

EXAMINER HOLSTEIN: Any cross examination on the testimony thus far with respect to location differentials?

Mr. Tipton.

CROSS EXAMINATION

By Mr. Tipton:

Q. At the beginning of your statement you quoted from the statement that I had made previously and then said there was no compulsion on the part of the Agricultural Agreement Act that they could be related. However, don't you think that one of the things of consideration here is whether there is a change of conditions in which they were justified originally whether those conditions are still [4129] applicable under today's marketing conditions? A. There may be some change in conditions, Mr. Tipton, as you will probably learn of improvements of the farms and accessibility of distant milk through super highways and bulk tanks, but I still claim that nearby milk does have a value on account of its accessibility to the market. As I think I have brought out on cross examination last night, we have had many cases in Massachusetts, Worcester, particularly, on something that has happened in the plant, either through accident or bad milk or spillage, that the handler has had to send out his trucks and pick up milk on a second pick up on the farm in order to have milk to use that day which would be impossible if he had to go to distant farms for it.

Q. You said that it had a value because of accessibility. Then to whom does it have this value? A. Well, this value to the handler in having the milk accessible when he wants it and also value to the producer having the nearby market which he has traditionally had is a value to each.

Q. So the value to the producer is contingent upon whether it is or has any additional value to the handler, is that correct? A. Well, I think the value to the producer is also associated with the fact that he has traditionally had the near-

by market closer to a metropolitan area and it was [4130] recognized in the early days that that milk was worth more and I think too that we have been talking about differential over and above a country price or distant price. I think back in the old days that the price was pegged more to a city price and that the handlers were not willing to pay as much money for distant milk as they had to before because it was not as accessible to the market.

I think the same provision applies today.

Q. You maintain that that condition is applicable today, that handlers in the nearby area purchasing milk from nearby producers are not willing to pay the same price up country? Is that what you are saying? A. We think so. I think that also as far as Worcester is concerned, that is what I am immediately interested in, I think that statistics of the market administrator show from the percentage of nearby milk that comes into the Worcester market that the handlers in general are more favorable to the milk up country than distant milk.

Q. How much more do you think that a handler buying milk from nearby areas is willing to pay for that milk; that is, buying up country milk that is delivered to his plant? A. I think that experience over the past 30, 40 years will show that he is willing to pay the price of such a market.

[4131] Q. Why don't we write that into the order, that the handler will pay 46 cents more? A. What is that?

Q. Why don't we write that into the order that the handler will pay 46 cents more? A. You have got it in your farm location differential.

Q. Well, the handler does not pay 46 cents over his up country cost, that 46 cents is taken out of the pool. A. Well, what are you talking about, the up country cost, the farm location or the supply plant cost up country?

Q. Well, you said that you thought that a handler would pay more for the nearby milk than— A. Distant milk, I meant distant milk.

Q. All right. Now then I am asking you how much more do you think that a handler would pay for nearby milk as compared to up country milk? A. Well, I don't know what

he would pay but he has traditionally paid even before federal orders and has continued to pay the 46 cents.

Q. I thought the nearby handler paid actually 54 cents as compared to milk delivered directly to his plant, as compared to milk delivered in the 21st zone? A. We are talking about the farm location differential here, Mr. Tipton, and not the zone differentials?

Q. We are talking about the price that the handler [4132] pays for the milk. A. We are talking about the price that a handler pays for his milk at the city plant, and as far as that is concerned what the handler pays the city plant is the same as class milk prices if he uses Class I prices, Class II, what he uses as Class II. It is the producer that will gain on the differential.

Q. Well, in effect a handler will not pay any more for nearby milk than for up country milk? A. He does not have to under the order. He pays the Class I price.

Q. And he probably would, is that true? He won't pay a premium in other words? A. Well, the order does not require him to pay a premium but prior to the days of federal order in which the 46 cent differential was set up, if you want to call it a differential, the handler did pay a premium of 46 cents and the producer got that premium. That was the basis I believe for writing it into the order.

Q. Now you mentioned the ability of a handler that buys milk from nearby producers to pick up that milk during the two times a day. Would you say that that is a normal process that a handler goes through if he needs additional supplies of milk or would it be more normal and probable that he would contact another handler and have it sent over [4133] by another handler rather than send his truck out? A. I think that he would. Of course again I can't say what he might do in Washington or what he might do in Boston or Southeast or Connecticut. As far as Worcester is concerned I feel, and I think I can almost definitely state, that the handler would send out his pick up equipment to get a second pick up at those farms rather than pay a premium whether a handler were buying from the handler, say a handler selling one to another, charge a handler a handling cost on that milk.

Q. How long does it take for milk that is picked up one day at the farm, say, and delivered to a plant in the 21st zone, before that milk is in the city and available for bottling? A. Well, you are talking now about several different methods. I will have testimony on that later. There are many methods for picking up milk in the country. If milk is picked up in the 21st zone in a tank truck, picked up in pick up trucks, transferred to an over the road trailer and some garage, it is probably down there within 24 hours, but if it goes through a receiving plant it takes considerably longer.

Q. Well, it takes considerably longer. Isn't the normal process up country for milk to be picked up at a farm every day or every other day and delivered to a plant [4134] and it leaves that plant that evening then and arrives in the city the next day. Isn't that the normal procedure of the up country receiving operations? A. In some cases.

Q. Is that normal? Is that the normal operation or is that an abnormal operation? A. Well, no, I would like to use the dictionary like Mr. Sykes.

We have three different types of plants if you are talking about country plants which I have not said anything about. My testimony here has been entirely on farm locations, farm locations differentials you call them. Now you are getting into country plants and I think you are getting into the 54 cent zone differentials which I am going to have something to say about a little later.

Q. My question didn't have any relation to the 46 cent differential. I am simply trying to establish what is the normal condition that milk supplies from up country are available in the market as contrasted maybe to milk supplies available from nearby areas. A. Well, you have four different methods of getting milk down out of the country the way I see it. First you have got this Sand Pit Garage Transfer that I talked about. You also have what I call abandoned filling station type plant and there under the Boston, Worcester and [4135] Southeast Orders the definition of a plant is that milk picked up at a producer's farm delivered to a building where washing and sanitation facilities are maintained and his [is] there transferred to stationary equipment in the plant or to another

vehicle. it is considered the zone price at that plant. That milk probably moves down almost as fast as this bulk transfer on the side of the road.

You will have another type of plant which is a manufacturing plant that is primarily supplemental supplies. That is something else again. How often that milk moves out is problematical.

You have a third type of plant which is primarily a Class I receiving plant and there are many of them scattered around through Vermont and the Boston area. Those plants receive milk maybe picked up every other day, maybe every day from the farms. It comes in separated and sanitized, put through the plant. It probably leaves that evening so it may be the next morning. But he cannot in an emergency get it as quickly as this nearby milk that may be 10 or 15 miles away.

EXAMINER HOLSTEIN: Mr. Cutting, do you have any inquiry?

MR. CUTTING: If Mr. Tipton is through.

EXAMINER HOLSTEIN: I don't think he is.

By Mr. Tipton:

Q. I realize that we don't have a spot market per se here in Boston but we do have milk that is available for [4136] sale from handlers that are surplus to their operations or almost daily do we not? This milk is available to small handlers or large handlers that want to buy it, it is available to any handler that wants to buy it, isn't that true? A. It is true if they want to buy it and pay the mark up on it and take the milk as is. I am not criticizing anybody's quality but among our handlers who are rather proud of their quality they don't like to mix in with local milk something that may be two or three days old by buying it from some of these sources that you speak of. They would much rather send their truck out and pick up fresh milk and keep up the quality which they try to maintain. Now in saying that I am not saying anything at ail against the quality of this milk that you speak of, it may be just exactly as good, but it is a personal matter probably with the handlers involved.

Q. Well, there are some costs involved to this handler sending out his truck to pick up some scattered producers that

might have some milk in their vat when he needs it in the middle of the day, isn't there? A. Well, but to the extent that he may subsidize the truck because he has got an investment in his tank truck and he is paying its driver and he may not be getting enough out of his cartage to pay for that so they– well, theoretically he is subsidizing some of the cartage. Whether he picks it up this morning, this noon or midnight [4137] tonight it is so many hundred pounds from that producer and the producer is paying cartage on that number of pounds of milk.

Q. So the producer would stand the cost of this additional pick up. In other words the producer would be on every other day pick up. Could the producer stand the cost of that pick up? A. So much per hundredweight. It does not make any difference. He pays so much per hundredweight.

MR. TIPTON: That is all.

EXAMINER HOLSTEIN: Any further questions?

Mr. Cutting, you are next.

By Mr. Cutting:

Q. Mr. Bridges, perhaps we can clarify the record on what at least one handler might do with respect to this local milk and what his feelings might be. As former deputy administrator of the Worcester order are you familiar with the operations of Hillcrest Dairies to some extent?

MR. CHERNAUSKAS: I object to that. That is getting into the realm of information this witness received in his official capacity and it could bring him into the point of revealing confidential information, Mr. Cutting.

MR. CUTTING: I will rephrase the question.

MR. MAHONEY: May I point out, Mr. Cutting, he is still– [4138]

MR. CHERNAUSKAS: It might be better for Mr. Cutting to present the information himself.

I don't want the witness to be put in the position of being possibly accused of giving away confidential information which he received in his official capacity.

MR. CUTTING: I will rephrase my question.

EXAMINER HOLSTEIN: The question is withdrawn and will be rephrased.

By Mr. Cutting:

Q. In the preparation of testimony for this hearing and working with the dealer's counsel did you become quite familiar with the operations of some of the dealers, including Hillcrest Dairies? A. Yes. I don't know, anything that I say in that respect is something that I have learned since January 1st and nothing with regard to any information I have about any handler in Worcester or any other market prior to January 1st, 1963.

Q. In working with myself in the preparation of the materials for the Worcester Milk Dealers Council have you noted that our receipts from producers vary somewhat in the frequency of pick up, and has it been explained to you that we have done this to accommodate our requirements for milk for processing? A. Yes.

[4139] MR. CUTTING: That is all.

EXAMINER HOLSTEIN: Dr. Johnson.

By Dr. Johnson:

Q. Mr. Bridges, was a large part of the higher price of nearby producers before federal order regulations due to a greater percentage of the nearby milk going into Class I? A. I think that is true, Mr. Johnson.

Q. Are location differentials which are paid nearby producers in considerable part to compensate them for sharing that high Class I percentage with distant producers under a market wide pool? A. Yes.

Q. Are the values of nearby milk for which location differentials are paid out of the pool separately and apart from the system of charges to dealers; that is, separate and distinct from Class I prices, Class II prices, transportation differentials and so on? A. Yes. I think I showed that in my testimony that the amount of money that was taken out or contributed by all producers to pay the 46 cents to a large percentage of the nearby deliveries and the Class I or the price to the handler is the same according to his Class I requirements. Was that your question?

DR. JOHNSON: Yes, thank you.

[4140] EXAMINER HOLSTEIN: Any other questions? Mr. W. T. Smith.

By Mr. W. T. Smith:

Q. Do I gather from an answer you made to Mr. Cutting, Mr. Bridges, that you feel that the nearby producer actually provides the handler in Worcester for example with greater services than the producer who might be located in a distant region? A. Well, getting back to the dictionary to services, he provides the handler with quicker service by being nearby and having the milk accessible and the quality and grade that the handler has been in the habit of receiving. If Mr. Geyer needed that milk that he was getting from certain farms to blend in with the rest of the milk that he had at that time, it is of valuable service to him to be able to go out there and get that milk rather than have to send it—to send to the country and have to wait several hours for it.

Q. Isn't it true, Mr. Bridges, that many nearby producers have provided much larger bulk tank facilities than would normally be needed just as an accommodation to the handler who buys their milk? A. Yes, and that has been particularly true, Mr. Smith, since we are getting into modern times, with every other day delivery and three days a week larger surpluses have to [4141] be carried for that purpose.

Q. And also isn't it true that the competitive situation on the street when handlers to some extent obviates the transfer of milk from one handler to another?

Let me expand on that question just a little bit.

EXAMINER HOLSTEIN: If he can answer it, let him answer it.

THE WITNESS: I would rather not answer, only if he explained it.

By Mr. W. T. Smith:

Q. Isn't there a sort of a human element of suspicion between handler A and handler B which prevent handler B from going to handler A except under extreme conditions to purchase supplies? A. It could be in some instances. We do not admit in Worcester that there is any suspicion between handlers.

Q. Would you accept my statement that there is suspicion between handlers in the Southeast area? A. If you say

so, I will accept it. I don't know anything about the Southeast area.

* * *

[4015] CHRISTOPHER B. SYKES

was recalled as a witness and, having been previously sworn, was examined and testified further as follows:

EXAMINER HOLSTEIN: The written statement which Mr. Sykes will read into the record and to which are attached two tabulations will be marked Exhibit 93 for identification.

(Exhibit 93 was marked for identification.)

DIRECT TESTIMONY (Resumed)

THE WITNESS: Thank you, Mr. Examiner. My statement is as follows:

[4016] We are unequivocally opposed to Proposal 52 whether it be coincident or not to a merger of any or all of the New England orders.

It seems pointless for us to include in our testimony any further analysis of the circumstances and the evidence which led inescapably and justifiably to the original incorporation of farm location differential payments at current rates in the Boston order initially and later in each of the other New England orders upon promulgation. Exhibit 24 constitutes an adequate basic record for this purpose taken with direct testimony already given in this hearing by Mr. Lee for NEMPA and by Mr. Geyer for CMPA.

It does appear, however, that some additional analysis of what we believe to be the basic facts as well as a sound critique of terminology is called for. The facts are that, during the time antecedent to the inception of federal regulation, milk dealers were paying more for nearby milk than for distant milk, not necessarily because its intrinsic value as milk was greater but because of its geographical origin. This higher rate per hundredweight was not arrived at by milk dealers then through the process of computing a distant price and adding thereto a premium of differential in order to arrive at a final figure. The current use of the word "differential" can therefore be misleading in itself, unless one remembers that

originally [4017] it meant only that the prevailing prices for nearby and for distant milk were different and by an amount which was determined probatively to be 46 cents in some instances and 23 cents in others. There was no evidence then, nor was there since any new concrete evidence developed, that what became a "farm location differential" in the New England orders was ever paid to nearby milk producers by the handlers themselves, except as an inseparable component of a higher going price for milk.

Given the presence of such price stratification as did exist in the market at the time, the Secretary appears simply to have decided, in line with the Act's prescription that a determination of parity prices is a prerequisite that such federal regulation as was to be insituted in the Boston marketing area must, in its provisions governing the determination of prices to producers, give recognition to the then existing price structure which was an undeniable and salient feature of the pre-order marketing procedure. We cannot now conceive of any manner in which this previous relationship of prices could have been preserved in a market wide pool except through the specification by regulation that nearby producers would continue to receive a higher rate of payment for milk and that such payments would continue for milk and that such payments would continue to be an obligation of the regulated pool inasmuch as, before regulation, they had been the result of simple [4018] economics in the milk market which was to be pooled. The established higher monetary value of nearby milk in the open market prior to federal regulation was thus maintained with the inception of the regulated market by means of provisions requiring the allocation to such milk of pool funds in a manner designed to preserve a prior status quo, or uniformity, of price.

* * *

[4023] Within the scope of this definition, the farm location differential is a form of payment the provisions for which are characteristically repeated in like milk marketing orders. And it is a payment common to particular places or groups of producers. Within the concept of the legal section of the

definition, the provisions for payment of farm location differentials constitute long established practice resting for authority on long consent, viz. the frequent and continued acquiescence, jointly or severally, of the very advocates of Proposal 52 during the course of many previous hearings as well as referenda on orders, as promulgated or as amended, to provisions for payment of farm location differentials which have themselves remained unchanged in intent and in result for nearly a quarter of a century. The payment of such differentials can also logically be interpreted as the custom of the milk business provable as presumably presupposed in New England federal orders, whether now or later.

The meaning of the past participle of the word "apply" is also of paramount significance and the definition of the very follows:

[4024] 1. To place in contact; to put or adjust (one thing to another);–with "to", as to apply medicaments to a diseased part of the body.

2. To put to use; to use or employ for a particular purpose, or in a particular case; to appropriate, allot, devote, as to apply money to the payment of a debt.

3. To make use of, connect with, or pronounce, as suitable, fitting or relative; to bring to bear on; as, to apply the testimony to the case; to apply an epithet to a person.

4. To engage or employ diligently or with close attention; as, to apply oneself to a task.

5. Now rare. (not in our opinion applicable or pertinent.)

6. Obs.

7. Astrol.

In applying our testimony to this case we are sedulously avoiding the application of any epithets to any persons, but state categorically that a higher rate of payment to nearby producers for milk was in origin a difference in rate of payment which, by usage, practice and convention, was suitably and fittingly made use of and was connected with such milk by handlers. The orders have therefore, in incorporating and maintaining provisions for "farm location differentials", truly

and justly recognized [4025] them as a translation of "market . . . . differentials customarily applied." The practice of making such payments has now an even more considerable status as "unwritten law" and certainly does not lack for authority on the grounds of "long consent". It is furthermore a usage which may well have acquired by long continuance "a legally binding force", and we will, if necessary, pursue its certification as such.

A statistical comparison of the prices received, under the four New England orders whose marketing areas cover portions of Massachusetts, by producers in the 46 cent farm location differential zone with those received, under pricing orders of the Massachusetts Milk Control Commission, by other Massachusetts producers will show, not only the continuing validity of the farm location differential payments, but also a strong case for an increase in such rates. Table I of Exhibit 93 lists city plant prices for Class I and Class II, by months for 1962, together with the blended prices payable to 46 cents zone producers; it also shows, for the same periods, the Class I and Class II prices applicable in markets administered by licensed milk dealers in such markets. Finally, this table sets forth the range of difference between the first and second series of prices. A simple average of the amounts which define the upper and lower limits of this range shows that prices under the state order exceed those under federal orders by $.214 to $.493 [4026] despite the fact that the federal order prices already give effect to existing farm location differential payment provisions.

Table II of Exhibit 93 shows the extent to which producer receipts were assigned to Class I over the same period in the same markets and through indication of the high and low months of utilization, points up the relatively high degree of seasonal variation in production in federal order markets as opposed to the state market as a whole. This obviously accounts, at least substantially, for the higher prevailing prices to producers in the latter market.

As an adjunct to this I would like to submit another table which is headed "Worcester County Price Study" and which

covers the difference in price between the average composite price paid under price orders of the Massachusetts milk control commission to Massachusetts state producers in Worcester County selling to licensed milk dealers there in the period starting November 1956 through July 1959. The pertinency of these is to indicate a prior base of price in Worcester County in an area which is now substantially part of the marketing area for the Worcester order.

This is exactly the same type of table for a prior period of rather the figures in it, particularly the column headed "difference" is arrived at in the same procedure as the comparison for the years of 1962 for the state [4027] average. Composite price as a whole were the federal order nearby prices and the orders as listed except this has specific application to the Worcester order only.

There is no source indicated at the bottom of this table and I will state for the record it is the records of milk control commission of the Commonwealth of Massachusetts for the period shown.

EXAMINER HOLSTEIN: Did you yourself take these figures from those records, Mr. Sykes?

THE WITNESS: No, they were reported to me. Incidentally to identify this even more specifically the Massachusetts Milk Control Commission prepares for the University of Massachusetts, particularly for Ellsworth W. Bell, the Extension Economist, an average composite price paid by licensed milk dealers in Massachusetts to milk producers in the state order markets. That figure Professor Bell uses in a price tabulation which he includes in the monthly issue of what is known as "The Dairy Digest" and it appears in that publication under the title, "other markets." That figure is identical to the figure used in Table I of Exhibit 93.

It is also reported to me, and would be to anybody else who asks for it, what the prices have been by counties or by groups of counties. In other words, this is not something that is necessarily done specifically for me alone, anybody [4028] who asks for the information could get it. At the time that this third table was prepared we were follow-

ing very closely the differences between the city plant nearby price and in the Worcester order compared with the prices that producers outside the order were receiving in Worcester County.

Incidentally this table was submitted as part of our testimony in the 1959 hearing, which final decision was rendered, I believe—well, during the summer of 1960 and took effect on September 1, 1960.

EXAMINER HOLSTEIN: The document just described by Mr. Sykes is marked Exhibit 94 for identification.

(Exhibit Number 94 was marked for identification.)

EXAMINER HOLSTEIN: Does that complete your statement, sir?

THE WITNESS: It does, sir.

EXAMINER HOLSTEIN: Are there any questions?

Mr. Chernauskas.

CROSS EXAMINATION

By Mr. Chernauskas:

Q. Mr. Sykes, I would like you to assume that the city of Gardner, which is in the Worcester order, was part of the federally regulated marketing area for a period of say twenty years hypothetically. Is it your contention that because the city has been customarily in the federally [4029] regulated area and has customarily been treated as a regulated area that there has resulted upon it a legally binding force which would prevent the Secretary from exercising the instructions in the Act to make his determination as to whether any particular item in an order tends to effectuate the purpose of the Act. A. I cannot answer that question yes or no, Mr. Chernauskas, because it appears to me you started off with a specific thing that involved the inclusion of a community in a marketing area and then asked me whether my interpretation of the word "customary" would prevent the Secretary from exercising any jurisdiction over any provisions in the order. It seems to me that is a far broader question than it started out to be.

Q. Let's restrict it say to removing the city of Gardner from the order. A. I don't think that any interpretation of the word "customarily" would carry of itself the entire weight

in making such a decision but I will say that here again is a question of my expressing an opinion as to what the Secretary would do, but if I am entitled so to do I would think the fact that it had been in a regulated area for as long a period as you describe would help considerably in determining whether or not it remains.

Q. Actually isn't it true that whatever must be done [4030] with regard to a provision or an order program under the Agricultural Marketing Agreement Act must be done in accordance with the terms and provisions of the Act itself rather than some– A. No. My interest here, Mr. Chernauskas, is in connection with whether there has been considerable use of this word "differentials"; "customarily applied." I am interested in what the exact meaning of these words by, I would say, competent authority. I also have had some recourse through counsel to what might be any definitions in legal dictionaries which might be at variance with this and we find nothing substantial that is listed for either of these three words that is different in intent.

EXAMINER HOLSTEIN: Is that all?

MR. CHERNAUSKAS: Yes.

EXAMINER HOLSTEIN: Any further questions?

Mr. Tipton.

By Mr. Tipton:

Q. On the first page of Exhibit 93 you say, "The facts are that, during the time antecedent to the inception of federal regulation, milk dealers were paying more for nearby milk than for distant milk."

Then you go on and say "not necessarily because of its intrinsic value"– A. That of is supposed to be erased out of there.

[4031] "Because its intrinsic value as milk was greater but because of its geographical origin."

Q. Could you tell me what items related to its geographical origin that contributed to the higher price that was being paid for nearby milk as was being paid for up country milk? A. All I know about this situation, Mr. Tipton, is what appears to be obvious, and it appears to be obvious to me from

an examination of the exhibits that are in so far that it was not necessarily a question of intrinsic value—in other words, it character as milk—but primarily because of its geographical origin. You think I used here the words, "geographical" to avoid repeating "local". Or "nearby" too many times but the implication I think is quite clear that what I am referring to is the nearby purchases and being nearby it has to be because of geography and geographical location. I mean I think it is implicit in the word.

Q. But my question really dealt with what about this geographical origin that contributed to handlers paying more for milk in this geographical origin as you described here as to more distant sources? A. What I mean by this statement, Mr. Tipton, is that it was there and there geographically and that the facts, at least as far as we are concerned, show that a higher price was being paid for it. That is all I am [4032] saying.

Q. I am asking though what contributed to this higher price being paid? A. I have not made any statement that I know of about that.

EXAMINER HOLSTEIN: Well, if you don't know, you can say so.

THE WITNESS: I didn't make any statement as to contributory factors.

EXAMINER HOLSTEIN: Well, the cross examination, Mr. Sykes, is not necessarily related to the exact words that you used. The cross examiner can ask you what you meant or ask you if you have any knowledge of matters related to what you meant and that is what Mr. Tipton is doing. He wants to know if you can tell him the factors that entered into this higher payment or nearby milk or milk of a geographical origin or whatever term you want to use.

THE WITNESS: No, except the fact that apparently they were receiving higher prices prior to order inception.

By Mr. Tipton:

Q. Then how could you come to the conclusion that it was not because of intrinsic value but was because of geographical origin. A. Mr. Tipton I said not necessarily because of intrinsic value.

[4033] Q. I will insert the word "necessarily" in my question. A. It does not seem to me that the exhibits that are in so far necessarily specify that there was some different character from a nutritional standpoint or some other standpoint that would be intrinsic to the milk from different locations. That is the only point I am trying to make.

Q. Well, in the next sentence, you say, "This higher rate per hundredweight was not arrived at by milk dealers then through the process of computing a distant price and adding thereto a premium or differential in order to arrive at a final figure."

Now I think that statement probably stands correct. However, did not these handlers arrive at the price at which they were willing to pay for the nearby milk by comparing that to a price at some other sources? A. I think undoubtedly being big men they assessed the economic situation, yes, if that is what you mean.

Q. And they paid a higher price for milk from nearby sources as compared to milk from more distance sources for some reason, is that right? A. They must have had some reason, yes.

Q. Well, can you tell me some of the reasons you think it might have contributed to that higher payment?

MR. MAHONEY: I will object on the basis this question has been asked at least once before if not twice before.

[4034] Unduly repetitious.

EXAMINER HOLSTEIN: In all fairness I don't think it was, until he gets an answer it is not repetitious.

MR. MAHONEY: I would submit, Mr. Holstein, that it has been answered, that the witness does not know of any specific reason. He has stated that this situation did in fact exist but he knows of no reason, and again Mr. Tipton asks him what reason is that?

EXAMINER HOLSTEIN: Well, I will overrule the objection and let the question be asked just once more.

You may answer it, Mr. Sykes.

THE WITNESS: May I have the question read?

(The question referred to was read by the reporter.)

THE WITNESS: No, I have no knowledge of the individual reasons that each individual handler might have used in arriving at this price. I make no assertion that I do know.

By Mr. Tipton:

Q. That was not my question really. I just asked do you have any reasons? A. No, I don't know of any and I am not offering any reasons.

Q. If federal regulations were to so disappear in these orders now, do you think a handler located in Boston and receiving milk from farmers located in a distance of within 40 miles of Boston and was receiving milk from [4035] up country sources more distant and had received this milk in his plant and was in his vat and it was of exactly the same quality, would he pay any difference due to—do you think for either one of the sources?

MR. MAHONEY: I will object to this. It really presupposed a situation which in fact does not exist, and the statute itself, is specific differentials customarily applied.

EXAMINER HOLSTEIN: The objection is overruled.

THE WITNESS: May I ask for clarification, Mr. Tipton? In each instance is the milk received producer milk?

By Mr. Tipton:

Q. Yes. It is in the vat of the handler, yes. The handler has it in his plant. Both is priced f.o.b. the handler's plant. A. And the question is would he pay any more for the nearby milk in the absence of federal regulations?

Yes, I think it is quite likely he might.

Q. Why do you think that he might? A. Well, this would depend in my estimation to a great extent on what the individual business situation of the handler to how many you were referring is. He might for instance have distribution that was quite compatible with the supply and he might feel quite strongly that he had a business in economic interest in securing a supply from the [4036] area in which he did business. Now that is one reason which might contribute.

Q. Do you have any others? A. Yes, because of not necessarily specified that this is regular supply from both sources and I would assume the possibility that in connection with

this that the up country milk directly received might be in the nature of supplemental supply.

Q. So now we must assume that they are both regular sources? A. I still think it might apply.

Q. What might apply under that assumption? A. The higher price of nearby producers.

Q. Why under that assumption?

MR. MAHONEY: I will object on repetition again.

EXAMINER HOLSTEIN: No, this question is not repetitious, this particular last question is not. The objection is overruled.

THE WITNESS: I can think of a number of reasons that might be applicable, Mr. Tipton. I don't know what weight they have. We can say that he is more satisfied from the quality standpoint with the nearby milk–

By Mr. Tipton:

Q. We had assumed that quality was the same. A. I didn't understand that. I thought this was [4037] two different sources of milk in the same vat and then would there be, would there be circumstances under which he would pay more for the nearby producer milk and then why would he be doing it?

Q. I had specified quality exactly the same. A. Oh, it might be because his nearby production was all located in the same community in which his plant was and that he felt that a good pay scale to nearby producers kept them in business and had the effect of keeping the tax rate in his community down. You are asking a very hypothetical question and I am forced to give a hypothetical answer to it.

Q. Do you have any other reasons? A. Yes. I can say one thing that might have very definitely an application and that is that the greater accessibility of the milk to him might make it possible for him, we will say, if this were a bulk route to pick up some of his nearby producer milk at very short notice when he turned out to be running short or let's suppose there was some off labor in the up country milk of equal bacteria standards and he might be on a sport where he had to lay his hands on some milk quickly. In the case of a bulk

route operated every second day he always has the recourse of making a single day pick up in order to provide himself with milk that he absolutely requires on the spot.

Q. Of course you realize that my question specified [4038] of course you realize—specified that the milk was in the vat of the handler of equal quality in the city plant? A. Then we are dealing with a single instance on a single day.

Q. Start from that one. A. Well, all right. He has all the milk in the vat and he goes to bottle it or he has bottled it and somebody suddenly realizes it is off flavor, has nothing to do with the bacteria count whatever.

EXAMINER HOLSTEIN: Mr. Sykes let's be fair to Mr. Tipton. He stated two or three times the milk was of equal quality. None of it is off flavor. That was a condition that is part of his hypothetical question and he is entitled to an answer to the question that he gave.

THE WITNESS: I might say that the milk industry as far as I know it there is a considerable variance in what the word "quality" applies to, and if I have misinterpreted Mr. Tipton's usage I apologize.

We will take the fact that it is all pure, fresh, wholesome milk at this point and I will still say that he can get a call from the Veterans of Foreign Wars or the Oakmont Country Club to supply an order the following morning and he does not have enough milk for it and he still has greater accessibility to his nearby milk to fill unexpected demands for his bottling appointments.

[4039] By Mr. Tipton:

Q. Let's assume he picked up the morning milk and has delivered all the morning milk from his producers and all of a sudden he gets an order from wherever you said for additional supplies of milk. Now where would he get those additional supplies of milk? A. By sending his truck—not his truck necessarily, his truck or the truck that picks up his bulk route, and picking up milk at seven o'clock at night.

Q. But he needs it at 3 o'clock in the afternoon or 2 o'clock in the afternoon. A He has already picked up. He can go out and pick up whatever happens to be in the tanks.

Q. He possibly can, and possibly more logically he can call a broker or call some other dealer and ask for a supply of milk? A. I don't know what he would do. You asked me in what circumstances he might consider that the nearby milk had greater value. I am giving you one instance in which I think he might.

Q Let me ask then what would be the normal procedure of a handler that had picked up all the milk from his producers on one day and at noon he decided he needed an additional supply of milk and he needed the milk shortly thereafter. What would be the normal procedure of handlers [4040] in the market? A. I would say that one normal procedure certainly would be to contact another handler and see if he had some additional milk to sell.

Q But going back now still to the original question milk in a vat in the handler's plant of equal quality, he knows that part of it came from nearby sources and he knows that part of it came from more distant sources, the milk is in the vat. Do you think that the handler would be willing to pay more from the nearby milk than for the up country milk? A. I have already answered that question in the affirmative.

EXAMINER HOLSTEIN: Yes, the witness has said yes and he has given you two samples.

Mr. Tipton.

May I point out that the difficulty you are having is because you are trying to get the witness to agree with you and of course he won't. You are in the position of making your argument and you should put it in your brief. I am not trying to restrict your cross examination but this is largely the responsible factor for this long hearing.

MR. TIPTON: I am sorry if I contributed to that.

EXAMINER HOLSTEIN: You are not the only one. I believe everyone here contributed to that. I believe half of these questions were arguments that should appear in the [4041] brief. So is Exhibit 93 and I will have to say about that in a minute.

By Mr. Tipton:

Q. Could you explain for me the sentence beginning with "within the concept of the legal section of the definition" on

page 3, the last paragraph, and that is the first part of the second sentence. Where I have trouble I guess is where you get down to acquiescence. A. I am having trouble locating the sentence to which you refer.

Q It is on page 3 and it is the second sentence of the last paragraph on the page, "the frequent and continued acquiescence, jointly or severally, of the very advocates of Proposal 52." A. I know of no instance, and in cross examination I asked you if you knew of any instance in which any of the cooperatives which you represent have voted against an order in referenda on an order which contained nearby farm locations differential payment provisions.

Q. That is what you mean by that sentence? A. That is exactly what I mean.

Q. Now you have some figures showing the prices paid by the milk control commissions—or not the milk control commission but by handlers who are regulated by the state orders in Massachusetts. Do you know the auditing [4042] process of the milk control commission of handlers which they regulate? A I know that the director of Milk Control, Mr. Bond, testified there in answer to this same question and the compensatory price hearing which was held August 28th and August 30th of 1962 and I know that it is conducted on a quarterly basis by virtually his statement, that this is conducted on a quarterly basis by what are considered to be competent auditing personnel.

Does that answer your question?

Q. Well, do they perform an audit which you would think is equivalent to the audit performed by the market administrator's office? A. I am not going to abrogate myself in a position of determining the difference in quality if any between two audits.

Q. Do you know, does the state auditor have any jurisdiction or require a handler or not allow a handler to make any specified amount of deductions? In other words, could a handler under the state order deduct from the price that is announced a charge for transportation of the milk considerably in excess of what it might normally cost? A. I would

say, Mr. Tipton, that the provision of official order 3(g) ol issued by the milk Control Commission under the authority of Chapter 94 A, [4043] General Laws of the Commonwealth, specifies in particular each transportation charge is subject to the approval of the direct of Milk Control.

Q. Do you know the producers actually receive as compared to the prices which you portray here in these exhibits? A. Do you mean of each individual producer that is involved in this computation?

Q. No, in general how much less if anything less or is this the price the producer actually receives or how much less would he get? A. Well, the same extent that the blended price under the orders reflect the price which the order specifies it—the uniform price and to the same extent these prices reflect what the milk control commission determines is the price payable on the basis of its class prices by utilization by the handler. Now to the extent the deductions are made the thing is the same under the order as it is under the control commission as far as I can see if it is an authorized deduction.

Q. Well, what kind of a basis does the Milk Control Commission use?

You said he reviews transportation losses. What kind of a basis does he use in determining whether a transportation allowance is acceptable or unacceptable? [4044] A. Well, in his opinion as far as I know whether it is equitable considering the distance involved and the quantity of milk involved and the general operations for instance of this the bulk trucker. It would also apply to routes where the milk dealer is handling his own truck in order to pick up canned milk. Of course it would not apply in the case where producers are hauling their own milk to the plant.

Q. You mentioned in your statement on page 5 that "One of the reasons for the justification of it is the more even seasonality of production of the producers in the nearby area." A. That is not what I said.

EXAMINER HOLSTEIN: The witness says that is not what he said.

By Mr. Tipton:

Q. I am sorry. What did you say?

Well, do you think that a more even seasonality of production of producers in the nearby area constitutes a reason for justification of the nearby differential? A. I didn't so state but I think it might be contributory to the entire situation, yes.

Q. Do you contend that a producer in the nearby area because he has a more even seasonality should be entitled to a differential while the producer in a more distant [4045] area having the same seasonality of production should not be entitled to the differential because he is not within what is designated the nearby area. A. No, I have not offered this as a reason, Mr. Tipton.

Q. I thought you said just a minute ago you thought this was a reason for justification? A. My direct statement here, Mr. Tipton, includes a comparison of prices paid in 1962 under the state order compared with the prices paid at city plants to producers in the 46 cent zone for the various markets listed and I have then made a simple statement that the utilization which is shown in table II is a contributory factor to the extent that the state order prices currently are still higher than the order blend prices to producers in the 46 cent zone at city plants. That is all I said.

Q. Do you think that a more even seasonality of production of producers in the nearby area constitutes a reason for them receiving a nearby differential? A. No, not in itself. The whole case for the 46 cents and the 23 cents as far as I am concerned is the fact that that was the situation, of higher prices prior to order and in translating them to a market wide pool, I can see no other way in which the price justification could be reflected without other provisions than the farm location differential provision.

[4046] MR. TIPTON: That is all.

EXAMINER HOLSTEIN: Any further questions?

Mr. Cutting?

By Mr. Cutting:

Q. Mr. Sykes, I would like to refer to table 2 of your exhibit for just a moment. You have shown in this table com-

parisons of 1962 percentages of assignment to Class I for the Boston, Springfield, and Southeast New England orders and the state control areas. Comparing these percentages of Class I utilization we find that the state order percentages are considerably higher and comparing them with order 7 which seems to be the highest utilization of the federal order areas I find it is approximately 15 and a half percent higher. Would this in any way be interpreted that the state controlled areas surrounding the federal order areas are relying on the federal order areas to balance their supplies? A. Not necessarily, no. I don't think that is a fair general inference, no.

Q. Is it possible that this might reflect that certain dealers under state control would be making a very high utilization of their local production in balancing their supplies to purchases or totally unregulated milk from nearby and northern New Hampshire? A. I think in certain instances it is possible, Mr. Cutting, [4047] yes.

Q. Do you know of any producers in this general area, Massachusetts producers in this general area, who have switched back and forth to any extent at all from handlers regulated under federal orders to or from dealers regulated by the state A. I am bothered a little bit by switched back and forth. How many switches are we talking about?

Q. Any switches? A. Yes, I know of some.

Q. Do you know of any bulk tank– A. I know of some both ways, excuse me.

Q. Do you know of any bulk tank loads of milk which might have normally been utilized by state control dealers who are now moving on the federal order market? I am making specific reference to a load that I believe is or was hauled by a trucker by the name of–he hauls for Newton, you know who I am talking about. Crocker. A. Well, you are going quite a long distance back Mr. Cutting, and I think if I am correct your reference is to a load of milk originating in from producers in New Ipswich, New Hampshire, Ashby, Massachusetts; Lunenberg, Massachusetts; and Leominster, Massachusetts. That was formerly in some instances for over 25 years, was delivered to a plant known as the Clover Hill

Plant in Lunenberg. Is that the load [4048] to which you are referring?

Q. Possibly, yes.

To refer back to your answer to my previous question for a moment that you knew of some transfers or switches by producers to or from federally regulated handlers, to or from state regulated handlers, does this in any way reflect the supply requirements of the state regulated handlers? A. Well, I thought I indicated, Mr. Cutting that I know switches which have occurred in both directions, not only from federal order markets into state order markets but also vice versa. I know of some from state order into federal.

Q. But my question was have any of these shifts been indicative of the supply and needs, either over supply or under supply of these state regulated dealers? A. I think among things they could be, yes.

MR. CUTTING: Thank you, that is all.

EXAMINER HOLSTEIN: Any further questions?

THE WITNESS: I would like to complete an answer.

EXAMINER HOLSTEIN: Oh, yes, you may.

THE WITNESS: In answer to Mr. Cutting, he assumed I was through. I wanted to follow it up.

EXAMINER HOLSTEIN: Go right ahead, sir.

THE WITNESS: If Mr. Cutting's reference is to the load of milk hauled by Crocker which formerly was [4049] delivered to the Clover Hill Plant in Lunenberg, the history of that is quite simple because the plant was bought by—I mean the routes of Clover Leaf, Clover Hill, the business was bought by Devine's Milk Laboratory which after the promulgation of the Southeast New England order became a southeast pool handler. The farm location zone in which these producers live was not the 46 cent zone for the southeast order but the 23 cent zone, and this resulted as you can see in a price disparity as far as these producers were concerned and finally resulted in their transferring to Hood in Charlestown immediately after the time that the Boston–Marrimack order merger was completed and the adoption into Boston of the Merrimack Valley 46 cent zone ended up with all of the producers being in the 46 cent zone for Boston.

MR. CUTTING: I have just one further question.

EXAMINER HOLSTEIN: Go ahead, Mr. Cutting.

By Mr. Cutting:

Q. With reference to this situation which I have just described this load of milk presently going to Charlestown? A. Yes, sir, it is, it has been for some time.

Q. Is it made up at the present time of producers who found themselves in this situation that I describe? A. No, not exclusively, Mr. Cutting.

[4050] EXAMINER HOLSTEIN: Mr. Chernauskas.

By Mr. Chrnauskas.

Q. In answer to the last question of Mr. Tipton you seemed to indicate that your impression is that the reason the nearby differential presently is in the order was that the nearby producers when the order came into effect were receiving a higher price. A. Yes.

Q. And that was some what, twenty, twenty-five years ago? A. I used the phrase a quarter of a century obviously for literary purposes but it does apply almost exactly to the Boston Order situation.

Q. And your definition is, I would take it, that you think the words "customarily applies" go back to that period? A. Well, my particular reason for doing this is that the citation from the Act and multiple use of this particular phrase of three words has been used by proponents of Proposal 52, and my desire here is that I contribute a full understanding of what the words actually mean, particularly with references to the word "apply" which does not maintain.

Q. I am wondering then in your opinion, Mr. Sykes, how long do you think the Secretary should continue to customarily apply that differential? Into perpetuity or what? A. I am a little confused here, Mr. Cherauskas, because [4051] I didn't believe that the Secretary was the one that customarily applied.

Q. As I understand your testimony you indicate that the reason we have a nearby location differential is that when the order was put in or prior to the inception of the order producers in the nearby area were historically receiving a higher

price than the ones further out and that the order recognized that fact by calling that higher price a nearby location differential. A. That is right.

Q. And I get it from your testimony that you are applying the phrase "differentials customarily applied" to that situation. A. That is correct.

Q. My question was that it appears then that the reasoning for the differentials goes back twenty-five years and now at twenty-five years hence we still have the differentials, and I am asking you how long should they continue? A. From our standpoint they are part and parcel of the price structure in New England, and if I am in a position to render a judgment on this I will say it is good as long as there are any nearby producers to make the milk.

Q. All right. Now historically then, going back twenty-five years, the higher price in the nearby area was paid for certain reasons, I don't know what they are but [4052] apparently higher prices were being paid nearby and lower prices were being paid upcountry and those prices were being paid under the conditions existing then. A. That is my understanding.

Q. Now is it your feeling that those prices should continue to be paid regardless of whether there has been a change in the conditions?

MR. MAHONEY: I assume Mr. Chernauskas means if it were proven that the conditions were changed.

MR. CHERNAUSKAS: I will expound on that a little bit.

By Mr. Chernauskas:

Q. Were there super highways up into the upcountry in 1936 as there are today? Were there tank trucks in 1937 as there are today, bulk tank loads, bulk tank farms?

MR. MAHONEY: Isn't this argumentative?

EXAMINER HOLSTEIN: No, the question is whether a change in conditions should have any effect upon the maintenance or what is known as the—

MR. MAHONEY: I am speaking about the limited access highways and the tank trucks, all those which are common knowledge.

EXAMINER HOLSTEIN: Well, Mr. Chernauskas is merely illustrating what he meant by change in conditions.

[4053] By Mr. Chernauskas:

Q. Was there in 1937 every other day pickup? Was there refrigeration to the extent that there is today? Was there electricity upcountry that there is today? I am asking you are those conditions which should be reflected in considering the pricing situation today? A. My answer to that question is– I don't know which way to answer it. Are they conditions which should be reflected in the pricing situation today? Is that the question?

Q. Yes. Well, let me phrase it different to give you a better prospectus.

EXAMINER HOLSTEIN: He has it.

THE WITNESS: My answer is no, Mr. Chernauskas. I would like to say why.

By Mr. Chernauskas:

Q. Go ahead. A. Because we are dealing with a lot of hypotheses here and I think you are asking me to imagine what should be the case today based on a decision that was made twenty-five years ago on the basis of certain existing conditions, and to me this is a ground rule in the pricing structure which was a basis for the inception of the regulation. Whether or not you would have any ball game at all without the initial regulation is very questionable. In other words, I think we are quite [4054] hypothetical is the way I have to answer that question.

Q. Well, let me ask you this then. Do you think that once a Federal milk order is promulgated and put into effect that the terms and provisions contained in that order should remain without change? A. No, not necessarily. I think it depends to a great extent on the character of the provision to which you refer.

Q. Then if they are changed, they should be changed to reflect the current conditions existing in the area; there may have been some changes from the time the order was put in and should any changes made in the provisions reflect those changes? A. Yes, but to me the question is whether what

you are talking about is a cornerstone of the the initiation of regulation or whether you are talking about something like the provisions of New England, basically Class I pricing formula, which has been changed from time to time for various reasons. I think there is a great difference as to the importance of the individual provision that is involved.

MR. CHERNAUSKAS: That is all.

EXAMINER HOLSTEIN: Any further questions?

Mr. Tipton.

By Mr. Tipton.

Q. Mr. Sykes, in regard to the last question you have made a statement as to whether there was a cornerstone of regulation or something to that effect. Could you probably [4055] not consider the price that the producers were receiving, the exact price the producers were receiving upcountry as a result of the Federal regulation? Was it cornerstone to the Federal order so far as those producers were concerned? A. I think possibly that would be their interpretation of it, yes, sir, but what I am referring to here is the fact that this all started on the basis of an apparently concerted and cooperative effort to stack regulation on some equitable basis. I am fairly well convinced that if this higher price structure which existed at the time was not reflected in the order provisions, I think I am justified in making a hypothecation there might not have been any order at all.

Q. Who paid the differential prior to Federal regulation, producers or— A. If you read my direct testimony or heard me give it, Mr. Tipton, you know I have adopted the position that it never was in fact paid by handlers to producers by such at all.

Q. Who paid the price in the nearby area? A. The dealers who were buying the milk.

Q. Who paid the price in the upcountry? A. The dealers who were buying the milk.

MR. TIPTON: That is all.

EXAMINER HOLSTEIN: See, Mr. Tipton, these last two questions did not establish any facts. Anybody knows that one buys, one sells, one gets paid. I am not trying to lecture

you, [4056] I am merely illustrating the type of question that adds nothing to this record and should be put in the brief.

Mr. Cobb.

By Mr. Cobb:

Q. Just for clarification, do you have a copy of Exhibit 94 there? A. Yes.

Q. In regard to this, I think it is called the Worcester County Price Study, these pounds here, are those receipts from producers? A. Yes.

Q. Where? A. By licensed milk dealers in Worcester County.

Q. All right. A. In the state order area of Worcester County as it existed, then, excuse me.

Q. All right. Now is the second column the state order class prices multiplied by the quantity of milk? A. That is correct.

Q. That is the second column? A. Yes.

Q. I assume the third column then is the average of those two, is that correct? A. That is correct.

Q. Now what is the fourth column? [4057] A. The fourth column is the price paid by Worcester pool handlers to producers in the 46 cent zone, or if there is no intermediate zone the city plant.

Q. This is the Federal order? A. That is correct, what was then an order in 99.

Q. Now the column on the extreme right, the value of the difference, will you explain how you arrived at that figure, please? A. It is Column 1 translated to terms of hundredweight multiplied by the difference between the two and multiplied by Column 5.

Q. All right. I just did not understand it. A. I am sorry. If I had had the time, I would have reproduced this, brought it up through the 31st of August 1960 but I did not have the time to do it.

EXAMINER HOLSTEIN: Any further questions?

Mr. Bridges.

By Mr. Bridges:

Q. I think just a couple short questions.

Getting back to this price structure before Federal order, isn't it possible that because of the accessibility of nearby milk that handlers set a price for nearby milk and rather than paying a premium over upcountry that the price engaged could be nearby and that they would only pay, say, a cent a quart less for the distant milk? [4058] A. That is my understanding, that something like that probably is the case.

Q. Actually it is not the upcountry milk? A. I don't think it was a differential.

Q. That is what I mean, it was gauged to the city price. A. Yes.

Q. Getting back to a question I think Mr. Tipton asked you about the accessibility, are you aware that in many instances when something has happened in a plant, I noticed in the Worcester plant spoiled milk or an accident in the plant, the handler sent out his truck and picked up milk from nearby farms for use that day? A. I know of instances in my own knowledge where it happened.

Q. Regardless of super highways and the bulk tanks, and it would have been impossible to get that milk down from there? A. Yes, I still think there is a substantial time.

EXAMINER HOLSTEIN: When your witness starts to answer the question, don't add to your question. Having asked the question and the witness having started to answer let him finish his answer and then ask another question.

I am sorry I interrupted you now.

THE WITNESS: I definitely think there are instances in which accessibility has been a very prime factor, yes.

[4059] By Mr. Bridges:

Q. And you would agree then that the nearby milk because of accessibility is worth more? A. That is certainly my opinion, Mr. Bridges, yes.

EXAMINER HOLSTEIN: Any further questions?

There appear to be none.

Exhibits 93 and 94 are received in evidence and become a part of the record.

(Exhibit Nos. 93 and 94 received in evidence.)

EXAMINER HOLSTEIN: I am not sure whether I received Exhibit 92 which was Mr. Garelick's testimony. If I did not, Exhibit 92 is received in evidence and becomes a part of the record.

(Exhibit No. 92 was received in evidence.)

EXAMINER HOLSTEIN: I might point out not by way of criticism but merely by way of information that most of what is in Exhibit 93 is argument. I know that Mr. Sykes stated that the reason he quoted so fully from the dictionary is because he wanted to avoid asking that official notice be taken of what is stated in Webster's Dictionary. That is not necessary. You may quote from the dictionary, from the Bible, from any case in any recognized court of record, either state or Federal, in your brief without asking that official notice [4060] be taken. The Secretary will of course always take official notice of recognized dictionaries, the Bible and other cases and other cases in Federal or state courts.

As I see it, and again I am not criticizing but I am merely pointing out the type of material that should be put into a brief. Exhibit 93 is a very lucid exposition of Mr. Sykes' position but much, if not all, of it is argumentative; very little, if any of it, has any factual material but refers to other facts and draws conclusions from those facts. That is the type of material that should be put in a brief.

The testimony offered in proceedings of this kind is written because it is rather voluminous and quite detailed, but that does not make it a bit different than if it were given orally without being read from a prepared statement. If this were being given orally by Mr. Sykes or anyone else without reading from a document, it would be subject to objection by virtue of the fact that it was argumentative and the objection probably would be sustained.

However, I did not want to interrupt Mr. Sykes' presentation. I am sure the Secretary wants to consider Mr. Sykes' position as he does the position of all witnesses here but this should be in the brief. I would advise you, Mr. Sykes, to put it in your brief and the Secretary will pay more attention to it than if it is incorporated in the testimony.

* * *

[1426] WILLIAM E. FLYNN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT TESTIMONY

EXAMINER HOLSTEIN: State your name for the record, your address, and whom you represent, sir.

THE WITNESS: William E. Flynn, Post Office address North Bennington, Vermont, producer in the Boston market for over 45 years, representing a small independent called the Independent Cooperative Association, Incorporated.

* * *

[1431] THE WITNESS: In regard to farm locations, the Administrator's report itself, last month, disclosed that $44,000 was deducted from the pool for the purpose of paying, as I understand it, the 48 cents and 23 cents from location differential.

Now, this deduction was taken from the pool of all producers and paid in as a bonus to those nearby producers in that area.

It gave a higher income to them, and if my arithmetic is correct, it also took 3 cents away from all producers and all other producers. It is my contention that they at the present time need this money more than the nearby producers.

It will also defeat the purpose of the order in uniform prices.

* * *

[1437] Q. And you made a computation of your own which showed that if this money had not been deducted, the price to your producers would have been increased by 3 cents. And I think you followed that by a statement that the more distant producers need it worse than the nearby producers.

Did you ever own or operate a farm in Massachusetts Mr. Flynn? A. No, I have not.

Q. Then this is a matter of opinion and not necessarily the result of some statistical computation with cost of production in one area against cost of production in another area, is that correct? A. In a way, but I won't entirely agree with that.

There are other elements that are taken into consideration there. The fact that quite a few of your Massachusetts farmers come out and the forage from our territory, and we have [1438] heavier expense, and you have a higher price that way, by virtue of lower freight charge, and sometimes direct plant trucking. I think these enter into consideration. One producer's cost of production differs. The cost of production of a producer in the same territory differs. You know that. It depends on the farm and everything else. When you go into cost of production, that is my opinion. But there are other elements to be considered there.

* * *

TESTIMONY OF MR. WELTS

[4501] Another defect in the present system that sometimes creates dissatisfaction and a feeling of injustice on the part of the producer is that it tends to discriminate between producers who are essentially similarly situated. Producers located in the same town have a community of interests, including a uniform tax rate and basis of assessment of their farm property. It seems more logical that all producers in a town, or none, receive a differential based on farm location, than that producers in each boundary town be split into two groups, one of which has a permanent income advantage of one-half cent per quart over the other on all milk deliveries to the Boston market.

It seems to me that these disadvantages of the arc-type boundary are sufficient to require a change from it, particularly if the change can be accomplished in a way that does not take away an existing farm location differential advantage from any producer who delivers his milk to the Boston market, and does not create a windfall for a large [4502] number of producers, and does not substantially disadvantage the great majority of Boston market producers who receive no farm location differential at all.

* * *

[4505] Exhibit 106 indicates that if my recommendation were adopted the boundaries of the respective differential areas would be extended to encompass all of the territory within the boundaries of the twelve "40-mile" towns listed on page 2 and nine "80-mile" towns listed on page 4 of Exhibit 106. These expansions of the respective differential areas would result in the inclusion in the 46 cent areas of a total of nine producers now in the 23 cent area, and the inclusion in the 23 cent area of a total of seven producers now outside of any farm location differential area.

I believe that this slight increase in the number of producers receiving an increased farm location differential is considerably outweighted by the advantages of getting away from the difficulties I previously mentioned as being associated [4506] with arc-type boundaries.

* * *

[4258] TESTIMONY OF JOHN ADAMS

was called as a witness and, having been previously duly sworn, testified as follows:

DIRECT TESTIMONY

THE WITNESS: My name is John Adams and I am representing New England Milk Producers Association, Northern Farms and Maine Dairymen Corporation.

My testimony relates to Proposal No. 21. I do not [4259] propose to re-examine the basis or justification for the use of farm location differentials or of nearby differentials as they are more commonly known under the five New England orders.

When the Boston, Springfield, Worcester, and the former Merrimack Valley orders were originally issued, certain nearby differential areas were defined which appeared to be appropriate in terms of existing condition in each of the various markets. The provisions for nearby differentials payable to producers whose farms were located in certain defined areas

recognized existing price relationships and supply areas, and competitive relationships between markets.

Most of the milk was delivered in cans, which tended to limit the distance over which it could economically be transported. The scope of operations of individual distributing plants was comparatively limited, and generally confined to a single, well-defined marketing area. A considerable degree of overlapping existed between the differential areas as defined under the various orders, and the milk of producers moved almost entirely to the markets with which it would logically be expected to be associated.

To the extent that variations existed in the definitions of the differential areas, they appeared to be justified, and to create no serious problems in the marketing of milk. [4260] Supplies of milk were generally well adjusted in accordance with the differential areas as defined under the various orders, and primarily on the basis of relative hauling costs to one or another market.

A number of important changes have occurred in recent years, all of which indicate the need for coordination of the pooling, classification, and assignment provisions of the various orders which was accomplished by amendment effective September 1, 1960.

One change has been the very substantial conversion to bulk tank delivery, which has made it possible to move milk over longer distances from farm to market, and to move it to different markets. Another has been the issuance of two new Federal orders covering the large markets of Southeastern New England and Connecticut. The differential areas as defined under the two newer orders are well coordinated with each other, but were not well coordinated with the comparable areas as defined under the three older orders, and probably could not have been, since amendments to each of the five orders were not then up for consideration. Another development has been the closing and consolidation of distributing plants, with the remaining distributing plant(s) now serving more than one market.

Finally, there is the possibility that such a plant may shift between markets, for purposes of regulation, on a [4261] month-to-month basis, depending on where the greater proportion of its milk is distributed. These changes, coupled with the lack of uniformity in the definitions of the differential areas under the various orders, in recent years have had serious disruptive affects on the marketing of milk or producers in southern New England. The lack of uniformity in the differential areas under the various orders has tended to create a number of tight compartments which impede the marketing of milk, or the readjustment of supplies between markets, in response to shifts in sales, or shifts in the applicable order regulation.

A number of illustrations can be given, and I have not attempted to arrange them in precise chronological order. Soon after the issuance of the Connecticut order, Sealtest decided to discontinue operating its distributing plant in Springfield, and to supply its outlets both in Springfield and Connecticut from another of its distributing plants located in Hartford.

Sealtest thereupon ceased to be a pool handler in Springfield, and its Hartford plant continued to be operated as a Connecticut pool plant. Its Springfield plant had been receiving a considerable quantity of milk for many years from producers located in Hampshire and Franklin Counties of Massachusetts, and the handler would have liked to continue to receive this milk at Hartford.

[4262] The producers, however, were located in the 46 cent differential area under the Springfield order, but in the non-differential area under the Connecticut order. We were forced to re-market the milk which the handler had been receiving for many years in Springfield, and to transfer other milk to Sealtest from producers whose farms were located in eastern New York, and which had previously been received by another Springfield handler. In this case, it was possible to effect an approximate substitution of supplies, but only by disruption of long established relations between two groups of producers and the handlers who had been receiving their milk.

Pioneer Dairy is another former, and smaller, Springfield

pool handler, with a plant located in Southwick, Massachusetts, who acquired sufficient store outlets in Connecticut to cause it to be regulated under the Connecticut order, rather than the Springfield order This handler, also, had been receiving milk from producers in Hampden or Hampshire Counties of Massachusetts, most of whom were located north of the Massachusetts Turnpike. These producers also were located in the 46 cent differential area under the Springfield order, but in the non-differential area under the Connecticut order.

When Pioneer Dairy ceased to be a pool handler under the Springfield order and became subject to regulation under the Connecticut order, it was necessary for us to re-market the milk of these producers, and for Pioneer Dairy to find a [4263] new source of supply. If the handler should lose his store outlets in Connecticut, he would probably revert to regulation in Springfield. In effect, the handler needs two sets of producers, one for Springfield and the other for Connecticut.

Some time earlier, the Whiting Milk Company had discontinued the purchase of milk from a group of producers in the general vicinity of Northfield, Massachusetts, which had formerly been received at its Worcester plant. This milk is currently being received at our Worcester plant. It is high quality milk, and entirely in bulk tank. On several occasions, we could have re-marketed the milk in Boston, except that the producers are located in the 46 cent differential area under the Worcester order, but in the 23 cent differential area under the Boston order. Following the issuance of the Southeastern New England order, we could have re-marketed the Northfield load to a handler under that order, except for the same reason. The handler in this instance ended up by going into eastern New York to obtain a milk supply directly from producers, where the "tight compartments" to which I referred do not apply.

EXAMINER HOLSTEIN: The time has come when we must vacate this room. We will reconvene in the Empire Room just off of the main lobby.

(Whereupon, a short recess was taken.)

[4264] EXAMINER HOLSTEIN: The hearing will please come to order.

Let the record show that we are convened in the Empire Room and an announcement to that effect was made before the recess for the purpose of moving to this room.

You may proceed, Mr. Adams.

THE WITNESS: In recent years the Whiting Milk Company has also been engaged in closing and consolidation of its distributing plant operations. The handler has discontinued operation of its former distributing plants in Providence and in Worcester, and its sales in these markets are now supplied from its Boston distributing plant. The Whiting plant in Providence had received milk from producers located in Rhode Island and eastern Connecticut. The plant in Worcester had continued to receive milk from producers located in Worcester County. All of this milk was also in bulk tank.

Whiting would have liked to continue to receive both lots of milk at its Boston distributing plant, but the producers in both instances were located in the 46 cent differential area under the Southeastern New England or Worcester orders, but in the 23 cent differential area under the Boston order. We were able to re-market the milk of the producers located in Rhode Island and eastern Connecticut with another Southeastern New England handler. The milk of [4265] the former Whiting producers located in Worcester County has continued to be received at our plant in Worcester, and the same problem would arise in attempting to re-market this milk, say in Boston or Southeastern New England, as referred to in connection with the Northfield load.

When the Southeastern New England and Connecticut orders were first issued, some conflict existed in the classification and assignment provisions with respect to movements of bulk milk between Boston and either of the other two markets. To put itself in a more favorable position to continue to supply certain outlets for bulk milk to handlers in Southeastern New England and Connecticut, Deary Bros. for a time operated a plant at Putnam, Connecticut, as a supply plant under the Southeastern New England order, for the receipt of

milk from producers located primarily in eastern Connecticut.

Subsequently, the classification and assignment provisions of the various New England orders were coordinated in amendments to the various orders, effective September 1, 1960. This removed the original reason for operation of the Putnam plant as a supply plant under the Southeastern New England order. Deary Bros. would then have liked to transfer these producers back to their distributing plant located at Webster, Massachusetts where the milk had previously been received.

The same series of amendments, however, provided [4266] for a substantial expansion in the definition of the Worcester marketing area, with the result that the Deary Bros. plant at Webster, Massachusetts, became subject to regulation under the Worcester order. Insufficient attention had been given to the need for corollary changes in the differential area to accompany the expansion in the marketing area, with the result that the producers located in Connecticut, whose milk had temporarily been received at the Putnam plant, but which the handler now wished to transfer back to his distributing plant at Webster, Massachusetts, were located in the non-differential area under the Worcester order. Deary Bros. was forced to continue to receive the milk of these producers at its Putnam plant, until such time as a hearing could be held, and the Worcester order amended, to provide for appropriate changes in the definition of the differential area under that order to conform to the changes in the definition of the marketing area.

Several other small handlers whose plants happened to be located near the Connecticut line, and who became subject to regulation under the Worcester order at the same time, were caught in a similar position. In one instance, a small handler whose plant was located in Massachusetts, and who became subject to regulation under the Worcester order beginning September 1, 1960, received milk from one or two producers located within a mile or half mile of his plant, but whose farms happened to be located across the line in Connecticut. The amendment to [4267] the definition of the differential area under the Worcester order was neces-

sary to correct an obvious inequity, but it represented no more than a piecemeal coordination of the differential areas as between the five New England orders.

The most striking illustration of the need of farm location differential is happening at the moment relative to Deary Bros. and producers shipping to the Hood Company at Providence, Rhode Island. Mr. Deary has testified this afternoon that his plant at Dudley, Massachusetts, will be in the Southeastern New England order during July, August and September as a result of an audit.

This will affect producers north of the Massachusetts Turnpike in the State of Massachusetts. It has placed them in the 23 cent location differential area for Southeast where they have assumed that they would be in the 46 differential area for the Worcester order. In the case of the Hood Company at Providence, Rhode Island, they had notified one cooperative in that area that effective March 1 they would not receive the milk in Providence from approximately twenty producers but if the cooperative could not market this milk they would take the milk at their Charlestown plant, this plant being under the Boston order. Those producers then would either be in the 23 cent location differential for the Boston order or the basic area for the Boston order where they are now receiving the nearby differential in the Southeast order. This has a [4268] serious impact on the milk checks of nearby farmers.

These illustrations are sufficient to indicate the problems that have arisen in recent years, due to lack of uniformity in the definition of the farm location differential areas under the various New England orders. The lack of uniformity has impeded the re-marketing of milk supplies of producers in southern New England, and in many instances such remarketing would not have been necessary except for the lack of uniformity. Where distributing plant operations have been consolidated, or a distributing plant shifts from one market to another, for purposes of regulation, the conflicting definitions of the differential areas have had serious disruptive effects on established marketing relationships between producers and handlers.

On the other hand, it is not feasible to contract the differential area(s) for a market, or a group of markets, when or where they have been long established. We do not think it is practical or equitable to destroy a pattern of prices to producers in New England federal order markets that has existed for years, as an incident to coordination of the differential areas between markets, and it is much more than an "incident" to the producers who might be involved.

In the great majority of instances, the milk of producers whose farms are located in a differential area under one or another of the New England orders would continue to move [4269] in the same way and to the same markets as now. Our proposal aims, so far as possible, at maintaining existing equities of producers and handlers.

Coordination of the differential areas in New England would eliminate the effect of nearby differentials in directing milk to a particular market, or in precluding its movement to a different market. It would eliminate the disruptive effects on marketing arrangements between producers and handlers that result from the closing and consolidation of distributing plants, and the shifting of such plants between markets, for purposes of regulation. Milk supplies would tend to move more freely between markets, on the basis of relative hauling costs, and such differences as might exist in blended prices between markets. Such a system would contribute to natural and orderly marketing conditions, and more efficient handling of local milk supplies.

That concludes my statement.

EXAMINER HOLSTEIN: Cross examination.

Mr. Sykes

CROSS EXAMINATION

By Mr. Sykes.

Q. Is Deary Bros. still receiving any producer milk? A. I do not know.

Q. With reference to the same time and the same hearing, namely, were you referring to the area of Worcester on [4270] December 1, 1950, and in your direct testimony? A Yes.

Q. In your direct testimony you made reference to several milk dealers who became Worcester pool handlers as a result of the marketing area. A. That is correct.

Q. Isn't it a fact that the only other dairy other than Deary Bros. was Rooter's Dairy? A. I can't recall.

Q. With reference to the continued receipt by Whiting of a load of milk from around the Worcester area, isn't it true that there were two loads of milk that Whiting was receiving at its then Shrewsbury plant? A. I believe that is correct.

Q. And that one of these loads was from western Worcester? A. Yes.

Q. And the other was within the 46 cent nearby location differential for Boston? A. Yes.

Q. So that in fact if Whiting had wished to, they could have continued to receive this load? A. They could have.

Q. Are you aware, Mr. Adams, as to the suggestion that has been made on behalf of Worcester Council Milk Dealers that [4271] situations such as the shifting of a city distributing plant on the basis of a small percentage be solved either by pooling the city distributing plant in the marketing area in which it is located or that non-pool election could be made? A. I heard that testimony, yes.

Q. Would this help solve the problem in the case of Deary Bros. if such a provision had been in effect? A. I don't believe so.

Q. Well, to continue that one question further, if the provision had been in effect, the city distributing plant would be pooled in an order if the plant were located in the marketing area with that order, would that not have made Deary a Worcester pool plant in all of these instances to which you refer? A. Under the major proposals we hope that will not be a problem.

Q. Well, to me that is the answer to another question which I have not yet asked.

You don't care to answer the question I did ask, Mr. Adams? A. Correct.

Q. Isn't it true that by virtue of the fact that Deary Bros. was in certain months pooled under the Southeast New Eng-

land order producers north of the Massachusetts Turnpike, even though they were in the 23 cent zone, received a higher [4272] return than the Deary Bros. who had been with the pool? A. I have not checked that.

MR. SYKES: That is all I have.

EXAMINER HOLSTEIN: Mr. Tipton.

By Mr. Tipton:

Q. Wouldn't a merger of the order solve both the Deary problem and eliminate the need for a proposal? A. I believe the merger of Springfield, Worcester and Boston would solve their problem.

Q. And merger of all five of them would eliminate the need for the proposal you have just set forth? A. Probably.

Q. Is part of the justification of your association in this hearing for the continuance of nearby farm location differentials the fact that the farms of these producers were located in a certain locality around a market and historically received some prices that were in excess of prices? Is that true? A. I said in my first statement that I do not propose to read them on the basis of justification for the use of farm location differentials.

Q. I realize that but I am just asking if this is part of the position of your association in this hearing. A. Rephrase the question, please.

EXAMINER HOLSTEIN: Rephrase it?

[4273] THE WITNESS: Yes.

EXAMINER HOLSTEIN: Will you state it another way, Mr. Tipton?

MR. TIPTON: I will try, yes, sir.

By Mr. Tipton:

Q. Is not part of the justification as has been set forth by witnesses in your association for the continuance of the nearby farm location differentials the fact that farmers located in certain areas in relationship to certain markets historically receive prices in excess of prices that were received by farms from other areas? A. Historically they are receiving the same price that they received before Federal orders were originated.

Q. But was this not in relation to a specific market? A. Yes.

Q. Now what has been the change of conditions that would make a farm that was located within the 46 cent differential area for Worcester or Springfield, for example, but delivered its milk to Boston and would thereby either be not in a nearby differential area of any kind or in a 23 cent differential, what has been the change of conditions that would allow him to report a 46 cent differential? A. If he is currently receiving a 46 cent differential, he should not be subject to movement of his farm by distributor sales.

[4274] Q. But he has no historical relationship of having received 46 cents in relation to the Boston market, would he? A. He was in relation to the market where he shipped.

Q. Yes, but not in the Boston market. A. If he is not shipping to the Boston market, no.

Q. Would not the effect of your proposal increase the amount of money that is paid in the form of nearby farm location differentials? A. I have not gone into that.

Q. Well, it is in effect in your proposal. Can't you draw a conclusion from the testimony? A. It would seem to be negligible.

Q. But in each of the cases that you have outlined in your testimony, that would constitute an increase for the amount of money that was being paid in farm location differentials, is that right? A. To some extent.

Q. Well, to every extent. As I understand your testimony it is to every extent, isn't it? A. Yes.

* * *

EXHIBIT 7

[31]

MARKET ADMINISTRATOR - GREATER BOSTON MARKETING AREA

NUMBER OF PRODUCERS

By Farm Location Differential Areas
September 1960 - September 1962

Year and Month	In Nearby (46-Cent) Area	In Intermediate (23-Cent) Area	In "Distant" Area (Beyond Differential Areas)	Total Producers
1960				
September	679	58	8,917	9,654
October	681	56	8,956	9,693
November	670	58	8,944	9,672
December	662	58	8,898	9,618
1961				
January	656	58	8,864	9,578
February	655	58	8,901	9,614
March	666	59	8,923	9,648
April	660	63	8,948	9,671
May	669	63	8,945	9,677
June	660	57	9,007	9,724
July	658	52	9,326	10,036
August	658	46	9,065	9,769
September	649	49	9,109	9,807
October	638	54	9,223	9,915
November	627	54	8,953	9,634
December	631	117	8,798	9,546
1962				
January	619	57	8,566	9,242
February	618	59	8,517	9,194
March	626	60	8,493	9,179
April	623	58	8,613	9,294
May	616	56	8,528	9,200
June	598	61	8,464	9,123
July	641	87	8,123	8,851
August	625	83	8,056	8,764
September	621	85	8,027	8,733
October	617	85	8,444	9,146
November	614	83	8,218	8,915

November 1962

[32]

MARKET ADMINISTRATOR-CONNECTICUT MARKETING AREA

NUMBER OF PRODUCERS

By Farm Location Differential Areas
September 1960 - September 1962

Year and Month	In "Nearby" (46-Cent) Area	In "Intermediate" (23-Cent) Area	In "Distant" Area (Beyond Differential Areas)	Combination of "Intermediate" (23-Cent) and "Distant" Areas	Total Producers
1960					
September	2,927	79	232		3,238
October	2,914	80	241		3,235
November	2,897	78	240		3,215
December	2,817	80	239		3,136
1961					
January	2,819	75	236		3,130
February	2,748	80	236		3,064
March	2,785	82	235		3,102
April	2,784	84	235		3,103
May	2,788	84	233		3,105
June	2,764	84	232		3,080
July	2,743	85	232		3,060
August	2,735	90	234		3,059
September	2,715	91	234		3,040
October	2,698	90	235		3,023
November	2,692	89	231		3,012
December	2,674	90	235		2,999
1962					
January	2,670	118*	218*		3,006
February	2,650	116	215		2,981
March	2,618	115	211		2,944
April	2,585	**	**	247	2,832
May	2,554			246	2,800
June	2,555			244	2,799
July	2,497			185	2,682
August	2,490			182	2,672
September	2,474			180	2,654
October	2,472			181	2,653
November	2,430			178	2,608

* The "intermediate" differential area was extended January 1, 1962, to include all of Berkshire County, Massachusetts. Prior to that date, no differential was applied to milk produced on farms located in that portion of Berkshire County which is north of the Massachusetts Turnpike.

** Producers located in the "distant" area are combined with producers located in the "intermediate" area beginning April 1, 1962, because of the limited number of handlers who received milk from producers located in the "distant" area.

November 1962

[33] MARKET ADMINISTRATOR - SOUTHEASTERN NEW ENGLAND MARKETING AREA

NUMBER OF PRODUCERS

By Farm Location Differential Areas
September 1960 - September 1962

Year and Month	In "Nearby" (46-Cent) Area	In "Distant" Area (Beyond Differential Areas)	Combination of "Intermediate" (23-Cent) and "Distant" Areas*	Total Producers
1960				
September	1,298	1,178		2,476
October	1,291	1,084		2,375
November	1,293	1,082		2,375
December	1,293		1,090	2,383
1961				
January	1,269	1,065		2,334
February	1,263	1,061		2,324
March	1,250	1,050		2,300
April	1,241	1,022		2,263
May	1,232	1,011		2,243
June	1,222		1,010	2,232
July	1,215		661	1,876
August	1,213	905		2,118
September	1,223	746		1,969
October	1,214	724		1,938
November	1,205	861		2,066
December	1,199	942		2,141
1962				
January	1,192	937		2,129
February	1,197	932		2,129
March	1,186	924		2,110
April	1,182	833		2,015
May	1,159	835		1,994
June	1,165	825		1,990
July	1,149	1,019		2,168
August	1,148	1,074		2,222
September	1,137	1,066		2,203
October	1,212	615		1,827
November	1,203	601		1,804

* Producers located in the "intermediate" area are combined with producers located in the distant area because of the limited number of handlers who received milk from producers located in the "intermediate" area.

[34]

MARKET ADMINISTRATOR - SPRINGFIELD MARKETING AREA

NUMBER OF PRODUCERS

By Farm Location Differential Areas
September 1960 - September 1962

Year and Month	In Nearby (46-Cent) Area	In Intermediate (23-Cent) Area	In "Distant" Area (Beyond Differential Areas)	Total Producers
1960				
September	738	42	118	898
October	740	57	110	907
November	740	59	109	908
December	736	58	111	905
1961				
January	734	58	110	902
February	729	58	51	838
March	728	58	54	840
April	730	58	56	844
May	723	58	56	837
June	723	55	67	845
July	730	55	46	831
August	731	54	42	827
September	734	53	54	841
October	730	52	52	834
November	737	52	52	841
December	733	51	49	833
1962				
January	719	50	48	817
February	717	48	48	813
March	710	47	48	805
April	700	47	48	795
May	700	46	46	792
June	689	45	45	779
July	681	43	18	742
August	674	43	15	732
September	672	43	18	733
October	658	41	32	731
November	652	39	33	724

[35]

MARKET ADMINISTRATOR - WORCESTER MARKETING AREA

NUMBER OF PRODUCERS

By Farm Location Differential Areas
September 1960 - September 1962

Year and Month	In Nearby (46-Cent) Area	In "Distant" Area (Beyond Differential Areas)	Total Producers
1960			
September	658	473	1,13
October	651	572	1,22
November	652	578	1,23
December	659	562	1,22
1961			
January	644	557	1,20
February	680	552	1,23
March	682	546	1,22
April	676	533	1,20
May	650	525	1,17
June	659	399	1,05
July	650	307	95
August	652	304	95
September	663	351	1,01
October	667	213	88
November	650	223	87
December	587	149	73
1962			
January	664	221	885
February	659	220	879
March	651	218	869
April	661	223	884
May	655	230	885
June	653	229	882
July	670	357	1,027
August	650	263	913
September	636	188	824
October	572	109	681
November	547	211	758

[41]

MARKET ADMINISTRATOR - GREATER BOSTON MARKETING AREA

RECEIPTS OF MILK FROM PRODUCERS
By Farm Location Differential Areas
(In Thousands of Pounds)
September 1960 - September 1962

Year and Month	In "Nearby" (46-Cent) Area	In "Intermediate" (23-Cent) Area	In "Distant" Area (Beyond Differential Areas)	Total
1960				
September	10,594	690	133,039	144,323
October	10,743	712	135,914	147,369
November	10,027	675	126,879	137,581
December	10,467	701	134,767	145,935
1961				
January	10,794	699	137,229	148,722
February	9,908	647	127,920	138,475
March	11,628	807	159,667	172,102
April	11,746	853	168,783	181,382
May	12,842	948	187,519	201,309
June	12,685	963	193,731	207,379
July	11,828	847	175,415	188,090
August	11,613	784	156,567	168,964
September	10,770	724	157,322	168,816
October	10,884	780	166,273	177,937
November	10,037	738	143,499	154,274
December	11,023	2,322	150,597	163,942
1962				
January	10,938	839	151,090	162,867
February	10,107	765	137,962	148,834
March	11,796	837	166,407	179,040
April	12,005	984	178,918	191,907
May	12,824	1,015	193,418	207,257
June	12,389	1,050	195,428	208,867
July	12,780	1,738	163,567	178,085
August	12,101	1,646	153,875	167,622
September	11,783	1,651	152,595	166,029
October	12,075	1,680	164,319	178,074
November	11,708	1,496	151,326	164,530

[42]

MARKET ADMINISTRATOR - CONNECTICUT MARKETING AREA

RECEIPTS OF MILK FROM PRODUCERS

By Farm Location Differential Areas
(In Thousands of Pounds)

September 1960 - September 1962

Year and Month	In "Nearby" (46-Cent) Area	In "Intermediate" (23-Cent) Area	In "Distant" Area (Beyond Differential Areas)	Combination of "Intermediate" (23-Cent) and "Distant" Areas	Total
1960					
September	74,504	2,215	5,248		81,967
October	78,115	2,336	5,735		86,186
November	75,263	2,252	5,665		83,180
December	80,228	2,426	6,042		88,696
1961					
January	82,780	2,454	6,235		91,469
February	74,889	2,268	5,770		82,927
March	85,174	2,700	6,872		94,746
April	81,864	2,729	6,846		91,439
May	87,795	2,968	7,610		98,373
June	82,291	3,003	7,435		92,729
July	74,828	2,652	6,255		83,735
August	74,856	2,726	5,816		83,398
September	74,245	2,606	5,909		82,760
October	79,171	2,664	6,444		88,279
November	74,452	2,459	5,938		82,849
December	80,037	2,642	6,536		89,215
1962					
January	84,834	3,613*	5,993*		94,440
February	76,818	3,257	5,474		85,549
March	85,768	3,812	6,385		95,965
April	82,362	**	**	7,785	90,147
May	87,455			8,409	95,864
June	79,278			7,748	87,026
July	74,060			4,660	78,720
August	74,915			4,509	79,424
September	75,679			4,494	80,173
October	78,687			4,656	83,343
November	77,277			4,487	81,764

*The "intermediate" differential area was extended January 1, 1962, to include all of Berkshire County, Massachusetts. Prior to that date, no differential was applied to milk produced on farms located in that portion of Berkshire County which is north of the Massachusetts Turnpike.

**Receipts from producers located in the "distant" area are combined with receipts from producers located in the "intermediate" area beginning April 1, 1962, because of the limited number of handlers who received milk from producers located in the "distant" area.

[43]

MARKET ADMINISTRATOR - SPRINGFIELD MARKETING AREA

RECEIPTS OF MILK FROM PRODUCERS

By Farm Location Differential Areas

(In Thousands of Pounds)

September 1960 - September 1962

Year and Month	In "Nearby" (46-Cent) Area	In "Distant" Area (Beyond Differential Areas)	Combination of "Intermediate" (23-Cent) "Distant" Areas*	Total
1960				
September	30,663	20,071		50,734
October	31,774	21,735		53,509
November	30,753	21,146		51,899
December	32,522		23,246	55,768
1961				
January	33,132	23,598		56,730
February	30,106	21,727		51,833
March	34,544	25,507		60,051
April	33,675	24,190		57,865
May	36,474	26,046		62,520
June	34,203		25,210	59,413
July	32,010		15,019	47,029
August	32,139	18,309		50,448
September	31,236	14,870		46,106
October	31,915	17,050		48,965
November	29,962	17,982		47,949
December	31,373	23,302		54,675
1962				
January	32,634	24,550		57,184
February	29,759	22,298		52,057
March	34,123	25,700		59,823
April	33,899	23,507		57,406
May	36,297	25,360		61,657
June	33,879	23,973		57,852
July	31,570	23,922		55,492
August	32,120	24,579		56,699
September	31,591	24,984		56,575
October	37,254	13,800		51,654
November	33,509	15,813		49,322

*Receipts from producers located in the "intermediate" area are combined with receipts from producers located in the "distant" area because of the limited number of handlers who received milk from producers located in the "intermediate" area.

November 1962

[44]

MARKET ADMINISTRATOR - SPRINGFIELD MARKETING AREA

RECEIPTS OF MILK FROM PRODUCERS
By Farm Location Differential Areas
(In Thousands of Pounds)
September 1960 - September 1962

Year and Month	In "Nearby" (46-Cent) Area	In "Intermediate" (23-Cent) Area	In "Distant" Area (Beyond Differential Areas)	Total
1960				
September	12,803	831	2,068	15,702
October	13,425	1,022	2,180	16,627
November	12,763	1,067	2,226	16,056
December	13,532	1,179	2,474	17,185
1961				
January	13,797	1,188	2,555	17,540
February	12,579	1,118	703	14,400
March	14,688	1,330	825	16,843
April	14,799	1,288	813	16,900
May	16,086	1,366	864	18,316
June	15,638	1,320	959	17,917
July	14,087	1,080	617	15,784
August	13,869	940	488	15,297
September	13,445	929	662	15,036
October	14,197	1,028	694	15,919
November	13,150	948	640	14,738
December	14,031	1,035	668	15,734
1962				
January	14,660	1,110	723	16,493
February	13,482	1,009	654	15,145
March	15,578	1,154	733	17,465
April	15,677	1,174	732	17,583
May	16,562	1,241	823	18,626
June	15,400	1,210	800	17,410
July	13,979	1,033	314	15,326
August	13,836	915	242	14,993
September	13,809	959	275	15,043
October	13,893	1,062	510	15,465
November	13,492	1,042	528	15,062

[45] MARKET ADMINISTRATOR - WORCESTER MARKETING AREA

RECEIPTS OF MILK FROM PRODUCERS

By Differential Areas
(In Thousands of Pounds)

September 1960 - September 1962

Year and Month	In "Nearby" (46-Cent) Area	In "Distant" Area (Beyond Differential Areas)	Total
1960			
September	12,847	6,986	19,833
October	13,241	8,696	21,937
November	12,545	8,550	21,095
December	13,153	9,091	22,244
1961			
January	13,396	9,189	22,583
February	13,294	8,360	21,654
March	15,582	10,037	25,619
April	15,176	10,015	25,191
May	16,025	10,926	26,951
June	15,452	7,942	23,394
July	14,172	5,107	19,279
August	14,423	4,474	18,897
September	13,532	5,088	18,620
October	14,231	4,683	18,914
November	13,369	4,368	17,737
December	12,135	2,721	14,856
1962			
January	14,688	5,048	19,736
February	13,431	4,589	18,020
March	15,357	5,350	20,707
April	15,607	5,672	21,279
May	16,727	6,152	22,879
June	15,784	6,027	21,811
July	15,111	6,381	21,492
August	15,031	4,662	19,693
September	14,786	4,210	18,996
October	10,369	4,168	14,537
November	11,672	3,954	15,626

Exhibit No. 46

NUMBER OF PRODUCERS AND DELIVERIES PER PRODUCER PER DAY BY AREAS AND BY UTILIZATION AS CLASS I.

TABLE 6(a)
1959

	Number of Producers			Deliveries per day per dairy		* % Class I of receipts	
	Farm Location Diff. Area	Distant to: City plants	Country plants	Farm Location Diff.	All Distant Producers	City plants	Country plants
Jan.	1509	119	510	706	635	95.8	41.9
Feb.	1512	219	549	715	701	94.1	22.0
Mar.	1512	112	670	738	751	91.3	17.7
Apr.	1493	88	662	773	771	94.9	10.4
May	1476	74	664	818	823	92.8	5.7
June	1466	79	668	795	815	90.6	15.5
July	1481	89	497	715	683	95.0	45.8
Aug.	1452	84	498	716	569	95.6	61.4
Sept.	1463	87	646	713	649	95.6	34.2
Oct.	1468	115	662	721	714	95.9	26.2
Nov.	1426	119	657	730	710	92.5	21.3
Dec.	1419	89	657	744	727	90.1	14.4
Average	1473	106	612	740	712	93.7	26.4

TABLE 6(b)
1960

Jan.	1414	88	493	767	792	87.1	11.6
Feb.	1416	99	477	777	850	88.8	4.1
Mar.	1421	98	317	789	912	89.9	5.3
Apr.	1403	97	479	823	945	87.5	2.0
May	1381	113	479	870	1007	79.7	0.4
June	1382	117	479	823	937	85.2	2.8
July	1373	136	466	768	772	89.3	38.5
Aug.	1366	136	464	795	709	90.6	44.1
Sept.	1336	128	1061	766	563	96.9	43.0
Oct.	1320	127	989	776	628	93.1	43.9
Nov.	1315	112	983	780	644	93.5	43.3
Dec.	1316	114	981	797	685	92.1	25.1
Average	1370	114	639	794	787	89.5	22.0

* Includes receipts from producers in farm location differential areas and distant producers delivering to city plants.

NUMBER OF PRODUCERS AND DELIVERIES PER PRODUCER PER DAY BY AREAS AND BY UTILIZATION AS CLASS I.

TABLE 6(c)
1961

	Number of Producers			Deliveries per day per dairy		* % Class I of receipts	
	Farm Location Diff. Area	Distant to: City plants	Country plants	Farm Location Diff.	All Distant Producers	City plants	Country plants
Jan.	1310	107	982	815	710	90.0	22.0
Feb.	1303	109	982	824	721	90.0	33.4
Mar.	1290	106	953	863	778	90.7	32.4
Apr.	1295	81	954	866	779	86.3	34.0
May	1274	103	923	923	819	85.6	28.3
Jun.	1264	91	923	902	828	88.1	24.8
Jul.	1249	91	578	826	724	91.3	54.0
Aug.	1255	92	831	825	640	91.1	50.8
Sep.	1267	93	664	821	655	95.1	59.0
Oct.	1249	111	633	824	739	93.2	38.1
Nov.	1201	109	757	832	692	94.8	47.0
Dec.	1191	111	827	850	801	90.3	29.9
Average	1262	100	834	848	741	90.5	37.5

TABLE 6(d)
1962

Jan.	1192	114	823	883	845	91.2	24.6
Feb.	1197	108	824	888	854	91.8	23.8
Mar.	1186	104	820	928	897	92.4	25.2
Apr.	1182	105	728	956	941	87.1	25.6
May	1159	107	728	1010	980	86.8	21.6
Jun.	1165	109	716	969	969	89.4	24.2
Jul.	1149	189	830	886	757	90.8	48.0
Aug.	1148	198	876	903	738	89.8	54.1
Sep.	1137	205	861	926	781	89.2	46.5
Average 9 months	1168	138	801	928	862	89.8	32.6

* Includes receipts from producers in farm location differential areas and distant produce delivering to city plants.

TABLE 9(a)

AVERAGE PERCENTAGE CLASS I AND AVERAGE BLEND PRICE
(R.I.M.C. Board Comparative Monthly Report)

	Percent Class I Use					Average Blend Price				
	R.I.					(Rhode Island)				
	1954	1955	1956	1957	1958	1954	1955	1956	1957	1958
	93.8	92.2	90.6	93.2	93.2	$6.31	$6.48	$6.39	$6.50	$6.67
	94.2	90.8	92.7	90.4	89.5	6.32	6.41	6.40	6.39	6.49
	92.9	90.3	92.3	89.1	88.7	6.27	5.97	5.97	6.14	6.08
	90.2	90.6	88.5	87.2	89.0	5.74	5.98	5.80	5.67	6.06
	86.4	83.6	85.5	84.6	88.1	5.60	5.34	5.43	5.57	5.54
	89.2	87.4	87.7	86.8	89.0	5.70	5.47	5.50	5.64	5.70
	93.2	92.5	90.2	93.5	93.0	6.08	6.07	5.98	6.29	6.19
	90.9	92.7	92.5	95.0	93.0	6.01	6.08	6.07	6.38	6.29
	92.3	95.1	93.8	92.0	92.6	6.06	6.17	6.53	6.64	6.26
	92.6	93.1	93.0	92.8	94.8	6.50	6.50	6.50	6.71	6.32
	94.3	94.4	93.7	95.7	90.8	6.57	6.56	6.53	6.83	6.25
	94.3	94.2	91.0	91.0	90.8	6.55	6.54	6.42	6.64	6.25
erage	92.0	91.4	91.0	90.9	91.0	$6.14	$6.13	$6.13	$6.28	$6.18

	Boston					Boston 201-210 mile zone				
	1954	1955	1956	1957	1958	1954	1955	1956	1957	1958
	58.6	63.6	58.9	61.5	59.5	$4.61	$4.75	$4.55	$4.98	$4.81
	57.0	61.3	58.0	59.0	57.8	4.46	4.69	4.47	4.78	4.78
	50.2	54.3	51.9	55.0	51.3	4.14	4.19	4.15	4.46	4.38
	45.4	49.2	45.9	48.6	46.7	3.66	3.80	3.80	4.07	3.95
	39.3	41.2	45.7	42.6	43.2	3.42	3.53	3.70	3.84	3.76
	40.0	40.5	40.7	41.3	39.1	3.43	3.59	3.60	3.89	3.69
	50.8	57.8	49.0	54.8	50.3	3.89	4.23	4.26	4.54	4.24
	59.1	69.4	63.7	60.0	57.8	4.25	4.64	4.80	4.83	4.74
	62.5	55.9	62.8	62.5	61.4	4.61	4.66	4.79	5.03	4.84
	64.9	59.2	66.2	61.8	61.8	4.82	5.03	5.12	5.28	4.98
	72.5	64.4	68.0	63.9	64.1	5.01	5.19	5.39	5.36	5.05
	67.3	60.2	60.1	58.2	62.0	5.05	5.06	5.11	5.16	5.14
erage	55.6	56.4	55.9	55.8	54.6	$4.28	$4.38	$4.47	$4.62	$4.53

Note: Rhode Island Dealers not listed paid full Class I price.

TABLE 9(b)

PRICES TO PRODUCERS IN PHILADELPHIA AT COUNTRY AND AT CITY PLANTS

September 1961 to August 1962

	* Country Plants				City Plants		
	Number Plants	Ave. % Class I	Average Price	Diff.	Number Plants	Ave. % Class I	Ave. Price
1961							
Sept.	17	73.8	$4.71	$.88	33	91.9	
Oct.	17	78.1	5.12	.88	32	93.3	
Nov.	16	78.8	5.15	.83	32	93.3	
Dec.	15	74.3	5.02	.88	32	90.3	
1962							
Jan.	15	67.7	4.56	.89	32	87.6	
Feb.	16	62.2	4.42	.95	32	84.8	
Mar.	16	62.4	4.43	.97	32	85.8	
April	16	59.4	4.03	.98	32	84.9	
May	16	56.5	3.95	1.01	32	83.1	
June	14	58.6	3.99	1.01	31	84.1	
July	12	57.3	4.13	.88	32	82.3	
August	11	58.4	4.18	.92	31	84.9	
Average	15	65.6	4.47	.93	32	87.3	

* Adjusted to 205-1-215 miles.

TABLE II

DIFFERENCE BETWEEN RHODE ISLAND BLEND PRICES IN DIRECT DELI NEARBY ZONE AND BOSTON PRICES IN 201-210 MILE ZONES

	1954	1955	1956	1957
January	$1.70	$1.73	$1.89	$1.52
February	1.86	1.72	1.93	1.61
March	2.13	1.78	1.82	1.68
April	2.08	2.18	2.00	1.60
May	2.18	1.81	1.73	1.73
June	2.27	1.88	1.90	1.75
July	2.19	1.84	1.72	1.75
August	1.76	1.44	1.27	1.55
September	1.45	1.51	1.74	1.61
October	1.68	1.47	1.38	1.43
November	1.56	1.37	1.14	1.47
December	1.50	1.48	1.31	1.48
Average	$1.86	$1.68	$1.65	$1.60

Source: Rhode Island Milk Control Board Monthly Announcement of Prices to Produc
Boston Administrator Reports.

TABLE 12(a)

SOUTHEAST ORDER USE VALUE AND PRICES PAID AT CITY PLANTS AND AT COUNTRY PLANTS PRICE REDUCTION FROM USE VALUE IN FARM LOCATION DIFFERENTIAL AREA AND PRICE ADDITIONS TO USE VALUE AT COUNTRY PLANTS

	Farm Differential Area				Country Plant Deliveries			
	Percent Class I	Use Value	Blend Price	Price Reduction	Percent Class I	Use Value	Blend Price	Price Addition
1959								
Jan.	95.8	$6.33	$6.15	$.18	41.9	$4.33	$5.15	$ .82
Feb.	94.1	6.48	6.12	.36	22.0	3.86	5.12	1.26
Mar.	91.3	6.17	5.76	.41	17.7	3.53	4.76	1.23
Apr.	94.9	5.87	5.45	.42	10.4	3.22	4.45	1.23
May	92.8	5.60	5.21	.39	5.7	3.02	4.21	1.19
June	90.6	5.53	5.23	.30	15.5	3.25	4.23	.98
July	95.0	6.09	5.97	.12	45.8	4.29	4.97	.68
August	95.6	6.32	6.29	.03	61.4	4.88	5.29	.41
Sept.	95.6	6.75	6.44	.31	34.2	4.39	5.44	1.05
Oct.	95.9	6.75	6.38	.37	26.2	4.07	5.38	1.31
Nov.	92.5	6.64	6.26	.38	21.3	3.98	5.26	1.28
Dec.	90.1	6.55	6.13	.42	14.4	3.77	5.13	1.36
Average	93.7	$6.26	$5.95	$.31	26.4	$3.88	$4.95	$1.07

TABLE 12(b)

1960								
Jan.	87.1	$6.25	$5.93	$.32	11.6	$3.59	$4.93	$1.34
Feb.	88.8	6.31	5.96	.35	4.1	3.42	4.96	1.54
Mar.	89.9	6.13	5.90	.23	5.3	3.27	4.90	1.63
Apr.	87.5	5.47	5.21	.26	2.0	3.10	4.21	1.11
May	79.7	5.24	4.99	.25	0.4	2.97	3.99	1.02
June	85.2	5.39	5.16	.23	2.8	3.02	4.16	1.14
July	89.3	5.92	5.83	.08	38.5	4.13	4.83	.70
August	90.6	6.17	6.11	.06	44.1	4.46	5.11	.65
Sept.	96.9	6.51	6.27	.24	43.0	4.53	5.27	.74
Oct.	93.1	6.39	6.20	.19	43.9	4.59	5.20	.61
Nov.	93.5	6.41	6.21	.20	43.3	4.61	5.21	.60
Dec.	92.1	6.37	6.01	.36	25.1	4.13	5.01	.88
Average	89.5	$6.05	$5.82	$.23	22.0	$3.82	$4.82	$1.00

TABLE 12(c)

SOUTHEAST ORDER USE VALUE AND PRICES PAID AT CITY PLANTS AND AT COUNTRY PLANTS PRICE REDUCTION FROM USE VALUE IN FARM LOCATION DIFFERENTIAL AREA AND PRICE ADDITIONS TO USE VALUE AT COUNTRY PLANTS

	Farm Differential				Country Plant Deliveries			
	Percent Class I	Use Value	Blend Price	Price Reduction	Percent Class I	Use Value	Blend Price	Price Addition
1961								
Jan.	90.0	$6.10	$5.78	$.32	22.0	$3.98	$4.78	$.80
Feb.	90.0	6.09	5.84	.25	33.4	4.19	4.84	.65
Mar.	90.7	5.90	5.63	.27	32.4	3.98	4.63	.65
Apr.	86.3	5.39	5.25	.14	34.0	3.86	4.25	.39
May	85.6	5.17	5.04	.14	28.3	3.64	4.04	.40
June	88.1	5.23	5.07	.16	24.8	3.58	4.07	.49
July	91.3	5.93	5.93	.00	54.0	4.58	4.93	.35
Aug.	91.1	5.93	5.88	.05	50.8	4.56	4.88	.32
Sep.	95.1	6.04	6.02	.02	59.0	4.73	5.02	.29
Oct.	93.2	5.99	5.84	.15	38.1	4.28	4.84	.56
Nov.	94.8	6.24	6.12	.12	47.0	4.60	5.12	.52
Dec.	90.3	6.11	5.83	.28	29.9	4.17	4.83	.64
Ave.	90.5	$5.84	$5.69	$.15	37.8	$4.18	$4.69	$.51

TABLE 12(d)

1962								
Jan.	91.2	$5.94	$5.65	$.29	24.6	$3.95	$4.65	$.70
Feb.	91.8	5.95	5.64	.31	23.8	3.93	4.64	.71
Mar.	92.4	5.95	5.58	.37	25.2	3.82	4.58	.76
Apr.	87.1	5.38	5.14	.24	25.6	3.54	4.14	.60
May	86.8	5.18	4.95	.23	21.6	3.38	3.95	.57
June	89.4	5.25	5.02	.23	24.2	3.46	4.02	.56
July	90.8	5.90	5.77	.13	48.0	4.34	4.77	.43
Aug.	89.8	6.08	5.98	.13	54.1	4.65	4.98	.33
Sep.	89.2	6.05	5.89	.16	46.5	4.43	4.89	.46
Oct.			6.11				5.11	
Nov.								
Dec.								
Ave.								

TABLE I(a)

NUMBERS OF PRODUCERS BY STATES
1959 - 1961

	1959	1960	1961	Change from 1959	August 1962	Change from 1959
Connecticut	411	392	357	- 54		
Massachusetts	625	582	535	- 90		
Rhode Island	411	376	337	- 74		
Total Nearby	1447	1350	1229	- 218	1148	- 299
N.H. & N. Y.	137	133	149	+ 12		
Vermont	566	610	772	+206		
Total Distant	703	743	921	+218	1074	+371
Grand Total	2150	2093	2150		2222	+ 72

Notes:

(a) *Source:* Market Administrator's Southeastern New England Milk Market Statistics for the years - 1959, 1960 and 1961, and Monthly Statistical Reports for months of 1962.

(b) *Source:* Farm location differential receipts were from producers living in Connecticut, Massachusetts and Rhode Island except that in 1959, 223 thousand pounds were received from New Hampshire upon which a differential of 23 cents was paid.

TABLE 10

CITY PLANT BLEND PRICES AND CLASS I PERCENTAGES OF PRODUCER MILK

1961

	Blend Prices City Plants		Class I Percentages of Producer Milk	
	Southeast	Springfield	Southeast	Springfield
January	$5.78	$5.72	68.1	72.9
February	5.84	5.72	71.8	75.8
March	5.63	5.41	71.1	73.1
April	5.25	4.98	67.8	68.8
May	5.04	4.77	66.0	66.2
June	5.07	4.71	65.6	63.4
July	5.93	5.32	82.2	67.7
August	5.88	5.45	79.1	71.7
September	6.02	5.58	86.4	76.7
October	5.84	5.54	78.8	74.6
November	6.12	5.90	81.3	80.9
December	5.83	5.63	70.0	72.5
Average	$5.67	$5.37	73.4	71.8

1962

	Southern New England		Connecticut		Worcester		Springfield	
April	$5.14	67.1	$5.06	73.2	$5.05	68.8	$4.91	68.4
May	4.95	65.3	4.87	72.7	4.87	68.3	4.83	71.7
June	5.02	67.6	4.99	76.1	4.94	69.2	4.81	72.1
July	5.77	76.2	5.63	79.1	5.44	68.5	5.32	71.1
August	5.98	77.8	5.82	81.1	5.86	77.9	5.58	74.3
Sept.	5.89	74.8	5.82	81.2	5.88	79.4	5.77	79.3
Average	$5.46	71.4	$5.36	77.2	$5.34	72.0	$5.20	72.8

Exhibit 77A

Excerpts From

FEDERAL REGULATION OF MILK HANDLING IN BOSTON
1933-46

The Development of the Licenses and Order Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area, November 3, 1933 - June 1, 1946

Prepared for the Market Adminstrator under
Federal Milk Order No. 4

Gilbert R. Barnhart

April 1947

(Presented as a Thesis in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy, Department of Government, Harvard University)

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Title VII

Allocation of Producers' Shares in the Class I Market

The general base period under License 15 was September, October, and November, 1932, which applied to all producers not excepted by special provisions. Of these latter, there were three types, constituting three special classes of producers: (1) producers whose milk on September 1, 1933, was being trucked directly from farms to plants located in the marketing area or was being distributed in the market by the producers, who retained their cooperative association or handler bases, or if no such bases existed, were allotted bases equal to 90 percent of their average daily deliveries of milk during the general base period or any part thereof, or if no deliveries were made during the general base period, 90 percent of their average daily deliveries for the first 90 days of deliveries or part thereof elapsed on September 1, 1933; (2) country producers delivering milk on September 1, 1933, under base rating plans in effect prior to that date, who retained their bases under such plans; and (3) Golden Guernsey producers, who received a group base equal to the aver-

age daily sales of Golden Guernsey milk in the market as Grade A or under a Golden Guernsey trade name during the general base period, such total base to be distributed among individual producers by the American Guernsey Cattle Club, subject to the market administrator's approval. Producers not covered by an exception class and who delivered milk or cream during the general base period received bases, after the computations were completed, equal to 64 percent of their average daily deliveries during the general base period.[5]

Those groups of producers who had not been selling milk under a base rating plan prior to the installation of the federal base system felt that the provisions of the latter unduly favored producers who had operated under the New England Milk Producers' Association bases. Therefore, the new base plan under License 38 offered a compromise.[6] The total of bases to be established was to equal the total average quantities of milk used daily by handlers in the market as Class I milk. To determine an individual producer's base, the percentage of Class I use to deliveries in the base period was applied to such producer's average daily deliveries during September, October, and November, 1933, or his average daily deliveries during the calendar year 1933, whichever was higher. The general percentage computed for the market was 61 percent.[7]

License 38 did not, in terms, specify any variations from the general method of computing bases for classes of producers, but the administrator, acting under his power to revise bases to maintain equity among producers, allotted preferential bases to nearby producers to give effect to the historically higher prices they had received in the market. A study was made of the eight years 1926 to 1934 to obtain the proper differential between nearby and distant producers' returns from the sale of milk. It was determined that all producers whose milk was delivered directly to plants located within 35 miles of the State House in Boston should have bases equal to 85 percent of the higher of their daily average deliveries in the alternative base periods.[8]

Under the first license, the provisions relating to the computation of bases did not contemplate any necessity for administrative discretion to modify bases of individual producers who, because of unusual circumstances peculiar to their production, might be very greatly injured by the allotment to them of very low bases. In the brief period of its operation, the original base plan proved to be too rigid. The market administrator received scores of letters from producers appealing for relief from what were often absurd bases, but since neither the license nor the agreement empowered him to modify the base rating rules, he could only reply with inconclusive promises to grant the relief when and if he was given the necessary power through an amendment. As we shall see in Chapter V, although the power was sought earnestly, it was never granted, and it remained for License 38 to correct the defect. Here was an example of too hasty generalization about the nature of production in the milkshed. The license attempted to reduce to rule matters whose natural variation was considerably wider than the experience of the people who drafted the regulation. Discretion was indispensable to administration even of general rules relating to the base rating system.

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[5]Annual Report of the Market Administrator for the Greater Boston Sales Area for the Year Ended June 30, 1935, Section VIII, p. 1a.

[6]Loc. cit.

[7]Loc. cit.

[8]Annual Report of the Market Administrator for the Greater Boston Sales Area for the Year Ended June 30, 1935, Section VIII, p. 1b.

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Title VII.

Allocation of Producers' Shares in the Class I Market

I. Establishment of bases

A. For regular producers

Dr. Ellenberger proposed changing the 1933 base period from September, October, and November 1932, to "the five months, July to November, inclusive, 1932": and the 1934 base period, comparably, to the five months, July to November, inclusive, 1933. The longer rating period, in Dr. Ellenberger's opinion, would have been more equitable to that group of producers who had never been under any rating plan before November 3, 1933, and whose production followed seasonal trends more closely than that of the group of producers who had operated under the base rating plan introduced for the Boston market by the NEMPA in 1930 This latter group had learned to increase production in the "open" months of September, October, and November to improve their bases for succeeding years. Therefore, their late summer production tended to be short and needed the complementing supply produced during the months of July and August by the seasonal producers, if the needs of the market were to be met. Including July and August in the base period would have allowed credit to seasonal producers for high production in these months, resulting in their obtaining higher bases for the subsequent year.[70] The Hood Company opposed these amendments. It considered September, October, and November, the months least disturbed, on the demand side, by vacations and abnormal business conditions and therefore the best months to take as the base period.[71]

B. For new producers

Dr. Ellenberger proposed raising the maximum base allowed a new producer from 60 to 65 percent of his average daily deliveries during the first 90 days. Such a change was thought more equitable, especially where a new producer had his farm in nearby territory and knew his neighbors had high bases.[72]

Ellenberger also proposed amending paragraph 3 of section A of Exhibit D to give cream producers bases if they were willing to deliver Class I and/or Class II milk on demand of the handler to whom they usually delivered.[73]

C. For special classes of producers

1. Nearby producers

Reginald W. Bird, representing the Massachusetts Producers' Advisory Committee and in general nearby Massachusetts producers, offered a proviso to sub-paragraph (a) of paragraph 1, Section A, Exhibit D, as follows:

> "Provided however that those Massachusetts Producers who truck to a dealer located within a distance not exceeding 30 miles from the Massachusetts State House selling in the Boston area shall be regarded as located in the Boston area, and the producers or dealers located in the Boston area who ship outside the Boston area into a secondary market area shall be regarded as located within the limits of the particular market in which their product is sold. The distributor selling within and without the Boston area shall pool among all his producers the surplus ratings in the different markets to which he ships in proportion to the volume of his shipments according to the ratings of his producers."

As we have seen, there were pending amendments to the definition of the Greater Boston market which would have limited the market to the area within some definite radius of the State House. Bird pointed out that no matter what radius was selected, there would always be nearby producers who would be delivering to handlers' plants located outside the official market area and who would be ineligible to receive the high bases provided by the first part of subparagraph (a). The amendment seems, therefore, to have intended a separation of three groups of nearby producers classified on the basis of deliveries to handlers who make sales (a) in the Boston market only, (b) in secondary markets only, or (c) in both the Boston and secondary markets. The 30-mile limit selected by Bird merely extended arbitrarily the concept of the mar-

ket for the purpose of securing to a larger group of nearby producers the favorable nearby basing provisions. The next clause of the amendment did attempt to exclude a group of nearby producers who delivered to handlers who were deemed (by the terms of the clause) to be handlers operating in other markets. These producers would have been cut off definitely from the benefits of subparagraph (a). The second sentence of the amendment then provided for allocating the total surplus which a handler would carry as the result of operations in two or more markets. From Mr. Bird's testimony, it would seem he intended that nearby producers bear only the surplus which they created.[74] Therefore, this group would gain a still more preferred position in the market. The Hood Company approved the first part of this proposal, but objected to the creation of any special pooling requirements that might have to be devised to carry out the intent of the remainder of the amendment.[75]

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[70]Hearing 2, pp. 656-662.

[71]Second Memorandum Brief submitted by H. P. Hood & Sons, Inc., in connection with Hearing 2, p. 17.

[72]Hearing 2, p. 662.

[73]Hearing 2, p. 663.

[74]Hearing 2, pp. 687-689.

[75]Second Memorandum Brief submitted by H. P. Hood & Sons, Inc., in connection with Hearing 2, p. 16.

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Title VII.

Allocation of Producers' Shares in the Class I Market

I. Establishment of Bases

C. For special classes of producers

1. Near-by producers

Effective March 16, 1935, an administrative change of considerable significance took place in the percentage applied in the establishment of near-by producers' bases. Before this date producers whose farms were located within 35 miles of the State House had been assigned bases equal to 85 percent of their average daily deliveries in September, October, and November, 1933, or 85 percent of their average daily deliveries for the entire calendar year 1933, whichever amount was greater. But by the middle of March 1935, a large proportion of small handlers buying Massachusetts milk were not complying with the license. So, as a concession to win the cooperation of the Massachusetts Milk Control Board in enforcing, or trying to enforce, the terms of the federal license on intrastate handlers, the cooperative associations agreed to allow to producers whose farms were located within 40 miles of the State House bases equal to 100 percent of the higher figure yielded by the two alternatives mentioned above. These bases became effective March 16, 1935. Less than five percent of the producers in the market were within the 40-mile zone.[12] Apparently this was the first appearance of the 40-mile zone as a definite working concept in the market regulation, although it did not appear in the official language until Order No. 4 became effective.

II. Rules for Administration of Base Rating System

The wording of the "75 percent rule", which had been put into the license on February 24, 1935, in a form such that it had a quite different result from that of the rule as applied administratively, was changed to conform to the administrator's version, to be effective until July 1, 1936. This amendment had been requested by the market administrator.

See discussion, page 209. A new paragraph, paragraph 2 of section 4 of Exhibit A, was inserted, providing that as of July 1, 1936, and thereafter, the rule would apply with the effect of the wording as it stood in the license from February 24 to April 30, 1935. The net effect was to restore the administrator's rule until the producers in the market had been afforded ample warning of the application after July 1, 1936, of the more drastic version of the rule. This result had been suggested by the administrator. See discussion cited above.

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[12] Annual Report of the Market Administrator for the Greater Boston Sales Area for the Year Ended June 30, 1935, Section VIII, p. 1b.

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pp. 332-333

C. For special classes of producers

1. Nearby producers

Order No. 4 included nearby producers under the base rating provisions applicable to regular producers and new producers, as the case might be, and made no provision for preferential bases as the license had done. Nearby producer differentials under the order took the form of a guarantee of payment of the city plant Class I price of $3.30 per hundredweight for all delivered base milk testing 3.7 delivered by producers whose farms were located not more than 40 miles from the Boston State House to handlers' plants located not more than 40 miles from the State House.

Under the order producers having farms located not more than 40 miles from the State House had their bases reduced about 25 percent. These producers under the license had been allotted bases of 100 percent of their daily average deliveries in the year 1934. Their new bases were computed under the order by taking 75 percent of their daily average deliveries in 1933, 1934, or the year ending September 30, 1935, whichever was the highest.[126]

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[126] Annual Report of the Market Administrator for the Greater Boston Sales Area for the Year Ending June 30, 1936, Section VIII, p. 13.

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B. Farm location differentials

1. Applicable to near-by producers

Paragraph 2, Section 1, Article VIII of the original order required payment of $3.30 per hundredweight, the established city plant Class I price payable to producers, for base milk delivered by producers whose farms were located within 40 miles of the State House to handlers' plants similarly located. This sort of provision had been necessary under the base rating system as set up after February 9, 1936, to make a real differential effective to these producers. The amended order, having omitted base rating, converted this provision into one providing, in paragraph 4, Section 4, Article VIII, for payment of 46 cents per hundredweight in addition to blended prices to producers whose farms were located within the 40 mile zone. Deliveries to plants located within the zone was omitted as a condition and the differential was thereby converted into one depending solely on farm location. These producers could deliver to more distant plants and still receive the differential, although they would then have their payments subject to deductions for freight. The 46 cents was subject to reduction in cases where the blended prices plus 46 cents exceeded $3.19 per hundredweight, the established city plant Class I price payable to producers.

In the hearing the government tentatively proposed that this differential be 36 cents per hundredweight, pending the receipt of evidence as to the proper amount.[76] Wesley Bronson testified that from 1927 through 1930 producers delivering to the Deerfoot Farms Company at Southboro, Massachusetts, received on the average for all milk so delivered $1.16 per hundredweight more than producers received on the average in the 191-200-mile zone for all milk. Also, in the ten years 1923 through 1932, producers delivering to the J. B. Prescott Company at Bedford, Massachusetts, received on the average $1.04 per hundredweight more for all milk than producers in the 191-200-mile zone.[77] Both of these companies mentioned had their plants located within the 40 mile zone. Since the

proposed differential would give near-by producers about 90 cents per hundredweight over 200-mile zone producers,[78] Bronson thought it was adequate.[79]

John L. Carten, Jr., representing the Nearby Milk Producers Association whose members had farms in the 40-mile zone, thought 90 cents was too low and gave evidence that one of the producers he represented had received between $1.20 and $1.30 per hundredweight over the NEMPA price in the 200 mile zone for all milk delivered by this producer in the period 1920 to 1930 to the Hood Company at Salem, Massachusetts. Carten wanted at least a cent a quart differential, or 46 cents per hundredweight.[80] In a brief submitted later, the Association reiterated the request for 46 cents, which would give near-by producers about one dollar more per hundredweight than 200 mile producers, and stated that only on this basis would its directors and members support the amended order.[81]

2. Applicable to intermediate producers

The amendment offered in the hearing by the Dairy Section, with respect to the amount of differential payable to these producers in addition to the blended price for all milk delivered, proposed 18 cents per hundredweight as a tentative figure, pending introduction of evidence as to the proper histroical differential.[82] This provision was new in the order and was intended to recognize the price advantage these intermediate producers had enjoyed long before the regulation had taken effect in the market and which the base rating system had recognized by the allocation to them of high bases. When base rating disappeared from the order, some other provision had to be substituted with respect to intermediate producers, or the order would operate to their disadvantage.[83]

Evidence of prices paid producers by the Manchester Dairy System, Inc., of Manchester, New Hampshire, a small operating cooperative association when then had the only receiving plant in the 40-80 mile zone was submitted in a brief after the hearing. This purported to show that for the years 1929-1936, inclusive, Manchester producers had been paid on the average $.594 per hundredweight more than the average prices paid producers

in the 200 mile zone.[84] However, the order as issued contained a 23 cent per hundredweight differential, or a half cent per quart, payable to producers with farms located in the intermediate zone. Added to the difference in the carlot freight allowances for the zone in which the Manchester plant was located and for the 200 mile zone, this gave Manchester producers about 35 cents per hundredweight more than 200 mile zone producers.

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[76]Hearing 6, pp. 231-232. R. D. Aplin.

[77]Hearing 6. p. 266.

[78]Hearing 6, p. 267.

[79]Hearing 6, p. 266.

[80]Hearing 6, pp. 281-282.

[81]Brief subscribed and sworn to by John L. Carten, Jr., July 3, 1937.

[82]Hearing 6, pp. 231-232. R. D. Aplin.

[83]Hearing 6, pp. 10, 232, 356. R. D. Aplin.

[84]Brief regarding proposal to amend Order No. 4 regulating the handling of milk in the Greater Boston, Massachusetts, marketing area, Article VIII, Section 4, Paragraph 3, subscribed and sworn to by Carl A. Smith, Manager, Manchester Dairy, Inc.

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p. 455

II. Adjustments in Payments to Individual Producers

B. Farm location differentials

1. Applicable to nearby producers

The January 16* amendments extended the payment of the 46 cent near-by differential to milk delivered from farms located in Barnstable and Plymouth Counties, Massachusetts. These counties were close enough to the marketing area to give rise to conditions of production and marketing similar to those obtaining for milk produced on farms located within the 40-mile zone. These counties were two of the coun-

ties named in section 4, Article IV, relating to outside market prices and freight allowances, which were considered to be too close to the marketing area to permit freight allowances on producer milk sold in markets lying within them.

2. Applicable to intermediate producers

The limitation on the differential payable on milk delivered from 40-mile farms was extended by the January* amendments to apply to the 23-cent payment on milk delivered from intermediate farms. In both cases the upper limit was the city plant Class I price for milk other than that sold to the Federal Surplus Commodities Corporation.

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*(1939)

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Title VIII.

Payments to Producers

II. Adjustments in Payments to Individual Producers

B. Farm location differentials

Under Section 10(e)(3) and (4) of the order before the June 1 (1946) amendments the limitations on the amounts of additional payments to near-by and intermediate producers were set at the Class I city plant prices. This prevented near-by producers, whose farms were located in city plant territory from receiving anything more than the highest price payable for Class I milk at the plants to which they delivered milk. But the intermediate producers could be paid a combination of zone blended prices plus 23 cents or some fractional part thereof and in effect receive per hundredweight a price higher than the zone Class I prices applicable to Class I milk received at the plants to which they delivered milk. The market administrator recommended that the total price payable to both nearby and intermediate producers be limited to the zone Class I price payable at the plants at which their milk was received. The proposal was inserted in the hearing notice by the Branch and finally adopted.

A study in the market administrator's office showed that from 55 to 70 producers in various periods had received over $3,000 in excess of the value of their milk at the zone Class I prices. The administrator maintained that the intent of the order was to limit nearby and intermediate differentials to the applicable zone Class I prices. Furthermore, the 40-mile zone runs through Providence, Rhode Island, and Fitchburg and Worcester, Massachusetts. Outside market handlers operated plants just outside the 40-mile zone, and if they should become pool handlers under the order, they would be in a position to draw credits from the pool in the short season when the blended prices were high, even though the handlers had 100 percent Class I use of receipts. They would be credited with payments of blended prices plus nearby and intermediate differentials which would total greater than their zone Class I charge.[88] There was no opposing testimony.

In subparagraph (1) and (2) of Section 10(a) new limitations were established at the zone Class I prices applicable to plants at which near by and intermediate milk was received.

On June 1 Barnstable and Plymouth Counties were deleted as additional areas, farm location in which entitled a producer to receive the 46 cent near-by differential. The necessary proposal was made by the administrator. A study had showed that no producers whose farms were located more than 40 miles from the State House in these counties had delivered milk to pool handlers since June 1942.[89]

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[88]Hearing 16, pp. 1574-1578. R. D. Aplin.

[89]Hearing 16, pp. 1578-1580. R. D. Aplin.

Exhibit 77

TABLE 7

SEASONAL VARIATION IN 1962 MILK PRODUCTION BY "NEARBY" PRODUCERS IN NEW ENGLAND FEDERAL ORDER MARKETS AND BY "DISTANT" PRODUCERS IN THE BOSTON MARKET

	Boston "District" Producers		Five-Market Nearby Producers	
	Daily Average Deliveries	Percent of 1962 Daily Average	Daily Average Deliveries	Percent of 1962 Deliveries
	(1000 lbs.)		(1000 lbs.)	
Jan.	4,873.87	90.84	5,088.84	100.40
Feb.	4,927.21	91.83	5,128.46	101.18
Mar.	5,367.96	100.05	5,245.87	103.50
Apr.	5,963.93	111.15	5,318.33	104.93
May	6,239.29	116.28	5,479.52	108.11
June	6,514.27	121.41	5,224.33	103.07
July	5,276.35	98.34	4,758.06	93.88
Aug.	4,963.71	92.51	4,774.29	94.20
Sept.	5,086.50	94.80	4,921.60	97.10
Oct.	5,300.61	98.79	4,912.19	96.92
Nov.	5,044.20	94.01	4,921.93	97.11
Dec.	4,823.58	89.90	5,057.77	99.79
1962	5,365.52	100.00	5,068.48	100.00

Exhibit 19

MARKET ADMINISTRATOR - CONNECTICUT MARKETING AREA

NUMBER OF PRODUCERS, BY STATES (Preliminary)

January - July 1962

	Connecticut	New York	Massachusetts, Rhode Island*, and Vermont**	All States
January	1,671	1,054	246	2,971
February	1,659	1,048	245	2,952
March	1,625	1,038	244	2,907
April	1,619	1,034	164	2,817
May	1,595	1,020	160	2,775
June	1,591	1,023	161	2,775
July	1,560	955	157	2,672

RECEIPTS OF MILK FROM PRODUCERS, BY STATES OF ORIGIN (Preliminary)

January - July 1962

(In Thousands of Pounds)

	Connecticut	New York	Massachusetts, Rhode Island* and Vermont**	All States
January	44,830	42,250	7,354	94,434
February	40,610	38,751	6,184	85,545
March	45,719	42,855	7,446	96,020
April	44,132	41,656	4,334	90,122
May	46,993	43,727	5,155	95,875
June	42,926	39,281	4,846	87,053
July	40,962	33,254	4,466	78,682

*No milk was received from producers located in Rhode Island during July 1962.

**No milk was received from producers located in Vermont during April-July 1962.

THE MARKET ADMINISTRATOR'S REVIEW

August 1962 Volume 14, No. 7

AUGUST HEARING TO BRING COMPENSATORY PROVISIONS IN LINE WITH SUPREME COURT DECISION

In an effort to bring the New England Federal milk orders into line promptly with the Lehigh Valley decision of the United States Supreme Court, a public hearing will be held in Boston's Hotel Bradford, commencing at 10 a.m., on August 28, 1962. In its notice of the hearing the USDA said the "hearing is being called in response to a request by a large number of producer groups to review particularly the provisions of the various orders which relate to treatment of partially regulated milk. As indicated by the Department's invitation to interested persons for proposed order amendments, the order provisions pertaining to the definitions of pool plants, pooling requirements, and the definitions of producer have a direct bearing on the extent and volume of milk partially regulated in the respective markets. Because of the related importance of the definitions and pooling requirements under each of the orders, which assist to determine the scope of class pricing and pooling under the respective orders, such provisions are open for review at this hearing as they relate to the proposals" in the notice of hearing.

On June 22, twenty-two producers' cooperative associations joined in a petition to the Department for an emergency hearing to consider substituting for the compensatory payment rate which now equals the difference between the Class I and Class II price at the plant from which outside milk may originate a new rate equal to

the difference between the applicable Class I and blended prices. On July 13 these cooperatives reaffirmed this proposal for consideration at the August hearing.

On July 30, 1962, Milk Marketing Orders Division Director Herbert L. Forest met in Boston with the representatives of the cooperatives. He discussed the "Wichita Plan" and possible modifications of it in light of the Lehigh Valley decision.

On August 2 the technical committee made up of economists of the New England cooperatives met again in the Market Administrator's office to discuss further suggestions for the revision of the compensatory payment provisions of the New England orders. At that meeting the committee agreed that the handler responsible for making compensatory payments should have the choice of making them at the rate, as at present, of the difference between the Class I and Class II prices, applicable at the outside plant where the milk was received from farmers, in which case the administrative assessment would apply on only the quantity of fluid milk products brought in from outside and disposed of in the marketing area. Or, provided that the necessary reports, records, and facilities are made readily available to the Market Administrator, he should have the choice of making them at the rate of the difference between the Class I and blended prices of the New England order applicable at the outside plant where the milk was received from farmers, plus any amount by which the classified use value (at New England class prices) of *all* of the milk received from dairy farmers at the outside plant exceeded the sum of of the amount *actually paid* to the oustide dairy farmers and the part of the compensatory payment based on the difference between the New England order Class I and blended prices applied to the quantity of fluid milk disposed of in the marketing area. If he chose this latter alternative the amount of the administration assessment would be based on the *total* quantity of receipts of fluid milk products at the outside plant.

On August 9 the 22 producers' cooperative associations joined in sponsoring a new proposal embodying the plan worked out by their technical committee on August 2.

The Hood company's proposed amendments concerning the compensatory payment features of the orders are as follows:

Amend Section 65 of the Greater Boston order and the corresponding provisions of the other four New England orders to provide that in order to insure uniform minimum class prices to all handlers in the marketing area, any person having route disposition

* * *

FARM LOCATION DIFFERENTIALS TO BE AIRED AT NEW ENGLAND MILK HEARING IN NOVEMBER

Often, public milk hearings are concerned exclusively with technical matters that repair or renew the machinery of milk marketing but are of little direct concern to producers. The comprehensive hearing scheduled for next November to consider 51 proposals is not such a hearing. It will hear three subjects which are of great importance to individual producers and to groups of producers. The time for them to be fully informed on these subjects is prior to the hearing so that they may express their views fully, either in person or through their representatives, at the hearing.

There have been times when after a hearing had been held, testimony and evidence analyzed by the USDA, amendments made, and action brought about by the new amendments, that producers have been shocked into an unhappy awareness that some changes had been made. This should not happen. In various ways producers are being given full notice that proposals for changes in New England milk orders have been made which, if adopted, will affect them significantly through their price for milk. What are these proposals?

There are three groups of proposals which merit the serious attention of producers: (1) Proposals for merging some or all of the New England orders;

(2) proposals for reducing the amounts by which Class I and blended prices (before addition of the farm location differential, if any) at city plants exceed prices in the basic Zone 21; and (3) proposals concerning the 46¢ and 23¢ farm location differentials. The purpose of this article is to present those in group (3).

Differentials Deeply Rooted

Farm location differentials have been in the Boston order since August 1, 1937, and in the other New England orders since their inceptions at the existing rates of 46¢ and 23¢, depending upon nearness of farm to market. Why were nearby producers given higher prices than those to distant producers beyond the amount justified by transportation cost? There has been folklore which held that nearby producers have a "right" to a location differential, that in some way the markets belonged to them and that upcountry producers are "outsiders" whose costs of production are lower and who are not "entitled" to as high a price. But all folklore aside, the important fact is that, historically, nearby producers did receive such higher prices.

At a public hearing in June 1937 the Government tentatively proposed farm location differentials of 36¢ and 18¢. Mr. Wesley Bronson, then economist for the New England Milk Producers' Association, testified that from 1927 through 1930 producers delivering to Deerfoot Farms Company at Southboro, Massachusetts, received on the average $1.16 a hundredweight more than producers received on the average in the 191-200-mile zone of the Boston milkshed. In the years from 1923 through 1932, a 10-year period antidating Federal regulation, producers delivering to the H. P. Prescott Company at Bedford, Massachusetts, received on the average $1.04 a hundredweight more for their milk than did producers in the 191-200-mile zone. The proposed farm location differential of 36¢ would give producers delivering to plants within 40 miles of Boston about 90¢ more than the price in the 191-200-mile zone, and Mr. Bronson supported the proposed differentials.

The Nearby Milk Producers' Association, represented at the hearing in 1937 by the late John L. Carten, Jr., considered the 90¢ overall differential to producers on farms within 40 miles of Boston to be inadequate. He gave evidence that one of the producers in the Association received from $1.20 to $1.30 a hundredweight over the NEMPA price in the 191-200-mile zone for milk delivered during the period 1920-1930 to the Hood company plant in Salem, Massachusetts, and he maintained that the nearby farm location differential should be at least a cent a quart, or 46¢ a hundredweight, which would give nearby producers about $1.00 a hundredweight more than the price to producers in the 191-200-mile zone.

Prior to August 1, 1937, higher returns to nearby producers had been provided through granting such producers preferential bases. The base-rating plan was dropped and the farm location differential became the vehicle in the August 1, 1937, amended Order No. 4 for granting higher returns to nearby producers.

Whether nearby producers received these premiums over upcountry prices because they were supplying handlers selling relatively large proportions of their milk as fluid milk or for what other reasons, is of little practical concern at this time. The important thing is that they did receive higher prices under the conditions prevailing before Federal regulation, and that the regulation recognized this fact. One of the questions that will be before the November hearing is whether the farm location differentials of 25 yars ago, which were about 25¢ of the price, are appropriate under conditions existing today.

Prosposals to Change Differentials

The operating cooperatives in the Boston milkshed have proposed that the present farm location differentials be reduced percentagewise each month by the percentage of Class II milk to producer receipts in the Boston pool. In 1961 the resulting within-40 nearby differentials, according to this proposal, would have declined from about 28¢ in January and February to 20¢ in June and climbed back up to 28¢ in November

and December. It would have averaged 25¢ for the year, or 21¢ below the present rate. Similarly, the intermediate zone differential would have varied from about 14¢ to 10¢ and back up to 11¢ in these months for an average of 12½¢, reflecting a reduction of about 10½¢ from the present 23¢ rate.

In the past there has been a proposal for raising the 16¢ within-40 rate to make it about 25% of the price to producers, restoring its relative importance to that prevailing a generation ago. At the other extreme there have been repeated proposals for the outright abolition of the nearby farm location differentials.

The Federal Milk Order Study Committee, widely known as the Nourse Committee, took a rather dim view of such differentials in its report issued in April 1962. The Committee said:

"Precedents for nearby differentials were established during the period of collective bargaining before there were any Federal orders. Various advantages have been claimed for nearby milk from the viewpoint of handlers — such as more desirable seasonality, earlier and more dependable arrival at city plants, easier and more economical supervision of producers and quality the possibility of direct hauling from the farms eby saving the expense of country plant operation. wever, the major purpose of nearby differentials apparently has been to compensate nearby producers for sharing market Class I sales with more distant producers in a market-wide pool. This principle seemingly was founded on the belief that in the absence of regulation, a higher percentage of nearby milk would be sold for fluid use.

"Producers in areas with a long history of nearby differentials have based their production decisions on them and capitalized their value into land and facilities. Consequently the differential payments are no doubt regarded by the participants as valuable 'market rights.'

"On the other hand, the manner in which nearby differentials are applied has a decided impact on intermarket relationships. Their use and effect may need careful re-examination in light of present conditions of increased mobility of milk supplies, for the payment

of special nearby differentials out of pool funds depresses the uniform price to producers outside the differential zones and thus tends to limit the extent of the supply area and maintain a higher fluid utilization under an order than would otherwise prevail. At the present time, this effect is so small in some instances as to be negligible. In others, it is very significant.

"Under the Boston order, nearby differentials are paid on only about 6% of the pooled milk and the uniform price is depressed less than 3¢ per hundredweight by these payments. Under the New York-New Jersey order, slightly less than 20% of the pooled milk qualifies for the nearby differentials and the uniform price is depressed about 6¢ per hundredweight.

Effect on Intermarket Relationship

"On the other hand, under the Federal orders for Worcester, Springfield, Southeast New England and Connecticut, nearby differentials are paid on 65% to more than 90% of the pooled milk and uniform prices are depressed from about 30¢ to more than 40¢ per hundredweight. In 1960, 90% of the pooled milk under the Connecticut order qualified for the 46¢ differential, and 3% for the 23¢ differential. The total amount paid in nearby location differentials was equivalent to 43¢ per hundred pounds of all pooled milk and the uniform price to producers outside the differential zones was depressed to that extent. Thus, the attraction of the high blended price resulting from a high Class I utilization under the order is substantially reduced with respect to producers in the outlying areas.

"In circumstances where a high percentage of milk qualifies for the nearby differentials the producers who participate derive little net gain except for the pool tightening effect of the lower blended returns in the outer zones. Thus, order provisions for nearby differentials of this magnitude can and do effectively limit access to the pools.

"To accomplish both recognition of historical patterns in the distribution of funds, and at the same time to minimize the pool tightening effect of an arbitrary nature, nearby differentials could be main-

tained but varied inversely with the percentage of pooled milk used in Class I. Thus, the rate would be very low or possibly zero when a high percentage of the pooled milk was used in Class I and relatively high when fluid utilization falls to a low level. Such a procedure would tend to modify somewhat the effect of decreased utilization on the prices of nearby producers, and thus protect to some degree their prior market rights and their capitalization of these rights into land values by giving them the advantage of a priority on the share of the receipts from the pool. In other words, their blends would be more stable and fluctuate less widely as Class I utilization increased or decreased. At the same time the access-limiting effect of nearby differentials would be more flexible and would vary according to the utilization in the markets. With low utilization the blend price depressing effects of nearby differentials would be greater and the barrier to additional producers' supplies would be stronger than when the opposite was the case.

"This principle is recognized in the provisions for nearby differentials under the present New York-New Jersey order, but not under the other orders which provide for such payments."

Exception by Swonger

C. W. Swonger, Research Economist of the New England Milk Producers' Association and an outstanding member of the Nourse Committee, disagreed with many of the foregoing views as seen from the following quotation from his note on the subject which was published with the Committee's report:

"Apparently nearby differentials are acceptable, if they apply to a relatively small proportion of the milk, but otherwise they constitute an unwarranted 'burden' on the pool. In Boston, nearby differentials apply to about 6% of the milk in the pool, or considerably less than New York. They apply to a much larger proportion of the milk in other markets of southern New England for the simple reason, as stated, that there are relatively more nearby producers. Yet their effect is the same, in Boston or Connecticut, to establish a par-

ticular pattern or relationship of prices, as between nearby and more distant producers, which is identical in both markets. Elimination of the nearby differentials contained in the Connecticut order would aggravate the price disparities in relation to other surrounding markets.

"In this connection, the report suggests that 'nearby differentials could be maintained but varied inversely with the percentage of pooled milk used in Class I.' Such a system as suggested would result in serious distortion of blended price relationships between markets in New England and New York, both to nearby producers and those located more distant from the market. Reference is made to the uniform pattern of nearby differentials used in New England markets. Any deviation of the type proposed would, for instance, depress blended prices to nearby producers in Connecticut, relative to Boston or New York, and raise blended prices to Connecticut producers in more distant zones, substantially above Boston or New York. It would create price disparities rather than remove them, as between producers similarly located with respect to the market.

"If we accept nearby location differentials as a fact of life in New England and New York, it follows that 'similar patterns of utilization' would result in wide disparities in 'uniform prices' as between producers similarly located with respect to the market, and vice versa. We cannot have it both ways. Of the two, it seems to me that approximate uniformity of blended prices is far more important, and competition tends to achieve this result."

Proposals 1 and 16 would reduce the present 54¢ difference between city and Zone 21 plant Class 1 and blended prices, 40¢ of which is conceived to represent the approximate railroad tank car freight rate from Zone 21 to Boston, 1¢ of which is the no longer existent 3% Federal transportation tax, and 13¢ of which is conceived to be the extra cost of receiving milk from producers at a country plant compared to that at a city plant. Proposal No. 22 would increase the nearby farm location differentials by the amount of any reductions stemming from action on Proposals 1 or 16.

Uniform Differentials Proposed Again

A proposal to give to nearby producers the highest possible location differential, figured from any one of the five New England markets, regardless of the market to which his milk is taken, was considered at the April 2-4, 1962, hearing on the New England orders. In its decision the USDA concluded that the record of the hearing "does not contain evidence that is sufficiently exploratory or comprehensive in nature to support a substantial deviation from the present design of the nearby farm differential provisions." The subject will be reviewed at the November hearing as Proposal No. 21:

"Amend the nearby farm location differential provisions of all the New England Federal orders to provide that payments for milk produced on farms located in New England will be subject to differentials to the following extent.

1. Any producer whose farm location would now entitle him to a differential of 46¢ per hundredweight under any New England order shall be entitled to a differential of 46¢ under whichever New England order the milk is delivered.

2. Any other producer whose farm location would now entitle him to a differential of 23¢ per hundredweight under any New England order shall be entitled to a differential of 23¢ under whichever New England order the milk is delivered."

The large color map in the March issue of the REVIEW shows the existing nearby farm location differential areas for the five New England Federal order markets.

Exhibit 93
PROPOSAL 52

Massachusetts Cooperative Milk Producers Federation, Inc.

We are unequivocally opposed to Proposal 52 whether or not it be coincident to a merger of any or all of the New England orders.

It seems pointless for us to include in our testimony any further analysis of the circumstances and the evidence which led inescapably and justifiably to the original incorporation of farm location differential payments at current rates in the Boston order initially and later in each of the other New England orders upon promulgation. Exhibit 24 constitutes an adequate basic record for this purpose taken with direct testimony already given in this hearing by Mr. Lee for NEMPA and by Mr. Geyer for CMPA.

It does appear, however, that some additional analysis of what we believe to be the basic facts as well as a sound critique of terminology is called for. The facts are that, during the time antecedent to the inception of federal regulation, milk dealers were paying more for nearby milk than for distant milk, not necessarily because of its intrinsic value as milk was greater but because of its geographical origin. This higher rate per hundredweight was not arrived at by milk dealers then through the process of computing a distant price and adding thereto a premium or differential in order to arrive at a final figure. The current use of the word "differential" can therefore be misleading in itself, unless one remembers that originally it meant only that the prevailing prices for nearby and for distant milk were different and by an amount which was determineed probatively to be 46¢ in some instances and 23¢ in others. There was no evidence then, nor has there since been any new concrete evidence developed, that what became a "farm location differential" in the New England orders was ever paid to nearby milk producers by the handlers themselves, except as an inseparable component of a higher going price for milk.

Given the presence of such price stratification as did exist in the market at the time, the Secretary appears simply to have decided, in line with the Act's prescription that a determination of parity prices is a prerequisite, that such federal regulation as was to be instituted in the Boston marketing area must, in its provisions governing the determination of prices to producers, give recognition to the then existing price structure which was an undeniable and salient feature of pre-order marketing procedure. We cannot now conceive of any manner in which this previous relationship of prices could have been preserved in a market wide pool except through the specification by regulation that nearby producers would continue to receive a higher rate of payment for milk and that such payments would continue to be an obligation of the regulated pool inasmuch as, before regulation, they had been the result of simple economics in the milk market which was to be pooled. The established higher monetary value of nearby milk in the open market prior to federal regulation was thus maintained with the inception of the regulated market by means of provisions requiring the allocation to such milk of pool funds in a manner designed to preserve a prior status quo, or uniformity, of price.

Section 608c(5)(b) of the Act provides as follows:

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for * * *

TABLE I

1962 PRICE COMPARISONS

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct. *	Nov.	Dec.
Federal Order (City Plants)												
Class I	$6.17	$6.17	$6.17	$5.73	$5.51	$5.51	$6.17	$6.39	$6.39	$6.39	$6.39	$6.39
Class II	3.482	3.470	3.278	3.041	3.008	3.043	3.22	3.303	3.264	3.287	3.31	3.309
Blends*												
Order 1	5.74	5.68	5.54	5.01	4.95	4.81	5.39	5.70	5.63	5.73	5.79	5.68
Order 6	5.45	5.43	5.39	4.91	4.83	4.81	5.32	5.58	5.77	5.87	5.83	5.75
Order 7	5.65	5.64	5.57	5.05	4.87	4.94	5.44	5.86	5.88	5.94	5.60	5.64
Order 14	5.65	5.64	5.58	5.14	4.95	5.02	5.77	5.98	5.89	6.11	6.12	5.79
State Order												
Class I	6.27	6.27	6.27	5.83	5.61	5.61	6.27	6.49	6.49	6.49	6.49	6.49
Class II	3.018	3.016	3.011	2.908	2.89	2.884	2.895	2.885	2.903	2.874	2.884	2.881
Average Composite	5.95	5.94	5.953	5.467	5.266	5.232	5.956	6.154	6.049	6.123	6.14	6.011
Difference between federal order city plant blend (to 46¢ zone producers) and state order average composite:												
Lesser	.21	.26	.373	.417	.316	.212	.186	.174	.159	.012	.02	.221
Greater	.50	.51	.563	.557	.436	.422	.636	.574	.419	.393	.54	.371

SIMPLE AVERAGES: Lesser difference, $.214; greater difference, $.493

*To producers in 46¢ farm location differential area

Source: Market Administrator's Monthly Statistical Reports, Reports

TABLE II

COMPARISON OF 1962 PERCENTAGES OF ASSIGNMENT TO CLASS I
(Producer Receipts)

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Order 1	61.2 (High)	59.2	56.3	48.7	47.0	44.0 (Low)	51.4	57.1	55.4	59.0	60.8	57.2
	Swing (Low to High) - 17.2											
Order 6	71.8	70.9	71.9	68.4 (Low)	71.7	72.1	71.1	74.3	79.3	82.6 (High)	81.1	78.5
	Swing (Low to High) - 14.2											
Order 7	75.2	74.6	74.5	68.8	68.3 (Low)	69.2	68.5	77.9	79.4	80.1 (High)	69.9	72.7
	Swing (Low to High) - 11.8											
Order 14	68.7	68.5	69.2	67.1	65.3 (Low)	67.6	76.2	77.8	74.8	84.9	85.0 (High)	70.1
	Swing (Low to High) - 19.7											
State Order*	90.2	89.9	90.3	87.6	87.4	86.1 (Low)	90.7 (	90.7 High)	87.7	89.6	90.3	86.7
	Swing (Low to High) - 4.6											

*Computed from figures in Table I
Source: As stated for Table I

The following material is among that designated by the respondents. Petitioners contend that this material is not of record and the printing here of this material does not constitute a waiver by petitioners of their objections to the material as not properly before this Court. Petitioners also reserve the right to request that the Court assess the cost of printing this material to the respondents. With respect to the plaintiffs' summaries of administrative proceedings, petitioners offered to stipulate to print in the appendix any testimony either party considered relevant which had not been certified to the District Court below. That offer was rejected by respondents.

CHARLES PATRICK RYAN
1334 G Street, N.W.
Washington, D. C. 20005

March 15, 1967

Klagsbrunn & Hanes
1200 18th Street, N.W.
Washington, D.C.

Attention: Lawrence D. Hollman, Esq.
Carlyle C Ring, Jr., Esq.

Gentlemen:

I am in receipt of notification from the U.S. District Court that the motion to intervene as defendants in the case of Russell Allen, et al. v. Orville Freeman, C.A. No. 3379-66, has been denied by the Court, the said motion having been filed by you in behalf of eight individual nearby producers.

It would be appreciated if you would advise me as soon as possible concerning whether you desire to file a brief as amicus curiae in the proceedings in behalf of your clients.

Very truly yours,

/s/ Charles Patrick Ryan

Item 34 STERLING 3-0004

Law Offices of
CHARLES PATRICK RYAN
400 Prudential Building
1334 G Street, N. W.
Washington, D. C. 20005

May 8, 1967

Lawrence D. Hollman, Esquire
Klagsbrunn & Hanes
1200 18th Street, N. W.
Washington, D. C. 20036

Re: Allen, et al. v. Freeman

Dear Mr. Hollman:

I have received a copy of the Order of the U. S. Court of Appeals denying the motion of Frederick T. Zuber, et al., for summary reversal of the Order of the District Court refusing leave to intervene in the above case.

On March 3, 1967, I stated in the plaintiffs' opposition to the motion for intervention that I would consent to the filing of a brief amicus curiae by Mr. Zuber, and I filed a formal consent thereto on March 17, 1967. At that approximate time I also sent you a letter in which I inquired whether you desired to file such a brief, since the motion for intervention had been denied. I requested an expeditious response to preclude any additional delay, and I believe that your reaction to said offer was of a negative nature.

If you now desire to file such a brief, I would not interpose any objection to the same, provided that it was filed and personally served upon me by 5:00 p.m. on May 11th. Any later date would preclude me from filing opposition thereto and would probably prevent the Court from adequately reviewing the same.

You will recall that I facilitated consideration of your appeal on an expedited basis, and I also stipulated to the hearing of your motion in the District Court on an expedited basis—even though Mr. Ring's request for the latter was made in the evening at my home with an alternative of a preliminary hearing the next morning rather than the following day. Time is now really of the essence, but I still wish to accord Mr. Zuber, et al., an opportunity to present any defense that may be appropriate, consistent with the rules and without waiver of any objections of any nature that the plaintiffs might choose to present in this or any other proceeding involving the same or other parties.

Very truly yours,

CHARLES PATRICK RYAN
Charles Patrick Ryan

cc: Irwin Goldbloom, Esq.

Item 35 STERLING 3-0004

Law Offices of
CHARLES PATRICK RYAN
400 Prudential Building
1334 G Street, N. W.
Washington, D. C. 20005

April 20, 1967

Irwin Goldbloom, Esq.
U. S. Department of Justice
10th & Pennsylvania Ave., N. W.
Washington, D. C.

Re: Allen, et al., v. Freeman
Civil Action No. 3379-66

Dear Mr. Goldbloom:

Enclosed is a copy of the plaintiffs' summary of the testimony presented during the 1963 promulgation hearings involving the Massachusetts-Rhode Island milk Order. The proposed brief of Dairymen's League Cooperative Association, Inc., applicant for leave to file a brief amicus curiae, states that the differential in this case, unlike that in *Blair*, "was not designed to compensate for any such loss of the fluid milk market". The testimony set forth is for the primary purpose of rectifying this possible inaccuracy, and the statements of those in favor of the nearby differential have been utilized in this connection. The only reference that I have made concerning testimony in opposition to the differential is that of Mr. E. L. Tipton, economist for Cooperative Dairy Economics Service, and the same is illustrative rather than exhaustive of the testimony of this nature.

I believe that all of the records references are in the volume of excerpts of the administrative record previously filed in the case, with the exception of that relating to the brief or paper filed by the Government in the 1937 Boston

order hearing, and the latter is attached to the enclosed summary for your convenience.

• • • • • • • • • • •

I understand that the Government has certified the entire administrative record of the 1963 hearings, and I would appreciate being advised as to whether you consider any other hearing records necessary in this proceeding.

Very truly yours,

CHARLES P. RYAN

Plaintiffs' Summary of Record of 1963 Promulgation Hearing

The following summary of the testimony presented during the 1963 promulgation hearings resulting in the Massachusetts-Rhode Island milk order, concerning the nearby farm location provision of said Order, is set forth for the convenience of the Court, in that the excerpts from the administrative record are quite lengthy and contain no index or other statement of contents that would reflect the nature of the testimony therein.

In view of the fact that the record of the 1937 Order for the Greater Boston Area is not as voluminous, and inasmuch as many of the same individuals gave the same testimony in the hearings in respect to the milk orders that were consolidated (Southeastern New England, Worcester and Springfield) into the Massachusetts-Rhode Island milk order as they gave in the said 1963 promulgation hearings for the present Order, the same is not set forth herein. If the defendant regards the same as necessary in these proceedings, the plaintiffs will furnish a summary of the same for the convenience of the Court. The stated former milk orders are found in the Volume previously furnished by the defendant herein, and a portion of the 1937 hearing in respect to the nearby differential is also found as an exhibit in the administrative record

of the 1963 promulgation hearings resulting in the present milk Order.

The plaintiffs have also attached hereto excerpts from the brief of the Government filed in the 1937 hearings, and all of the foregoing should be of assistance to the Court herein.

The following individuals testified in favor of the nearby differential provision of the Order during the 1963 hearings:

1. JAMES D. LEE, economist for New England Milk Producers Association and formerly an economist with the Market Administrator's office in Boston, testified that the nearby differential payments "have been justified over the years as a recognition of the historical pattern of prices which existed prior to regulation, or as compensating nearby producers for sharing a part of the fluid milk market . . ." (R., pp. 3393, 3991-93). The brief of New England Milk Producers Association (Exhibit 77) also states that the differential payments are for the purpose of "compensating nearby producers for sharing a part of the fluid milk market which they formerly enjoyed, with producers more distant from the market".

Mr. Lee referred to the Class I (fluid milk) bases that were assigned to nearby producers under the license program of defendant, initially applying to 85% of their milk and then to 100% of the same "in an effort to gain enforcement support from the Massachusetts Milk Control Board". (R., p. 3408). He also stated that the effect of the differentials is "to establish a particular pattern or relationship of prices as between nearby and more distant producers, which is identical for the five markets". (R., p. 3394).

Under cross-examination, Mr. Lee acknowledged that evenness of production "could be compensated for only under a base rating which we do not have", and that dis-

tant producers should be equally compensated if they have even production. (R., p. 3981).

He also acknowledged that the factors enumerated by Dr. Ellsworth Bell concerning value of nearby milk and resultant justification of the nearby differential in 1937 are not present today. (R., p. 4002). Mr. Lee maintained that "accessability" of nearby milk was the present reason for the differential. (R., pp. 3991-4002). However, he admitted that a handler would look to the cheapest source for a regular and quality supply of milk. (R., pp. 1718-1727).

Dr. HARRY P. YOUNG, economist for Local Dairymen's Cooperative Association of Rhode Island, referred to the base ratings formerly given to nearby producers that returned to them a Class I or fluid price for their milk, the distant producer receiving a composite price consisting of the remaining Class I price and the Class II price for their milk, (R., pp. 2322, 2327, 2328), and he regarded the differential as a continuation of such payments based upon the use value of nearby milk for Class I or fluid use. He justified the differential on the additional ground that small handlers could not bear the added costs in purchasing upcountry milk (R., p. 2326), but he fails to mention that the distant producer bears such handler's cost of paying a differential to the nearby producer as an alternative to purchasing upcountry milk, and he admits that handlers would not pay more for nearby milk today. (R., p. 2330).

Dr. C. W. PIERCE, economist from Pennsylvania State College, also testified for Connecticut Milk Producers Association, Modern Milk Marketing Association and Local Dairymen's Association. He testified concerning the use of nearby milk for fluid purposes as justification for the differential (R., p. 2641). Dr. Pierce also stated that milk prices are higher because of governmental regulation, but he illogically maintains that only the nearby producer should be accorded this governmental benefit. (R., p. 2647).

Dr. STEWART JOHNSON, economist, also testified for the foregoing organizations, and he stated under cross-examination that the nearby differential was based upon the nearby producers' greater utilization of his milk for Class I or fluid use, and that the differential was to compensate the nearby producer for the loss of such Class I or fluid use sales in a marketwide pool. (R., p. 4066). Dr. Johnson also acknowledged that the effect of the Connecticut differential was to keep dairy farmers in other States from shipping into the Connecticut market. (R., pp. 4071-72).

Dr. DAVID A. CLARK, economist at the University of California, also quoted from the Secretary's decision promulgating the Connecticut milk order in respect to justification for nearby differentials. (R., p. 2525). He maintained that the differential was to compensate nearby producers for sharing fluid utilization under marketwide pooling of milk (R., pp. 2535, 2538). Dr. Clark also testified that the Connecticut order was promulgated because the local supplies of milk were being replaced by cheap, unregulated milk (R., p. 2539), and he acknowledged under cross-examination that the nearby differential had the effect of preventing the free flow of milk (R., p. 2542). Dr. Clark further acknowledged that he did not really know if local producers had received preferential treatment prior to State regulation (R., pp. 2550-52), and he admitted that any such preference in respect to the payments would have disappeared, in the absence of Federal regulation (R., pp. 2552-53).

Dr. Clark maintained that the existence of the differentials for several years was reason for their continuance, but he acknowledged that nearby milk had no additional value or worth over distant milk at the present time, (R., pp. 2539-41), and that the justification for the differential could require re-examination.

Mr. WILLIAM J. NEWMAN, Local Dairymen's Cooperative Association, testified that the differential should be increased, referring to the higher prices that nearby producers previously received under State orders (R., pp. 3750, 3770-71), and to the utilization of nearby producers' milk for fluid purposes. (R., pp. 3751-54). He also acknowledged that the nearby differential is to compensate nearby producers for sharing Class I or fluid milk sales under marketwide pooling. (R., pp. 3757, 3769).

Mr. FRED BRIDGES testified for the Worcester Milk Dealers Council, stating that nearby milk had an extra value because of its accessibility, but he admitted that this factor constituted a possible value to a handler. (R., pp. 4129-30). He also admitted that the differential was to compensate nearby producers for sharing their high Class I percentage under marketwide pooling, and that their higher prices had been due to such use. (R., p. 4139).

Mr. CHRISTOPHER B. SYKES testified that he did not know why the nearby producer received higher prices than distant producers prior to federal regulation (R., pp. 4032-34), and he acknowledged that evenness of production would have no application if a distant producer's production was as even as that of a nearby producer. (R., pp. 4044-45). Mr. Sykes maintained that accessibility of nearby milk might justify the differential today, but under cross-examination by Mr. Chernauskas, Government counsel, he maintained that the differential provision should never be changed, irrespective of changes in the past 25 years. (R., pp. 4050-55).

Mr. HORACE B. WILDES, Dairy Committee Chairman of the Rhode Island Farm Bureau, acknowledged that the nearby differential is to compensate the nearby producer for sharing his fluid milk market with distant producers, and that the differential discourages distant producers from shipping to market. (R., pp. 2307-11).

A few of the foregoing individuals who testified in favor of the nearby differential also stated that production costs were higher in the nearby area, that taxes were higher in the State of Massachusetts, that the higher prices to nearby producers had been capitalized into farm or land values, etc., but they did not mention that the nearby producers received a higher price because of his location by virtue of both the transportation and direct delivery differentials that are included in the zone differential. Some of them acknowledged that these reasons did not justify payment of the differential by distant producers.

A number of those testifying maintained that nearby producers had never been paid a nearby differential as such, but that they had been paid an increased price over that paid to distant producers and that the differential represented the difference between such prices. They further stated that the purpose of the Act was to maintain the status quo in this regard. Although they maintained that handlers had never applied the differential as such, they failed to explain how it could then be regarded as a "market differential customarily applied by handlers".

Mr. KEN GEYER, General Manager, Connecticut Milk Producers Association, also testified for Modern Milk Marketing Association and Local Dairymen's Cooperative Association, and he adopted the testimony of Dr. Swonger, former NEMPA economist, that the differential payments "served to compensate nearby producers for sharing a part of the fluid milk market which they formerly enjoyed, with producers more distant from the market". (R., p. 2161). He quoted from the final decision of the Secretary in promulgating the Connecticut milk order on February 11, 1959:

> "The Federal order markets in New England and the New York-New Jersey market provide for similar differentials to their producers with nearby farms . . . . The differentials adopted recognized the higher per-

centage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes. Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market . . . ." (R., pp. 4463-64).

Under cross-examination, Mr. Geyer acknowledged that handlers would not pay the nearby differential today (R., p. 2166), and that such differential served to exclude Vermont dairy farmers from the Connecticut market, a fact which plaintiffs contend evidences the "trade barrier" aspect of the differentials in any market. (R., pp. 2163-64).

Mr. Geyer also referred to the justification and the findings made by the Secretary in 1958 in respect to the nearby differential provision of the Southeastern New England (R., p. 2168), which order was consolidated into the present milk order in 1964. The former milk order was the most important one consolidated into the Boston order, in respect to number of producers and area, and the Secretary's decision, 23 Fed. Reg. 8238, is included in the volume containing former milk orders and states as follows:

"Historically, dairy farmers in the States of Massachusetts, Rhode Island and Connecticut, because of their location with reference to the large population concentrations of New England have disposed of a substantially larger percentage of their production for fluid uses than have dairy farmers in the upcountry area. Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. Under the marketwide pooling herein proposed and without some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average

utilization of all milk on the milkshed rather than according to the utilization of his milk. Under a regulated market, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and has assurance that his milk will not be displaced by cheap unregulated milk, from more distant sources .... The scheme of nearby farm location differentials and the amount thereof is identical with that employed in adjacent Federal order markets ...."

The testimony of E. L. Tipton, Economist, Cooperative Dairy Economics Service, representing about 9 cooperatives at the hearing in 1963, brought out the lack of authority under the Act for requiring the differential payments to be made by other producers, rather than handlers. He also maintained that handlers would not pay such differential payments today, and that they had turned to upcountry milk because of the excess charge of 7 cents in the zone differential for nearby milk—a fact which established that handlers would not pay nearby producers either 46 or 23 cents for their milk over the uniform prices. His testimony also related to the promulgation of the other milk orders, and to the question of nearby producers having an outlet for fluid utilization. (R., pp. 2125-50, Exhibit 55).

Respectfully submitted,

CHARLES PATRICK RYAN
400 Prudential Bldg.
Washington, D. C. 20005
ST 3-0004
Attorney for Plaintiffs.

From the Economic Brief of USDA, 1937

F. Equalization of fluid milk sales among producers

The use plan of payments for milk puts all handlers in the market on an equitable competitive basis, and equalization of fluid milk sales is intended to do the same thing for all producers. Equalization of fluid milk sales is simply an extension of a plan that has been employed by each handler and each cooperative creamery. If a creamery sold 75% of its milk as whole milk and the remainder as cream, it did not pay 75% of its producers the fluid milk price for all their milk and the remaining 25% the cream price for all their milk. Such a method obviously would have been inequitable. Instead each producer was paid the whole milk price for 75% of his deliveries and the cream price for the remaining 25%. Under the proposed amendment to Order No. 4 the fluid milk sales of the whole market are distributed among all producers in the milkshed in exactly the same way as though they were all members of a cooperative association which equalized its fluid milk sales among its members.

The lack of any plan for an equitable distribution of fluid milk sales among all producers has been one of the principal causes of unsatisfactory conditions in the Greater Boston Marketing Area during past years, for it has led to destructive competition among groups of producers. Under normal conditions in the Eastern markets, whole milk prices average approximately twice as high as the prices paid for milk reported for use as cream. However, the milk used as cream is of the same quality as the milk used for fluid milk and can at any time be sold as whole milk in competition with it. A handler's ability to pay his producers a favorable composite price, as compared with the price of competitors, has depended largely upon his not having so great a volume of surplus sales (in this case cream) as his competitors. If, by cutting prices, a group

succeeded in selling a large percentage of its milk as fluid milk, its composite price would be higher than that of another group that received the full market price but carried a larger percentage of the surplus. Thus it was that a handler could cut the price of fluid milk in the city and still pay a composite price in the country, as high or even higher than that of the competitors who did not cut prices.

A few simple examples will illustrate the situation. If the Class I price is $3.00 and the Class II price is $1.50, and if there is 60% of the total milk sold as Class I, then a group of producers carrying its share of the market's surplus would return to its producers per hundredweight as follows:

60 pounds as Class I at $3.00	=	$1.80
40 pounds as Class II at 1.50	=	.60
Composite price per hundredweight	=	$2.40

This group of producers has more surplus than it needs to take care of the daily fluctuations in its sales. Therefore, if it can contract to sell a portion of its surplus milk at any price above $1.50 per hundredweight, it will obtain a greater return for its milk. If it sold half of its surplus milk for fluid milk consumption at $2.25 per hundredweight, which is slightly more than one-half cent per quart under the market price for fluid milk, and still continues (a practice not uncommon in Boston, particularly in the wholesale trade), the return to this group of producers per hundredweight would be as follows:

60 pounds as Class I at $3.00	=	$1.80
20 pounds as Class I at 2.25	=	.45
20 pounds as Class II at 1.50	=	.30
Composite price per hundredweight	=	$2.55

This group will have undersold the market by more than one-half cent per quart and by so doing it will have increased its composite price to producers for all milk by $.15 per hundredweight. If the handler were a proprietary concern rather than a cooperative, he probably would continue to pay his producers approximately the same net price as competing dealers in the territory and pocket the increased return.

Normally, this group of producers will have increased its fluid milk sales only at the expense of another group in the market. Assuming that this other group carried originally the same amount of surplus, the return to its producers per hundredweight would now be as follows:

40 pounds as Class I at $3.00	=	$1.20
60 pounds as Class II at 1.50	=	.90
Composite price per hundredweight	=	$2.10

More likely, however, in order to retain its fluid milk sales and maintain its price to producers, the second group, as well as others similarly threatened, would lower its own price to whom the cut-price milk was offered. Eventually, before the cut-price group succeeds in placing its surplus milk at a cut price, it might have to offer it to several customers and thereby have forced down the price on fluid milk sales of several times the volume of milk which it has to offer. If any considerable amount of surplus milk is thus offered to the trade at a cut price, it tends to force the fluid milk if the fluid milk price were eventually reduced to $2.25 as a result of this price cutting, it would still be enough above the price of surplus milk so that the process could be repeated. It is by this method that competition among a few groups of producers or handlers has often reduced the net return to all producers in the Boston milkshed much below a fair market level. Sufficient control of milk markets to prevent such practices is highly

desirable from the producer's standpoint. In many markets, price cutting has been carried to the point that producers withheld their milk from the market, causing a shortage of milk in the market. It should be obvious that when price cutting is carried to this point, it is inimical to the public interest.

The history of the Boston milkshed has shown that no group of producers can be kept from participating in the fluid milk market. The different groups either cut prices and share the fluid milk market on a lower price level, or else they cooperate and share the market on a fair and reasonable price level. Equalization of fluid milk sales throughout the market entitles each group of producers to maintain its share of the fluid milk sales without price cutting.

The actual operation of the equalization plan is simply a means of distributing to all producers equally the value of the fluid milk sales in the market by all handlers. With a 40% surplus in a market, each producer should get surplus prices on 40% of his deliveries. The Class I and Class II sales are not distributed equally among handlers. One handler may have no Class I sales, yet his producers are entitled to Class I price for 60% of their deliveries. But another handler may sell 100% of his producers' milk as Class I and his producers, if they are to carry the same amount of surplus as other producers, should get Class I price for only 60% of their deliveries. The equalization is made by the several handlers paying to producers through the equalization pool the difference between the Class I and Class II price on 40% of their total sales and to pay their producers Class I price for 60% of their deliveries, and for 40%, the Class II price. The first handler pays his producers Class I price for 60% of their deliveries by receiving from the equalization pool enough money to enable him to pay producers for 60 percent of the milk received at Class I prices, and Class II price for

the remaining 40%. If a handler happened to sell exactly 60% of his milk as fluid milk, he would pay producers directly for 60 percent of the milk at Class I prices, and for 40 percent at Class II, rather than paying them partly through the equalization pool.

The whole plan works exactly as if all handlers paid into the pool the value of their Class I milk times the Class I price plus the value of the Class II milk times the Class II price, whereupon the total sum would be distributed equitably among producers according to their deliveries. The Administrator's office acts merely as a clearing house for transactions. Thus there remains room for any gains through superior quality or differences in efficiency of any individual handler or association of producers, because any gain from operations after the milk has passed the receiving room door is retained by the handler or cooperative and not shared by the rest of the market.

Summary of Hearing Record in Promulgation of Boston Order, 1936

Item 36

The initial milk order for the Boston marketing area was promulgated by the defendant effective February 9, 1936, but it did not contain the nearby farm location differential provision. It was suspended on August 1, 1936, and was reinstated and amended on August 1, 1937, at which time the nearby farm location differential provision was inserted into the milk order in place of the "base-rating" provisions of the 1936 order. (R. (1963 Mass.-R.I.), p. 470; 2 F.R. 1589). No provision was made for the issuance of recommended and final decisions at that time, the findings of the Secretary being set forth in the order.

The defendant found that in 1934, 90.8 per cent of the milk sold in the Greater Boston marketing area originated

in States other than Massachusetts and was inextricably intermingled with Massachusetts milk. (Order, Finding No. 1; R., p. 10). The promulgation hearing conducted on December 10-11, 1935, disclosed that 59.4% of the milk came from Vermont, 5.9% from New York, 12% from Maine, 13.3% from New Hampshire, 9.2% from Massachusetts and .2% from Rhode Island, but it was actually impossible to tell where the intermingled milk was from. (R. 10, 31-32).

The defendant also found "that the prices received by producers for milk sold in the marketing area were, for a long time prior to said hearings, at a level that gave such milk a purchasing power with respect to articles that producers buy considerably below the purchasing power in the base period;". (Order, Finding No. 3; R. 66). See also R. 66-67, 101.

The defendant further found that determination and payment of a "uniform" price through a market-wide equalization pool "founded upon a base-rating plan" was proper and reasonable, and "that the payment of *class I prices* for the basis of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, due to the greater availability of their milk for *class I use.*" (emphasis supplied). (Order, Finding No. 4). An explanation of base-rating is set forth in the testimony of Paul L. Miller, Dairy Section, Agriculture Department (R. 16-20), and that of W. A. Bronson, economist for New England Milk Producers Association (R. 58-66).

An explanation of market-wide equalization is also found in the testimony of Mr. Bronson, who stated that handlers who are able to dispose of milk for fluid use force producers to give rebates, etc., in order to receive the Class I or fluid milk outlets (R. 58). He also stated that "Milk is a product having a value dependent upon the use to which it is

put. Milk used for fluid milk purposes has a value higher than milk used for cream or other by-product purposes." (R. 57-66). The giving of rebates, excessive hauling charges, etc., by producers to handlers who had a Class I or fluid milk outlet necessarily render any figures or statistics as to "higher prices" received by producers from such handlers of doubtful validity—since the quoted prices do not reflect the reduction caused by such factors.

It is apparent from the record that the Agricultural Department and the Massachusetts Milk Control Board were in agreement prior to the hearing that the Massachusetts producers were to be accorded a preferential position under the Order. In fact, the Government submitted an "Economic Brief" which purported to substantiate the position taken in this regard. The non-Massachusetts producers were actually fearful that legislation might be enacted precluding them from marketing their milk in the Boston market, in spite of the fact that Massachusetts milk comprised but 9.2% of the total milk, (R. 136, 179), and Charles E. Shepard, President of the Federated Dairy Association of Massachusetts, testified that one of the reasons for giving a preference to nearby producers was their intention of "becoming a menace to the enforcement of the agreement". (R. 362).

The Government acknowledged that under the base-rating plan and the proposed market-wide equalization the nearby producer would be accorded a preferential position which conflicted with the uniform manner in which such plans normally operated, and it is evident from the record that the explanation or definition of such plans was in conflict with the exception inserted therein. Mr. Miller of the Department acknowledged that under the base-rating plan the nearby producers would be paid a Class I or fluid milk price for their base milk, whereas the non-nearby producer would receive a blended or composite price made up of the remainder of the Class I price plus the Class II price. (R.

134-35). Mr. Miller attempted to justify the Class I or fluid price for the base milk of nearby producers by stating that "it should be noted that a producer whose farm is located near the market is in a position to supply Class I milk for use at all times, at less cost and distances . . .". (R. 135; Economic Brief, p. 119).

Mr. Miller admitted under cross-examination that he did not know if nearby producers actually did deliver their milk to the market but presumed that they did so. (R. 136). He also acknowledged that there were so many different types of base plans, methods of payments, etc., in the milkshed that "it is very difficult for you farmers to determine whether you, as an individual and a member of one group, are paid equitably in comparison with some other farmer as a member of some other group, because your bases of payments are somewhat, and often very different". (R. 18-19, 133-34). He further acknowledged that the purpose of a base-rating plan was to encourage more even seasonal production and that payments were made thereunder at a higher price for the producer's base, as determined by his deliveries over a representative period of time during the season of short supply, and that production over and above the base was to be made at Class II or surplus prices. (R. 17-18).

Mr. Bronson of the New England Milk Producers Association testified that a larger portion of the money from the pool is to be given to the "even" producer whose milk is more valuable because of such evenness of production (R. 63), but no consideration was given to individual producers in different parts of the milkshed whose production was "even" in respect to receipt of the Class I price for their base milk—except as to nearby producers who received such price irrespective of the evenness of their production.

Ernest H. Bancroft, president of New England Dairies, testified that nearby producers had a preferred position

because of the transportation factor and because they could become dealers, and he stated that the other dairy farmers should take what the nearby producer is willing to give them. (R. 282-83).

Charles E. Shephard, president of Federated Dairy Associations of Massachusetts, testified that nearby producers should have a preferred position in the pool because they have a higher cost of production, they may become dealers, and they can menace the enforcement of the milk order. (R. 357, 362).

Mr. Blandi testified that the nearby producer had a preferred position by virtue of the lower transportation cost, but he failed to mention that such producer was already compensated for this factor. (R. 208-10).

Mr. G. D. Bailey, producer and director of Bethel Creamery, testified that producers within the 40 mile zone could not supply the market with their limited production, but he stated that "However, if we antagonize them enough to keep this thing up, it is possible for them to get legislation through in their state to cause a lot of harm to the Vermont producers". (R. 179).

Howard Selby, manager of United Farmers Cooperative Creamery of Morrisville, Vermont, testified that the preference accorded to nearby Massachusetts producers will exempt them from the necessity of equalizing their production, in that they will receive a Class I or fluid milk price for their base milk rather than the blended price of Class I and Class II sales. He stated that nearby producers already had an advantage in not having to pay country stations' charges for receiving and handling their milk. Mr. Selby maintained that "no plan should give any preference to any one section over another", and that it was erroneous to contend that the preference given to the nearby producers "is such a small factor in Massachusetts that we can afford to wink at it". He stated that Massachusetts

milk constituted only 8% of the milk in the Boston market two years ago, then 9.2%, and now 14% of the total, maintaining that the preference in price given to nearby producers would encourage them to produce more milk with resultant lowering of the blended price that non-nearby producers would receive. He stated that perhaps the base of 75% would be lowered to 60% after one year and then to 40%, but he contended that there was no assurance of this and that the preference given nearby producers would be relinquished by them. (R. 121-23).

Mr. E. A. Lawson, a producer from Lyndonville, Vt., testified that the nearby producer would be accorded a preference by virtue of the payment of the Class I or fluid milk price for his milk, and he illustrates the fact that few producers could comprehend the technicalities of the Government's proposals. (R. 129-30).

Mr. William C. Miller, a producer and attorney for Cabot Farm Cooperative, testified that Massachusetts producers did not have a prior right to the Boston market, that they were being subsidized by payments from the pool belonging to all producers, and that they received a transportation difference. (R. 207-10). Mr. Tator, the Market Administrator, in reply to Mr. Miller's testimony, stated that the nearby producer was not being given everything he asked for, stating that "it is different from that what they have demanded. They have demanded, through their representative, that every drop of milk they make should be paid for at the Class I price." (R. 210-11). Mr. Tator maintained that his office did not recognize State lines, but he acknowledged that the "Massachusetts position" was that Vermont dairy farmers were a "tariff problem". (R. 211). He also stated that figures were not available to determine to what extent the nearby producers should receive a higher price, but that such preferential price would be lowered if the figures disclosed that it was not warranted. (R. 210-12).

In respect to the evenness of production factor, it was acknowledged that the dealer or handler can pay for the same by the savings that he makes by virtue of lower labor costs and less equipment used when production is even. ("The Price Structure of Milk", pp. 30-31).

From the foregoing testimony, the defendant Secretary found in the February 9, 1936, milk order that nearby producers, those within 40 miles of the Boston market, should receive a Class I or fluid milk price for their base milk "due to the greater availability of their milk for Class I use".

CHARLES PATRICK RYAN
400 Prudential Building
1334 G Street, N.W.
Washington, D. C. 20005
ST. 3-0004
Attorney for Plaintiffs.

Summary of Administrative Hearing Record Amending and Reinstating Boston Order 1937

The Agriculture Department also submitted an "Economic Brief" with respect to the proposed amendment and reinstatement of the Greater Boston milk order during the 1937 hearings. It noted that the source of milk for the New England supply area was as follows: Vermont, 52% (decrease of 7.4%); Massachusetts, 13.4%, (increase of 4.2%), Maine, 14%; New Hampshire, 12.8%; New York, 6.9%; and Rhode Island, .1%. (Brief, p. 10). It noted that in 1936, 86.6% of the milk for the Greater Boston marketing area came from States other than Massachusetts. (Brief, p. 16). This figure had decreased from the 90.8% originating from other States in 1934, but no mention was made as to whether the Massachusetts increase and the Vermont decrease were attributable to the preferential

price treatment accorded to "nearby" Massachusetts producers under the 1936 milk order. The brief, pp. 2, 4, also noted that prices had declined from 1929-33 by 36.8% in Massachusetts, 39.9% in Maine, 43.9% in New Hampshire, and 47.4% in Vermont, in respect to the purchasing power of dairy farmers for those commodities purchased by them, whereas the decline in price for such commodities was not so extensive.

This brief also noted at page 22 that "The heaviest producing area is located in northwestern Vermont while the area within 100 miles of Boston is a rather light milk producing area", and it further stated in respect to the supply area for the Greater Boston marketing area that "Much of the milk produced in Massachusetts is used in other markets in Massachusetts. However, there is some milk shipped to Boston from the western part of the State and from some producers located nearby Boston".

The Department brief also discussed the concept of equalization or market-wide pooling authorized by the Act at pp. 82-84, and it stated in part as follows:

> "The history of the Boston milkshed has shown that no group of producers can be kept from participating in the fluid milk market. The different groups either cut prices and share the fluid milk market on a lower price level, or else they cooperate and share the market on a fair and reasonable price level. . . . The actual operation of the equalization plan is simply a means of distributing to all producers equally the value of the fluid milk sales in the market by all handlers. With a 40% surplus in the market, each producer should get surplus prices on 40% of his deliveries. The Class I and Class II sales are not distributed equally among handlers. One handler may have no Class I sales, yet his producers are entitled to Class I price for 60% of their deliveries. But another handler may sell 100% of his producers' milk as Class I

and his producers, if they are to carry the same amount of surplus as other producers, should get Class I price for only 60% of their deliveries." (Economic Brief, p. 84).

On page 94 of said brief, reference was made to a study in which a sample of 15% of the producers in the market was taken, and the producers classified as even or uneven. The report stated:

"It was found that only around one-fifth of the producers in the market could be called even under this definition. These even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors. (See table 38)."

In spite of the fact that base-rating and evenness of production relates to the individual farmer's deliveries over a representative period of time, rather than to 15% of the producers or any particular "group" of dairy farmers whose farms are located in a particular area, the Department brief proposed that an exception be made to the equalization plan or market-wide pooling to allow "nearby" producers within 1-40 and 41-80 mile zones from Boston to receive a differential of 36 cents and 18 cents per cwt., respectively, in order to accomplish the purpose for which the former base-rating plan in the 1936 milk order was intended. (p. 94).

Mr. E. H. Jones, Commissioner of Agriculture for Vermont, testified in favor of true equalization and stated as follows:

"Now through a combination of circumstances and through strategy one group of producers and one group of dealers have obtained a potential monopoly of fluid milk sales and are able to pay prices better than their competitors; other groups carrying a surplus are hold-

> ing them back, and the prices which they are able to pay to their producers are so far below the cost of production that it seems to be this condition has gone just about far enough, and that a change is in order. I wish to make this statement, that a marketing system, or lack of system if you please, which permits one group of farmers to fatten while another group starves is unsound, inequitable, and unjust." (R. 81-84).

Mr. A. H. Packard, of Jericho, Vermont, also testified that the fluid market was under the control of a small group. (R. 98).

Mr. Alpin, Administrator for the Boston market, reiterated the allegations set forth in the "Economic Brief" concerning the evenness of nearby producers and stated that their milk was accessible to "small dealers". He maintained that the proposed differentials was to compensate for the fact that nearby producers had been able to get 36¢ and 18¢ in the two zones over the price paid to other producers, for the aforesaid reasons, and that it was intended to give them the same advantage under the amended milk order. (R. 129). He referred to the price preference as a "location differential". (R. 105-06), but he offered no explanation of how the Government's proposal could be authorized under the Act. Mr. Miller from the Department also stated to the same effect, but he acknowledged that "It is perfectly true out beyond these zones there are farmers who are perhaps as even producers of milk and as desirable sources of supply for a handler . . ." (R. 362). Mr. Miller also stated as follows at page 414:

> ". . . That really we were faced with the fact that the milk was already here and the problem is, therefore, a way of pricing milk in determining the proceeds of the sale of milk among farmers so as to prevent excess supplies of milk from pulling our price levels

all out of kelter, and that while the people who now have the Class I market or who are relatively in a good position in the market may feel—may think that this scheme is bound to force them to share the market more generously than they will be required to without it, that is, after all, the question that needs to be thoroughly considered . . . and we musn't throw this thing out just because it provides for a systematic way of sharing the market because, after all, there is no way of avoiding sharing the market". (R. 414).

In respect to prices, Mr. Alpin apparently changed his views later in the hearing, in that he stated at page 425:

"You have heard the testimony here that these producer associations have nothing to say about the price of milk. When we were operating in Boston we were continually told by the dealers, the large dealers, that they had to own their milk as cheap as their competitors, and that they intended to own their milk as cheap as their competitors. That being their policy, and it has been their policy for years, and they admitted under their own testimony yesterday that the dealer sets the price and the producers have nothing to say about it. I think that you have very little assurance as to what the price will be without a Federal order . . .". (Record 425-26).

Mr. Greer, an attorney representing various dealers, testified that Boston has 2 large dealers who control 60% of the sales in the market. (R. 442). He did not dispute the nearby producer's right to a price preference, but stated that such producer was compensated for his nearness to market by the transportation differential and that he would receive the proposed nearby differential under the Order whether he gets his milk to market quicker or slower than the distant dairy farmer. (R. 359-60). He also stated

that the provision cannot be enforced "as a matter of law", and that "the Federal authority cannot write into the order any provision which by its terms limits a preference to a state line, and it is obvious, also, that the thought is to achieve that result without putting it into words". He called the differential proposal "a make-shift device, a stop-gap which will not stand analization in the long run". (R. 358-59).

Henry T. Broderick, attorney and producer from Sterling, Mass., who represented other producers within the 40 mile zone, stated in part as follows at page 101 of the record:

> ". . . I cite to you that I am supported by your Chief Solicitor Blandin who has asserted, and we have a stenographic report of his comments, that he is prepared to defend this attitude of ours by virtue of custom through long years, in this market. . . . It is a matter of record that the milk shipped by my clients has been used daily for fluid purposes for many years by our customer. It should be used daily for fluid milk".

E. Frank Brannon, a producer from Fairfield, Vermont, testified against equalization of returns to dairy farmers, maintaining that they could get higher price without it, and that the independent producers in Vermont marketing their milk through a dealer with a substantial fluid milk business would sustain a heavy loss through equalization. (R. 114-15).

Mr. Williams, of Newport, Vermont, representing 3 producer organizations, was also against equalization and he said that producers in his group in the 200 mile zone who are receiving better prices than their neighbors should retain them, but he also acknowledged that a small group of producers could not control higher prices. (R. 57-59, 62-63).

Mr. Mm. C. Walker, a producer from Cabot, Vermont, testified in favor of equalization (R. 401-08), and Mr. T. F. Macauley of Shoreham, Vermont, stated that certain producers who have a large share of the fluid market should share the same equally with other producers, citing the increased costs of grain, etc., higher labor and increased retain prices. (See Briefs & Statements).

Judge George Thompson, General Counsel for Bellows Falls Cooperative Creamery, questioned the authority for the differential under the Act and Constitution (R. 237-38), and the brief submitted by the cooperative stated as follows:

> "Section 4 provides for differentials (for Massachusetts milk) which are without the provisions of the Act and therefore beyond the powers of the Secretary. The Act contemplates a uniform price for all milk of the same class to all producers whose deliveries are within the jurisdiction of the Act. The differentials proposed are not adjustments by differences in cost of moving milk into the market, incidental to location, but are arbitrary additions to the price as an added value of the commodity. "Nearby milk" has no value in excess of any other milk which on arrival complies with the market's requirement of quality. Its only advantage in the market is a lower cost of delivery. This difference is provided for in Article IV and Article VIII. The provisions of Section 4 as proposed is not only without economic justification, it is an unlawful discrimination in price between producers of the same class of milk, and against the letter and spirit of the Act. The desire of the management of the proponents to cover up a "take" from their own producers to bait some Massachusetts farmers into voting for this Order is not a ground sufficient to warrant this discrimination expressly provided for."

Even the Report of The Massachusetts Milk Control Board of November 30, 1936, acknowledged at page 9 thereof that:

> "In the opinion of the Board, Massachusetts producers cannot expect over any long period of time special protection against the competition of producers in other States. . . ." (Exhibits)

However, John L. Carten, speaking for a "Nearby Producers Association", insisted that "We must be protected against seasonal surplus", which was a manner of saying that nearby producers wanted a Class I or fluid milk price but did not wish to carry any of the burden of the surplus in the market. Mr. Carten maintained that nearby producers had even production, and "have much more expenses, much more trouble down here that has to be compensated some way, and the local producers—there is always a row in the market unless they are compensated in some way". (R. 281-85). He also referred to the difference in price between the nearby producers and those of the NEMPA in the 191 mile zone as illustrated by figures from one producer, neglecting to refer to the many different ways and amounts of payment for milk in the milkshed, and claimed that nearby producers should get a Class I or fluid milk price for at least 90% of their milk or else a cent a quart extra—46¢ per hundredweight. (R. 281).

Mr. Wesley Bronson, economist for New England Milk Producers Association, testified in favor of the differential, stating that from 1927 through 1930 producers delivering to Deerfoot Farms Company at Smithboro, Massachusetts, received a higher price for their milk, as did those delivering from 1923 to 1932 to the J. B. Prescott Company at Bedford, Massachusetts. He did not appear definite on the explanation of such figures, and he did not refer to the fact that some handlers had a higher percentage of fluid use than other handlers. Neither did he refer to the wide

range of prices paid in the milkshed, the many plans under which producers were paid, and other important factors such as rebates, etc. However, he appeared to contradict himself when he stated that producers in the 40 mile zone had received $3.10 per cwt. under the Federal order but only $2.46 under the Massachusetts state order upon suspension of the 1936 Federal order. (R. 268). No explanation was forthcoming as to how this coincided with the argument of nearby producers that they received higher prices prior to Federal regulation and therefore should receive the same under the Federal order.

Mr. Shepard, of the Federated Dairy Association of Massachusetts, testified that "We believe that as long as there are large supplies of fluid milk either within or without our State available for sale to our Massachusetts markets the price of milk in any part of our State is in jeopardy". Although Mr. Carten of the Nearby Milk Producers Association had testified that base-rating was completely unacceptable to nearby producers, Mr. Shepard stated that the abandonment of base-rating had put nearby producers to a disadvantage. Like other witnesses in favor of such differential, it was stated that "figures" from nearby producers showing their higher prices would be submitted in or with a brief rather than during the hearing where other participants could question the same. (R. 294-96, 299).

Mr. Alpin, The Boston Administrator, acknowledged that it was intended that nearby producers should receive such differential, due to such "higher prices" received by them "which cannot be entirely accounted for by the freight rate or the country station allowances". (R. 232). (R. 356).

A brief filed by the Secretary of the Nearby Milk Producers Association stated that unless they received the 46¢ per cwt. instead of the proposed 36¢ per cwt., the nearby producers "will swarm to the Office of the Market Administrator to remind him of it and demand an adjustment".

Another brief submitted by Mr. Branch, extension economist for the Mass. State College purported to justify the differential on the basis of alleged increased taxes, costs of production, etc., in Massachusetts. Another brief by Ellsworth Bell, holding the same position at said college, maintained that 15% of the milk used in the Greater Boston area is supplied by Massachusetts producers and 87.6% of it was sold for fluid use, whereas 73.7% of the Vermont milk was used for fluid purposes. He stated that "adequate location differentials must be allowed to those sellers near to market thereby making it unnecessary for any group to cut their offering price in order to obtain its share of the market proceeds of fluid sales". He also stated that "it is recognized that freight, country assembly expenses, container services, refrigeration and other charges are not required to the same degree with respect to milk produced nearby for fluid sale." He failed to illustrate how these savings to nearby producers justified an additional differential payment or to note that the nearby producer was already compensated for such factors, but also stated that nearby producers could retail their milk. (During the 1963 Massachusetts-Rhode Island administrative hearings, it was admitted that these factors were no longer (if they ever were) a justification for the nearby differential (R. 4002). and it was brought out during Mr. Bell's testimony during the 1949 administrative hearings for the Worcester, Mass., Federal milk order (R. 16-21) that he was not a dairy economist and knew very little once he was exposed to cross-examination concerning his direct testimony).

From all of the foregoing, the defendant Secretary found "That in view of changes in economic conditions since the date of the original findings, the payments to all producers and associations of producers delivering milk to all handlers of uniform prices for milk so delivered, without the use of a base-rating plan, but with the inclusion of special location differentials, is a fair and reasonable method of distributing

to producers the proceeds of sales of milk to handlers". (Order, Finding No. 2, 8/1/37). The Order gave 23¢ per cwt. to producers within 41-80 miles from Boston and 46¢ to those whose farms were within 40 miles, or such lesser amount as would equal $3.19 or fluid price.

Respectfully submitted,

CHARLES PATRICK RYAN
400 Prudential Bldg. St.-3-0004
Washington 5, D. C.
Attorney for Plaintiffs.

Summary of Promulgation Hearing Record for Worcester, Mass. Order

The promulgation hearing record that resulted in the Worcester, Mass. Federal milk order was discussed by the defendant in his Decision published in the Federal Register on November 23, 1949, (14 F.R. 7097), and his Decision in respect to the promulgation record of the Springfield, Mass., Federal milk order was also published the same date. (14 F.R. 7085).

Ellsworth W. Bell, agricultural economist, testified in favor of a nearby differential, but it was evident upon cross-examination that he knew virtually nothing concerning that upon which he had offered "expert" testimony. (R. 16-21, 38).

C. W. Swonger, economist for New England Milk Producers Association, favored the differential for the following reasons:

> "One is the fact of their existence under both the Boston and New York orders, and the fact that we have proposed a similar differential for Springfield. . . . A second factor is the existence of alternative marketing opportunities available to producers located in reasonably close proximity to the market. . . . This

would mean a loss of Class I sales to the pool, and rather than suffer such loss of sales, it has been considered desirable to recognize such alternative marketing opportunities in the form of a higher blend price to nearby producers. It is sometimes argued that this opportunity is less today, with expensive equipment and stricter Board of Health requirements relating to milk handling and distribution, but there are already a number of producer-handlers in the market. . . . A third factor has been that of more even supply. Nearby producers on the whole have done a much better job of adjusting the seasonality of their production to the requirements of their dealers and the fluid milk needs of the market. This is apparent from an examination of the seasonality of production for various zones in the Boston market. . . . The nearby producer does not create, nor is he expected to carry, the same proportion of surplus as does the more uneven producers located further distant from the market. It may be said that rating plans would be a more selective way of rewarding even production. But rating plans are anathema to many producers in northern New England . . . The other factor, on which there was extensive testimony in Boston at the time the present system of location differentials was adopted, was that of historical price relationships. . . . Worcester producers have continued over the years, to receive blended prices closely in line or somewhat higher over the price paid to nearby producers in Boston, . . . higher than could be explained on the basis of transportation costs on up-country supplies." (R. 630-34).

Mr. Swonger acknowledged that the purpose of the differential was to prevent nearby producers from sharing the surplus of the market (R. 633). He explained market-wide pooling and said that in dealer-pool type of marketing arrangement, "the high-use dealer is in a position to discount the Class I price through excessive charges for trucking and other devices" (R. 89). He maintained that this would not happen under equalization or market-wide pooling, and therefore "Worcester producers would also benefit from the fact that all of the Class I sales were accounted for, and

paid for at the Class I price, which is not now the case." (R. 647). He did not explain these self-contradictory statements in respect to nearby producers receiving a "higher price" for their milk under such circumstances or the effect of the same on the statistics furnished concerning prices. Mr. Swonger was unaware that the NEMPA voted for its producers (R. 101), but he was aware that such association did not consult its members (R. 92-95).

Clifton E. Whitney, representing Northern Farms Cooperative and the Maine Dairymen's Association, testified concerning the artificial and arbitrary barrier that the nearby differential erected around the fluid milk market. (R. 402-03). He stated that there was no justification for the location differentials, in that

> "Nearness to market is compensated for by the difference in freight rates as reflected in Section 7(c) . . . Claim is often made that producers nearest a market produce more evenly . . . We maintain that evenness of seasonal production should be encouraged by a pattern of seasonal pricing. Such a pattern of seasonal pricing is recommended in the proposed order under Section 7(a)(5). If further adjustment is necessary, it should be done through seasonal pricing. The mere fact that a producer is within a certain number of miles of the market or that he lives in a certain town is no assurance that he produces evenly or will continue to produce evenly in the year ahead." (R. 411).

Mr. Whitney stated that handlers should pay for any extra value or quality, and he maintained that a producer can still get an additional premium for milk over the minimum prices without the necessity for such location differential. He stated that because they exist without justification in the Boston and New York orders is no reason to extend them but to draw the line. Mr. Whitney quoted Sec. 608c(5)(B)(ii) of the Act pertaining to authorized adjustments to the uniform price required by the Act, and stated that it was obviously an impossibility for such a dif-

ferential to have been "customarily applied" because it could only arise under a market-wide pool. "Worcester has not been operating under a market-wide pool whereby those inside a given line receive such a differential". (R. 412-14). Mr. Whitney cited the case of *Brannan* v. *Stark*, 342 U.S. 451, which held that small deductions from the market-wide or equalization pool were not authorized under the Act, and he asked if these deductions from the pool for no service or value were authorized under the same. Mr. Whitney also testified that Boston producers had supplied the Worcester market during short supply, but they had to carry the surplus by themselves for years. (R. 419-20). He also maintained that some of their producers would be deprived of their market in the Worcester area, and that the history of the Boston market is not ground for the history of the Worcester market, a fact brought out by other witnesses.

Mr. Myron R. Laipson, a dealer, stated that 15% of the producers from out-of-State have served the Worcester market for years and should not be excluded by this "severe penalty". He maintained that the differential in the Boston market made it impossible for distant producers and his organization to compete, that the differential had not been customarily applied, and that the nearby producer was already compensated for his location by other valid differentials. (R. 702-05).

Hearing Examiner Gifford also commented that a handler could still pay a premium over the minimum price, and stated that "I have seen them paying eighty cents over the blend price for milk to make cheese out of. They can pay premiums. There is no question about that. What we are considering is whether this is a fair minimum price or not, not a maximum. That is up to a contract between the dealer and the producer". (R. 140).

Mr. Chester W. Smith, representing United Farmers of New England, New England Cooperative Dairy, Bethel

Cooperative Dairy, Shelburne Cooperative Dairy, Mount Mansfield Cooperative Creamery, Grand Isle Cooperative Creamery, Richmond Cooperative Creamery and Milton Cooperative Dairy, testified that producers outside the 30 mile nearby area are going to be taxed 35 cents per cwt. off their price for the purpose of adding about 11 cents on to other producers' prices within the 30 miles. (R. 446-47). He stated that under the Boston order the distant producer is taxed a much smaller amount, due to the fact that so many pay to so few, whereas under the Worcester order it would be reversed. (R. 469).

Mr. Paul Hawley testified that "The original proposal for the paragraph and the order, of course, is to effect a barrier in favor of certain areas or groups of producers, as I see it, and it is not a desirable provision in that it established almost as a necessity a close, tight supply situation in the Worcester market". (R. 424). He repeated the testimony of Mr. Whitney, (R. 428), concerning the fact that Boston served the Worcester market in periods of short supply but the latter disliked sharing the burden of the surplus of the market. (R. 370).

Mr. John R. Sibley, of Spencer, Mass., testified in favor of the differential, but his statistics were shown to be of doubtful validity. (R. 52-57).

A number of Vermont producers testified that they were part of the Worcester market and should not be excluded by the differential or a difference in price. (R. 200-221).

Summary of Promulgation Hearing Record for Springfield, Mass., Milk Order

The defendant's Decision regarding promulgation of the Springfield, Massachusetts, Federal milk order is set forth in 14 Federal Register 7085, November 23, 1949, and that and the Worcester Decision published the same date are hereinafter discussed together because of the virtually identical language and findings made in both Decisions.

George Fuller, president of United Dairy System, Deerfield, Mass., testified that he had petitioned for a Federal order because milk from Southern Vermont is in competition with Springfield milk and the Massachusetts Milk Control Board has been unable to control interstate milk. He stated that dealers can go into Southern Vermont and buy milk in a competitive position between New York and Boston order, rather than purchase milk at prices of the Massachusetts Board, and that a blended price in the Springfield market would be better than disorderly marketing conditions that come from such an unregulated market. (R. 20-23).

Ellsworth Bell, previously identified, testified but quoted for the most part from the report of July 1, 1949, of the New England Regional Milk Price Committee, which listed the factors that enter into prices paid to producers. He maintained that prices to producers supplying secondary markets should be kept in line with prices to producers supplying primary markets. (R. 29). Edmund Burke, representing General Ice Cream Company and Mallory Dairy Products, asked Mr. Bell what the legal basis is for such location differentials, other than that they are in the Boston order, but Mr. Bell is unable to answer this question. (R. 54-56).

Mr. C. W. Swonger, previously identified, testified that "what is needed is a type of regulation that would price all the milk in the market on a uniform basis regardless of its source, and remove the incentive to drop local producers in order to obtain cheaper milk for outside unregulated sources". (R. 84). Mr. Swonger also stated that "It is not possible to operate a market under a type of regulation that prices only about 60 per cent of the milk. Unless a means can be developed to regulate all the milk in the market on a uniform basis, the price structure will collapse, and local producers will be left without a market". (R. 94). He stated that "We have proposed a federal order, market

pool, with location differentials similar to Boston". (R. 97). He testified that New York order had a location differential, and stated that "We are not familiar with the circumstances and conditions that led to establishment of the present system in New York, but it would appear to us that the economic advantages that arise from proximity to the market apply to the location of the producer's farm rather than the plant to which he delivers his milk". He maintained that nearby producers supplying the Springfield market are entitled to expect a price comparable with nearby producers in Boston (R. 99-101), but he did not offer any explanation for this observation in respect to his prior testimony that the nearby producer would lose his market without federal regulation.

Mr. Clifton Whitney, previously identified, gave the same testimony in opposition to the location differential as that which he gave during the Worcester promulgation hearing. (R. 234-242).

Mr. Carol Hotaling, a Columbia County, New York, producer representing 36 other dairy farmers, testified that they had delivered to the Springfield market for the last 14 years. He stated that they should get such a differential, since they had to pay 50 cents per cwt. in transportation charges in delivering their milk. (R. 246-53). Other New York State producers testified to like effect, stating that they had always received the same price for their delivered milk as nearby Springfield producers, less the transportation charges, none being aware of any additional price or differential to nearby producers. (R. 256-270). Numerous dairy farmers from the Pawlet, Vermont, areas also testified against the location differential, stating that they had supplied the Springfield market for years, that their production was even and adjusted thereto, that they had incurred an added investment with the thought of supplying such market at all times, that they were not approved for other markets, that they would have difficulty finding

another market if such location differential excluded them from the Springfield market, that 70% to 80% of the "nearby" producers would receive such differential payments from 20% to 30% of the producers supplying the market, and that the "nearby" producers had no "vested interest" in the Springfield market. (R. 271-293).

Chester W. Smith, previously identified, did not take a position on the location differential as such, but stated that a question arises as to whether they are allowed under the Act. (R. 331).

Mr. Swonger repeated his testimony verbatim that he furnished in the Worcester hearing regarding alleged justification for the location differential, although he did admit that his figures showed that nearby Springfield producers received less than nearby Boston producers in the 1930s' and early 1940s'. (R. 456-64). However, he later maintained the nearby Springfield prices were closely in line with nearby Boston producers, as justification for a location differential (R. 478-79). He stated it was also justified because of "nearness to market" and maintenance of a Class I or fluid milk supply over the years. (R. 488). He estimated that 69% of the producers would be in the 46 cents zone, 12% in the 23 cents zone, and 19% outside of the favored zones. (R. 484-85). He acknowledged that many of the producers who had been supplying the Springfield market in past years would not be in the preferred locations and that therefore it did not include all "historical" producers. (R. 496-502). He was extremely evasive under cross-examination, however, in that regard, whether the producers left out of the preferred location zones had received the same price as those producers in such zones over the years (R. 505-13), and he did not know if over the years any "customary differential" was paid to those in the 46¢ zone different from those in the 23¢ zone who would actually lose money under the proposed arrangement. He acknowledged that his "figures" related to Massachusetts

vs. non-Massachusetts producers, rather than to nearby Springfield producers. (R. 525-26). He was unable to justify his usage of the term "historical relationships" when cross-examined concerning the fact that many dairy farmers who had supplied the Springfield market with direct delivered milk over the years were excluded from both differential areas and many were included in the 23 cents zone who had previously received the same direct delivered Springfield price for their milk. (R. 498-513). He was extremely evasive under cross-examination (R. 492-93, 505-13, 525), and contradicted himself many times, presumably being unaware that a higher price was paid for direct delivered milk over that received at country receiving stations because of the saving in handling charges, which higher price is attributable to the direct delivery or market differential authorized by the Act. He stated that ' It seems to us that the strongest case that can be made for location differentials in all of this area is that these producers have continued to receive a higher price than could be explained on the basis of transportation costs only which has been clearly in line with the price to nearby producers in Boston, and that this condition has continued to exist even with no regulation over out-of-state supplies". (R. 478).

Howard A. Putnam, testifying for Mallory Milk Products of Pawlet, Vt., and F. B. Mallory, Inc., of Springfield, Mass., testified that the location differential might cause them to go out of business because of loss of their producers, despite the fact that his company had just built a large receiving plant at Pawlet, Vt., in reliance upon supplying the Springfield market. (R. 551). He stated that they pay their producers a blended price and that Dr. Swonger was incorrect in his figures, a fact which Dr. Swonger appears to acknowledge several times. (R. 551, 557, 562).

Irving E. Sutin, representing the General Ice Cream Corp. of Rochester, N. Y., stated as follows:

"The past experience in the Springfield market fails to indicate any justification for these proposed differentials. A producer whose milk is delivered to a milk plant in the marketing area has been receiving the same price as other producers delivering to the same plant regardless of the location of his farm or the other farms from which the milk was shipped to the same plant. To provide differentials listed in the proposed Order would be a radical departure from accepted practice in the Springfield market. The proposed differentials would not only give premiums to producers whose farms are located in the cities and towns named and whose milk is delivered directly to plants in Springfield but would also be paid to those producers located in those cities and towns whose milk is delivered to country plants. This, likewise, is a departure from the marketing practices which have been followed in the Springfield market.

Adoption of the proposed differentials would impose without any justification a penalty and hardship on those producers who have been delivering milk to Springfield plants for many years. . . ." (R. 533-34).

Mr. Sutin maintained that payment, if any, should be made to those whose milk is delivered directly from their farms to plants in the marketing area, stating that "In this way producers who have historically delivered milk to the Springfield market would be given same preference . . ." He further stated that:

"It does seem that the proposal of 46 cents and 23 cents farm differential of the NEMPA would be illegal since it is contrary to the AAA of 1937. The Act provides for differentials "customarily applied by handlers subject to such order". No farm differentials had ever been paid in the Springfield market." (R. 537).

Mr. Sutin also stated at page 538 of the record:

"The other twenty per cent of producers would be penalized to pay for the gravy that the others would enjoy; or, if not penalized the alternative would be that they would be driven from the market. In effect, a

Federal marketing order of the Federal Government would have the tendency to make second class citizens of those producers who did not happen to be located in the preferential area arbitrarily drawn." (R. 538).

Mr. Sutin indicated that the only basis for such a differential is direct delivery (R. 541), a separate differential under the Order (Mass.-R.I.).

In his findings in the Decision of November 23, 1949, for the Springfield market order, the Secretary found that:

"(a) . . . Producers supplying milk to the Springfield market are located in Massachusetts, Vermont, New York, New Hampshire and Connecticut. Witnesses estimated the number of producers outside the State of Massachusetts from 30 to 40 percent of the total number supplying the market. . . .".

"(b) . . . The record shows that conditions exist in the Springfield market which have resulted in a loss of market for several producers. . . . The unsettling conditions which are disrupting the Springfield market result from the opportunity on the part of milk handlers to purchase milk from producers outside Massachusetts wholly on an unregulated price basis whereas the handlers who purchase milk from Massachusetts producers are required to make payments to producers in accordance with a classified price plan enforced by the Massachusetts Milk Control Board. . . .".

The Secretary further found that the lack of a uniform market-wide price plan for all producers supplying the market is a disruptive factor, and he referred to the great variance in prices paid by handlers in this regard. He also found that "A marketing order is needed in the area to assure producers of a market for their milk at reasonable and uniform prices".

The Secretary found in respect to payments to producers, 14 F.R. 7089, as follows:

"The percentage of milk utilized by individual handlers in Class I varies so widely that prices to producers have differed under an individual handler type pool by over $1.00 per hundredweight. Provision should be made for a market-wide type of pool in order that all producers delivering milk to all handlers may receive a uniform price for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered. . . .

The uniform price paid to producers should reflect differentials for the location at which the milk is delivered and for the customary market practice of paying somewhat higher prices to producers located near the sales area. Differentials which vary with the location of the plant at which a producer delivers his milk have been in common use in the Springfield and other New England markets. . . . Most of the dairy farms in Massachusetts are close to urban centers. This probably explains why prices to Massachusetts farmers for milk sold wholesale average considerably more than the prices paid to Vermont farmers. This difference cannot be attributable to transportation costs alone. . . .".

The Secretary referred to the alleged opportunity of nearby producers to retail their milk, and he stated that producers in this area "are accustomed to receiving a price which reflects the Boston differential payment". He dismissed the fact that other producers outside the preferred zones had received premiums or the Springfield price less hauling charges, stating that "a price difference of that amount cannot be expected to be maintained in a period of adequate milk supplies". (14 F.R. 7089-90). No attempt was made to distinguish the apparent inconsistencies in the Decision's findings or to justify the differential under the Act or on any mutually applied basis. No mention was made concerning a direct delivery differential or payment on that basis to all producers who performed that service. No attempt was made to justify the differential payments from out of the uniform price or market-wide equalization pool rather than by handlers,

nor was there any finding or conclusion concerning the requirement or manner of effectuating the purpose and policy of the Act.

Virtually verbatim language was used by the Secretary in his Decision of the same date promulgating the Worcester milk order.

The Secretary elaborated somewhat upon the statements in the Springfield and Worcester decisions when he promulgated the Southeastern New England milk order, his Decision appearing in the Federal Register (23 F.R. 8225) on October 24, 1958. He stated as follows in his Decision:

> "The Southeastern New England market is an interstate market encompassing all of the State of Rhode Island and a substantial area in Southeastern Massachusetts. . . . More than one third of the fluid requirements for the Southeastern New England area originates from sources outside the States of Rhode Island, Massachusetts and Connecticut. . . . The situation in both Fall River and New Bedford has continued to deteriorate as handlers, seeking to avail themselves of milk supplies at the most advantageous price, have tended to look to up-country unregulated supplies. . . As a result local producers have had difficulties in maintaining regular outlets for their production. This condition is most serious in the Fall River market where the several associations of producers whose members are the predominant suppliers of the market have a substantial volume of milk which is not accepted by handlers. Much of this milk is sold at manufacturing milk prices even though the local supply is inadequate to meet the market demands." (23 Fed. Reg. 8225-26).
>
> ". . . The same pressures which have led to a loss of market for many Fall River producers are applicable to the New Bedford area . . . . it is likely that if no action is taken handlers will seek lower priced un-

regulated milk supplies. The situation in the Rhode Island part of the market is substantially similar to that in the Fall River-New Bedford area. . . . The increase in available milk supplies generally and the fact that milk is readily available from upcountry sources at prices approximating the Boston blend has provided a strong incentive for handlers to drop local producers in favor of cheaper sources of supply. Less than one third of the fluid requirements of Rhode Island dealers are supplied by Rhode Island dairy farmers. . . . Several of the larger handlers in the market customarily have secured a lesser proportion of their necessary supplies from local producers than have other handlers. The buying advantage that these handlers have had on their purchases of outside milk has prompted other handlers to drop local producers in favor of sources of supply at upcountry points also. . . . Relatively large quantities of local producer milk were dropped during the latter months of 1957 and 1958; in some cases entire pickup routes were dropped at one time. . . . The Rhode Island Milk Control Board in the latter part of 1957 initiated an allocation program which was intended to assure a market for local producers . . . Unregulated, lower-priced milk continues to move into the market in even greater quantities than before the allocation scheme was initiated.

"Registered Rhode Island producers have enjoyed a preferential market over an extended period of years. The allocation program and the procedure employed by the responsible officials of the State in issuing permits for importation of nonregistered milk have tended to maintain such preferential market to the detriment of other dairy farmers whose production is an essential part of the market supply. . . .

"A market structure which grants a preferential price to registered Rhode Island producers cannot

provide a stable market for such producers over any extended period while handlers have the opportunity to gain a procurement advantage through the use of lower priced milk from upcountry sources. The State, as a practical matter, cannot effectively regulate milk which moves across state lines, and while local dealers may voluntarily reduce imports of outside milk temporarily to gain support from local producers, it is inevitable that the incentives for using unregulated milk will result in a loss of milk market for local producers.

"The Southeastern New England market is a deficit market and must rely upon sources of supply in Northern New England and New York to supplement the local supply. Recent developments in bulk tank cooling and transportation facilities have contributed to efficiencies which permit greater flexibility of handling operations at greater distances from the consumption center in Southeastern New England. . . . Premiums over the blend price which may be offered by local handlers making "upcountry" purchases have a detrimental effect upon adjacent by inducing producers to leave cooperative associations and markets with which they have maintained association for a number of years to deliver to handlers for this market." (23 Fed. Reg. 8226-27). . . .

"Historically, dairy farmers in the States of Massachusetts, Rhode Island and Connecticut, because of their location with reference to the large population concentrations of New England have disposed of a substantially larger percentage of their production for fluid uses than have the dairy farmers in the upcountry area. Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. Under the marketwide pooling herein proposed and without

some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk on the milkshed rather than according to the utilization of his milk. Under a regulated market, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and has assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources. The distant producer also benefits from an established Class I price, and by the fact that he gains a larger share of the fluid market than is likely without marketwide equalization. The use of a nearby differential will return to nearby producers a somewhat greater share of the Class I price than they would otherwise obtain through marketwide pooling. Moreover such a differential will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization. The scheme of nearby farm location differentials and the amount thereof is identical with that employed in the adjacent Federal markets." (23 Fed. Reg. 8238).

The foregoing language is almost identical to that used in the Secretary's decision promulgating the New York-New Jersey farm location differential in 1957, 22 Fed. Reg. 4213-14, a copy of which is found in the Supplemental Appendix filed in the *Blair* case and which is also filed herein with the briefs of that case as an exhibit.

Respectfully submitted,

CHARLES PATRICK RYAN
EDWARD J. RYAN
Attorneys for Plaintiffs.

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Senate Report No. 565
75th Cong., 1st Ses.s, May 13, 1937

MARKETING AGREEMENTS AND ORDERS

* * *

EXPLANATION OF AMENDMENTS

These amendments to H. R. 5722 are proposed to enable the producers of honey-bees and of fruits and vegetables for canning to develop marketing agreement and order programs in those cases where such programs would be beneficial to producers and would have their approval in accordance with the terms of the act. Under the original Agricultural Adjustment Act it was possible for producers of these commodities to have marketing agreement and license programs, but honey-bees and canning commodities were excluded in the amendments to the Agricultural Adjustment Act made in August 1935.

These amendments have been requested by producers and their representatives. Under the terms of the bill no order can be made effective with respect to these and other commodities unless the Secretary of Agriculture finds that the program has the approval of two-thirds of the producers. Under the circumstances there appears to be no logical reason for excluding producers of honey-bees and canning crops from obtaining the benefits provided in the bill.

EXPLANATION OF BILL

The principal purposes of this bill are to reenact the marketing agreement and order provisions of the Agricultural Adjustment Act, to make certain changes in respect to the basis to be used in marketing agreements and orders for fixing prices to be paid milk producers, and to authorize mediation and arbitration of certain disputes between the producers and handlers of milk.

NECESSITY FOR REENACTMENT OF THE MARKETING AGREEMENT AND ORDER PROVISIONS

Certain district courts have interpreted the Hoosac Mills decision, which invalidated the processing-tax and production-control provisions of the Agricultural Adjustment Act, as also rendering the marketing agreement and order provisions of the act invalid. These programs, as authorized by the act and as administered by the Secretary of Agriculture, are designed to improve the purchasing power of farmers by encouraging orderly marketing through the regulation of interstate commerce. These marketing programs are not for the purpose of controlling agricultural production and, in fact, they do not control the production of any agricultural commodity. Furthermore, under the provisions of the act such programs were contemplated to operate separately and independently and not as a part of, or in conjunction with the production-control programs.

While to date the question of the constitutionality of such regulation of interstate commerce has not been considered by the Supreme Court, the interpretation placed upon the Hoosac Mills decision by certain lower courts has rendered such programs temporarily ineffective in the districts to which such decisions apply; because these courts maintain that the Hoosac Mills decision invalidated the entire act, including this type of regulation in spite of the fact that the present act contains a separable provision.

The immediate reenactment of the marketing agreement and order provisions of the Agricultural Adjustment Act would remove the technical basis upon which such adverse decisions rest and enable producers to receive the benefits of such programs without the necessity of waiting until these cases have been finally acted upon by the Supreme Court.

MILK PRICES

Subsection (18) added to section 8 (c) of the Agricultural Adjustment Act by section 2 (f) of the bill provides a more workable standard for the guidance of the Secretary in fixing milk prices in an order issued for a particular marketing area. Milk is the only agricultural commodity for which prices are permitted to be fixed in orders issued under the Agricultural Adjustment Act and the Secretary is required to use the purchasing power of milk as his guide in the issuance of orders. This provision of the bill requires the Secretary, if an order or marketing agreement is to include fixed prices, to ascertain the prices which will be equivalent in purchasing power to prices of milk in the base period according to sections 2 and 8e of the Agricultural Adjustment Act. In addition, if he finds these ascertained prices are not reasonable in view of the local price of feeds, the available supply of feeds and other economic conditions which affect the supply of and the demand for milk in a particular marketing area, the Secretary shall fix such prices as will reflect these conditions, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. The peculiar nature of milk as a commodity and the power of requesting prices of this commodity have been set forth by the Supreme Court in its decision in the case of *Nebbia* v. *New York* (1934), 291 U. S. 502.

The reasoning there set forth can be applied with equal force to the regulation of interstate commerce in milk. The intricate problems of the milk industry as described in the above cited opinion, explain the use of the several pooling and price plans authorized for inclusion in milk orders. Their effectiveness depends upon their adaptability to conditions affecting each marketing area and upon their adjustment from time to time to meet changing conditions. The Secretary is to use the same standard in adjusting prices as is to be used in the fixing of prices initially in the regulation of any marketing area.

MEDIATION AND ARBITRATION

Section 3 of the bill authorizes the Secretary of Agriculture, upon the request of milk cooperatives, to mediate, and upon the approval of all parties, to arbitrate disputes between the cooperatives and the handlers of milk in a particular market. The matters which may be arbitrated are confined to those involving terms and conditions such as might be included in orders under the order provisions of the act. While this action grants certain exemptions and immunities from the antitrust laws to the parties requesting mediation or arbitration and with respect to the proceedings, agreements, or awards which follow, public interest is amply protected by the requirement that this authority is to be exercised only when the Secretary is persuaded that the declared policy of the act will be effectuated thereby. It is believed that through mediation and arbitration, the services of the Secretary of Agriculture and the Dairy Section of the Agricultural Adjustment Administration will be available to a greater and more effective degree in developing a sound working relationship between

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House Report No. 468
75th Cong., 1st Sess., May 13, 1937

Reasons for Reenacting the Marketing Agreement and Order Provisions

The Supreme Court in *United States* v. *Butler* ((1936), 297 U. S. 1), declared invalid the provisions of the Agricultural Adjustment Act authorizing production adjustment programs involving processing taxes and benefit payments. The question as to whether Congress has the constitutional power to regulate interstate and foreign commerce in agricultural commodities through marketing agreements and orders as provided in the Agricultural Adjustment Act was not before the court and has not yet been determined by the court. Lower Federal court decisions have differed on the question, and in two cases courts have held that the marketing agreement and order provisions were inseparable from the production adjustment provisions which fell in the *Butler case*. As a consequence of these decisions, doubt has been cast on the validity of all the agreements and orders, and producers of milk, particularly in New England, are now suffering from a seriously demoralized price situation.

The committee is of the opinion that Congress has the power to regulate interstate and foreign commerce in agricultural commodities in the manner provided in the act, and that an examination of the text and organization of the act and of its history shows these provisions are and were intended to be effective independently of the production adjustment provisions. The committee believes that this view will have the support of the Supreme Court.

Whatever may be the case, in order that whatever decision which may ultimately be rendered with respect to these provisions may turn on their constitutional validity rather than on their separability, and in order that express authority be given to enter into new agreements and orders in the areas in which they are necessary, it is highly desirable that these provisions be reenacted.

Provisions Reenacted

Section 1 of the bill reenacts all marketing agreement and order provisions of the Agricultural Adjustment Act, as amended, as well as certain other provisions not relating to production adjustments. The specific reenacted provisions and a description of their general subject matter are set forth in section 1 of the bill, and their text is set forth in the comparative print accompanying this report, and do not require further explanation. The sections and parts of sections of the Agricultural Adjustment Act not set forth are neither reenacted nor repealed. It is to be noted that section 1 relates only to provisions which are a part of the Agricultural Adjustment Act itself. Such provisions relating to agriculture as were enacted in the 1935 amendments (Public 320) or in other legislation but which were not specifically a

part of the Agricultural Adjustment Act are not involved in any respect in this bill. Section 32, relating to removal of surpluses, and section 37, relating to elimination of diseased cattle, of that act are of this character.

Amendments to Reenacted Provisions

Section 2 (a) of the bill amends section 1 of the Agricultural Adjustment Act. Section 1 in its present form contains a statement of the acute economic emergency which existed in 1933, and emphasizes the wide disparity at that time between prices of all farm commodities and the prices of other commodities. This general disparity does not exist to the same extent at the present time, but continuing and constantly recurring disparities do exist in the case of individual farm commodities, accompanying and caused by disruption of orderly marketing in the channels of interstate and foreign commerce. The proposed amendment contains a recognition of this disruption of interstate commerce, and of the national public interest resulting therefrom.

The amendments to the Agricultural Adjustment Act made by sections 2 (b), 2 (c), 2 (d), 2 (e), and 2 (j), respectively, of the bill remove from sections 2, 8 (a) (6), 8 (c) (5), 8 (c) (6), and 12 (a), respectively, all reference to production of agricultural commodities and to the adjustment program. These amendments are made for the purpose of indicating that the marketing agreement and order provisions have no connection with, nor have they as their objective, production control.

Section 2 (f) of the bill adds to section 8 (c) of the Agricultural Adjustment Act two new subsections. The first deals with milk prices. Milk is the only commodity for which producer prices for interstate milk may be fixed by the Secretary of Agriculture through orders under the Agricultural Adjustment Act. The necessity for price regulation in the case of milk has also been recognized by many States which have established milk boards to fix producer prices for intrastate milk, and the validity of such State regulation has been upheld by the Supreme Court (*Nebbia* v. *New York* (1934), 291 U. S. 502). Marketing agreements and orders for milk ordinarily involve pooling and price plans which, to be effective, must continue with the up and down swings of economic factors which relate to price. The proposed amendment recognizes this, and provides that if the Secretary finds that the national parity price for milk does not adequately reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area to which the marketing agreement or order relates, he shall fix such prices as will reflect such factors, insure a sufficient quantity of pure wholesome milk, and be in the public interest. The proposed amendment further provides that as the Secretary finds necessary on account of changed circumstances, he shall make adjustments in such prices. Such adjustments are to be made in accordance with the same standards as are provided for the initial fixing of prices under this subsection.

[Filed Aug. 25, 1967]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RUSSELL ALLEN, et al.,
Plaintiffs,

v. Civil Action No. 3379-66

ORVILLE L. FREEMAN,
Secretary of Agriculture
of the United States,
Defendant,

FREDERICK T. ZUBER, et al.,
Interveners,

STATE OF CONNECTICUT,
Amicus Curiae.

MEMORANDUM OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF MOTION OF INTERVENING DEFENDANTS FREDERICK T. ZUBER, ET AL. FOR PRESERVATION OF THE STATUS QUO

* * *

* * * In any case, the far farmers, if their position is upheld, will receive the funds. They are thus protected if a stay is granted; if a stay is not granted, there will be no remedy for the damage done the "nearby" farmers.

* * *

[Filed Jan. 9, 1967]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

RUSSELL ALLEN, et al.,
Plaintiffs,

v.

Civil Action No. 3379-66

ORVILLE L. FREEMAN,
Secretary of Agriculture
of the United States,
Defendant,

NEW ENGLAND MILK PRODUCERS'
ASSOCIATION, et al.,
Intervenors.

INTERVENORS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

* * *

Respectfully submitted,

/s/ Lawrence D. Hollman

/s/ Carlyle C Ring, Jr.
(per LDH)

Attorneys for the Intervenors

Klagsbrunn & Hanes
1200 - 18th Street, N.W.
Washington, D. C. 20036

Of Counsel:

Reuben Hall
75 Federal Street
Boston, Massachusetts 02110

Frederick V. Conard, Jr.
Shipman & Goodwin
15 Lewis Street
Hartford, Connecticut 06103

January 9, 1967

[Filed Jan. 11, 1967]

[Caption Omitted in Printing]

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs are five dairy farmers located in Vermont who bring this action purportedly as a class action for the benefit of all other persons in their class who are similarly situated and for themselves as individuals. Plaintiffs seek to enjoin the defendant, the Secretary of Agriculture and his agent, the Market Administrator, from administering the Massachusetts-Rhode Island Milk Marketing Order (7 CFR Part 1001) in such a way as to give effect to the farm location differentials or "nearby" differentials contained in the Order (Section 1001.72). In the alternative, plaintiffs seek to have the monies normally payable to "nearby" producers by virtue of the differentials held in escrow pending the outcome of the litigation.

As indicated in the affidavits of Herbert L. Forest, Director of the Dairy Division of the United States Department of Agriculture, and of Ruben Hall, Government Exhibits 1 and 2:

(a) The adverse effect to the public interest and injury to other producers outweighs the *de minimis* injury to the individual plaintiffs, who do not truly represent the class; and

(b) Plaintiffs have made no strong showing of the likelihood that they will prevail on the merits.

The Adverse Effect to the Public Interest and Injury to Other Producers Outweigh the *De Minimis* Injury to the Individual Plaintiffs, who do not Truly Represent the Class

Any injury which would be suffered by the plaintiffs in the event of temporarily withholding payment of the "nearby differentials would be *de minimis* when compared with the immediate and irreparable injury that would result to the "nearby

producers" and to the public interest if the "nearby" differential payments were withheld. The Government's exhibits show that "nearby" producers need the money represented by these differentials in order to pay for their current operating expenses. It represents a substantial part of their working capital. These differentials represent approximately 7.8 per cent of the total monthly return for milk of 2,181 "nearby" producers in the 46¢ zone. These producers comprise approximately 24½ percent of all the producers in the market and 98 percent of all "nearby" producers. To withhold such a large percent of the working capital of these "nearby" producers would cause all of them to suffer irreparable injury. The "nearby" differential amounts to approximately $148 per month to each of 98 percent of "nearby" producers on an average. This amount represents a substantial part of the entire labor income of such producers.

Should plaintiffs in this action ultimately prevail what they would receive is a windfall in terms of an increase in the basic blend price. Escrow of these "nearby" differentials would not immediately benefit plaintiffs' working capital position, or their economic position generally, because it would be unavailable during the time of the escrow. During the term of any escrow of these funds neither plaintiffs nor the "nearby" producers would have these monies available for their current operations.

The "nearby" producers for over 30 years have received these differentials. Their production, land values, facilities, dairy herds and labor are all geared to an overall return for their milk which, in substantial part, is represented by these payments. Plaintiffs, on the other hand, have not, either before the advent of the federal milk marketing orders program, or since that time, received the additional values for their milk which would be represented by throwing amount of these differentials into the total blend price. Compared to the "nearby" producers, plaintiffs' production has not been and is not now dependent on receiving any part of the amounts reflected in the differentials.

Should the plaintiffs ultimately prevail in this action, the effect on the blend price would be an increase of approximately 12¢ per cwt. This means that plaintiffs would receive an additional 12¢ per cwt. for their milk. The "nearby" producers would suffer a decrease in their returns of 34¢ and 11¢, respectively. However, should these "nearby" differential payments be held in escrow, or should a temporary injunction be issued, the "nearby" producers *immediate* cash return would be reduced by 46¢ and 23¢ per cwt., respectively. The immediate adverse effect on the "nearby" producers is four times as great as any ultimate benefit that might accrue the plaintiffs. No immediate benefit or injury would be suffered by plaintiffs.

The effect of a temporary injunction, or an escrow of the "nearby" differentials would not be to preserve the *status quo* but to destroy it. Either of these actions would have the effect of misaligning the entire pricing structure of the Order and effecting a substantial immediate amendment to the Order. This would disrupt the *status quo* which has existed in the regulation for over 30 years, and in the market for a much longer period.

Exhibits to Statement of Material Facts Filed February 24, 1967

[Caption omitted in printing]

EXCERPTS FROM BRIEF ON BEHALF OF NEW ENGLAND MILK PRODUCERS' ASSOCIATION, CONNECTICUT MILK PRODUCERS ASSOCIATION, INC., LOCAL DAIRYMEN'S COOPERATIVE ASSOCIATION, INC., AND PRODUCERS DAIRY CO. AS AMICI CURIAE

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601) *et seq.*), the Secretary of Agriculture is authorized to provide in milk marketing orders for the payment of a differential to nearby producers.

2. Whether the Secretary's 1957 decision to provide for nearby differentials in the New York-New Jersey Milk Marketing Order has adequate record support.

* * *

[22] * * * of such milk by the individual handler to whom it is delivered" (7 U.S.C. 608c(5)(B)(ii)), Congress authorized adjustments to the uniform price, including an adjustment predicated upon "the locations at which delivery of such milk is made." 7 U.S.C. 608c(5)(B)(c). We do not understand the appellants to take issue with the propriety of location differentials in general. Instead, they argue (1) that, although promulgated as adjustments based upon location, the nearby differential is in fact an unauthorized utilization differential, and (2) that, even if it is a location differential, it is rendered invalid by virtue of its arbitrary and discriminatory application. Neither contention is at all meritorious.

A. *The Nearby Differential Is an Adjustment Based upon Location.*

1. Authorization for the promulgation of location differentials had its inception in the 1935 amendments to the Agricultural Adjustment Act of 1933. See 49 Stat. 750, 753. By way of explanation, the Committee Reports state:

> The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets. [H. Rept. No. 1241, 74th Cong., 1st Sess., p. 10; S. Rept. No. 1011, 74th Cong., 1st Sess., p. 10.]

From the foregoing we think it evident that Congress intended by location differentials to compensate producers for the added [23] value of their milk which is attributable to his "distance from a primary market." That, precisely, is the objective of the "nearby differential." A producer's eligibility for a nearby differential turns exclusively upon the distance of his farm from the marketing center of the area embraced within the New York - New Jersey Order. The 120-mile nearby differential area has been divided into eight zones: 1-50 miles, 51-60, 61-70, 71-80, 81-90, 91-100, 101-110, and 111-120. The farther away the zone, the less the differential to which producers within that zone are entitled. There are two exceptions to the strict distance test. Farms in a limited number of counties have been placed within zones which do not reflect their actual distance from the basing points; but even here location is critical. 7 C.F.R. 1002.71(b)(4). And, producers who qualify geographically for nearby differentials lose that differential if they deliver to plants outside of the nearby area.[14]

Admittedly, the extent of the differential is also made dependent upon the percentage of fluid utilization in the market area. But that fact, as we show, *infra*, pp. 25-27, does not convert * * *

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[14]There is an exception to this exclusion. Nearby producers still will be eligible for differentials for deliveries made outside the geographical limits of the nearby area providing the delivery is made to a plant within the 140-mile zone or, if made to plants in specified counties, within the 150-mile zone. 7 C.F.R. 1002.71(b)(5).

* * * [26] by *all* participating handlers. In short, location, not utilization is the critical criterion.

Indeed, as promulgated in 1938, the order provided for adjustments in favor of milk produced near the market without regard to marketwide utilization. See 3 F.R. 1945, 2100. With the expansion in 1957 of the New York order to embrace the areas of New Jersey and upstate New York the utilization factor was added. Having determined that producers nearby the market center should continue to receive a differential—the reasonableness of this determination is demonstrated below (*infra* pp. 39-46)—the Secretary was desirous of incorporating a safeguard for the protection of non-nearby producers. Nearby differentials were considered justified principally because nearby producers historically enjoyed a greater percentage of the marketwide Class I sales (hence they received more for their milk than did producers located more distant to the center of consumption); inclusion of their sales within the blend results, therefore, in an increase of the uniform price. The nearby differential is intended to compensate partially those producers for the added value they bring into the pool for the benefit, in the main, of non-nearby producers. However, the Secretary correctly realized that as Class I utilization increases marketwide the amount of benefit conferred upon the pool by nearby producers declines. Hence, he set the nearby differential at rates varying inversely with the percentage of Class I milk in the pool * * *

[29] * * *

The New York Milk Marketing Order, notwithstanding its early vintage, was not the first to recognize the need for nearby differentials; such adjustments were incorporated in the first Greater Boston Marketing Order promulgated on February 7, 1936—less than six months after the enactment of the amendments to the Agricultural Adjustment Act which permitted adjustments for "the locations at which delivery of such milk is made." See 2 F.R. 1331. In relevant part that order provided (2 F.R. 1333):

> SEC. 4. *Location Differentials.*—The payments to be made to producers by handlers pursuant to para-

graph 1 of section 1 of this article shall be subject to differentials as follows:

1. With respect to milk delivered by a producer to a handler's plant located more than 40 miles from the State House in Boston, there shall be deducted an amount per hundredweight equal to the freight (considering 85 pounds of milk per can), according to the tariff currently approved by the Interstate Commerce Commission for the transportation, in carload lots of milk in 40-quart cans, to Boston from the zone of location of the handler's plant.

2. With respect to milk delivered by a producer to a handler's plant, located not more than 40 miles from the State House in Boston, there shall be added 18 cents per hundredweight.

3. With respect to milk delivered by a producer whose farm is located more than 40 miles, but not more than 80 miles, from the State House in Boston, there shall be added 23 cents per hundredweight.

4. With respect to milk delivered by a producer whose farm is located not more than 40 miles from the State House in Boston, there shall be added 46 cents per hundredweight unless such addition gives a result greater than $3.19, in which event there shall be added an amount which will give a result of $3.19.

Paragraphs 1 and 2 are comparable to the transportation differential provided for in 7 C.F.R. 1002.71(a); paragraphs 3 and 4 are the equivalent of the nearby differentials provided for in 7 C.F.R. 1002.71(b).

[30] Indeed, the nearby differential provisions of the 1936 Boston and 1957 New York-New Jersey orders are, in substance, identical in purpose and effect: (1) Both orders authorize payments to producers based solely upon the *location of the producers farm*, the only distinction being that under the Boston order there was but one basing point (the State House in Boston); the New York-New Jersey order has several basing points. (2) Under both orders the nearby differential payment is made out of the producer's pool and results in a reduc-

tion of the uniform blend price that would otherwise be paid to non-nearby producers. (3) Both orders divide the nearby area into zones with the producers situated in the closer zones being entitled to larger adjustments. The only differences in this connection (except, of course, the rates of payment) relate to the number of zones and the methods used in zoning producer farms. The Boston Order provided for two zones (0-40 miles and 40-80 miles from the State House); the New York order provides for eight zones. In addition, under the New York order, farms in certain counties are placed within zones which do not reflect their actual mileage from a basing point. But the essential similarity remains; both orders establish zones and provide for differential payments which reflect the proximity of the zone to the basing point. (4) Finally, both orders employ a utilization factor with the object of reducing, or eliminating, the nearby differential when market-wide fluid utilization is high. Under the Boston Order the differential to producers whose farms were located in the 0-40 [31] mile zone was to be "46 cents per hundredweight unless such addition gives a result greater than $3.19, in which event there shall be added an amount which will give a result of $3.19." 2 F.R. 1333. Under the New York Order, the rates of payment decrease as the percentage of marketwide Class I utilization increases; there is no nearby differential when 80% or more of all utilization in the market is in fluid form. Both orders recognized that the benefit nearby producers confer upon the market, and in turn upon all producers servicing that market through a higher blend price, decreases as fluid utilization increases marketwide.

Thus, dating almost to the very enactment of 7 U.S.C. 608c(5)(B)(c) the Secretary has construed that provision as permitting the very type of nearby differential which the appellants would have this Court declare unauthorized. It is, of course, axiomatic that such a long-standing contemporaneous administrative construction of the Section by the official charged with its administration is entitled to great weight. *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90; *Norwegian Nitrogen Co. v. United States*, 288

U.S. 294, 315; *United States v. American Trucking Associations*, 310 U.S. 534, 549.

Finally, while we think that 7 U.S.C. 608c(5)(B)(c) plainly permits differential payments to nearby producers, the authority to promulgate such differentials is certainly to be found in 7 U.S.C. 608c(7)(D), which authorizes such other terms and [32] conditions in addition to those expressly stated as are "incidental to, and not inconsistent with the terms and conditions specified in subsections (5)-(7) * * *." That provision reflects congressional recognition of the fact that in devising a particular form of regulation the Secretary must be afforded wide discretion. "A variety of plans * * * may well conform to the statutory standards. But the choice among permissive plans is necessarily the Secretary's; he is the agency entrusted by Congress to make the choice." *Secretary of Agriculture v. Central Roig Co.*, 338 U.S. 604, 614. See also *Stark v. Wickard*, 321 U.S. 288, 210; *Mitchell v. Budd*, 350 U.S. 473, 480; *Queensboro Farm Products v. Wickard*, 137 F.2d 969, 977 (C.A. 2). Even if the nearby differentials provided for in the 1957 New York and 1936 Boston orders are not squarely authorized by 7 U.S.C. 608c(5)(B)(c), they certainly are "incidental to, and not inconsistent with" that provision. 7 U.S.C. 608c(7)(D).

2. As we have shown, the nearby differential provided for in the 1957 New York Order, in substance, is identical to a similar provision in the 1936 Boston Order—both provisions were promulgated on the basis of the same statutory provision; both make the location of the producer's farm the critical eligibility requirement; both finance the differential out of the marketwide pool; and both vary the differential with the marketwide value of all milk. This identity is of particular significance since the 1936 Boston Order has received both judicial approval and congressional ratification.

* * *

The nearby differential provision considered in *Green Valley* was contained in the original Boston Order effective February 9, 1936; as such it "expressly [was] ratified, legalized and confirmed."

C. THE DECISION TO PROVIDE A NEARBY DIFFERENTIAL WAS PREDICATED ON A REASONABLE EXERCISE OF ADMINISTRATIVE JUDGMENT: IN NO WISE ARE NON-NEARBY PRODUCERS ARBITRARILY DISCRIMINATED AGAINST

The appellants' principal contention appears to be not that nearby differentials violate the statute, but that they result in an arbitrary and discriminatory benefit to nearby producers at the expense of non-nearby producers (App. Br. pp. 34, 42-46). In Point II (*infra* pp. 39-46) we show that the Secretary's decision to continue nearby differentials in the New York milk marketing area is amply justified by the facts adduced at the promulgation hearing. We show here that, assuming the propriety of those findings, nearby differentials in general are reasonable and in no wise discriminatory. To do this we need but look to the Secretary's rationale (22 F.R. 4213-4214):

> Historically, the percentage of the milk produced nearest to metropolitan New York–New Jersey which is used for fluid purposes is higher than the percentage of more distant production which is used in fluid form. Over 92 percent of the milk received in 1956 at pool plants within 125 miles was for fluid use. Nearby producers have been able to get a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. When milk is pooled on a marketwide basis, the nearby producer is paid on the basis of the average utilization of all milk in the milkshed rather than according to the utilization of his milk. Together with equalization, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and is protected to some extent from the loss of a market because of competition of cheap milk from more distant sources. The distant producer also benefits from an established Class I price, and in addition gains a larger share of the fluid market than is likely without equalization.

> In order to provide benefits of more nearly equal value both to nearby and distant producers, some form of special location differential is needed, the effect of which is to give the nearby producer a somewhat greater share of the high-priced Class I-A milk than he would obtain through marketwide pooling without such a differential, but a smaller share than he would be expected to obtain under an order with handler pools.

The Secretary's judgment to provide for nearby differentials in the 1936 Boston Order was predicated on very similar findings; findings which in the First Circuit's view established the reasonableness of that location differential. *Green Valley Creamery v. United States,* 108 F.2d 342, 346.

Plainly, therefore, if the Secretary's findings have substantial evidentiary support it is frivolous to suggest, as do the appellants (App. Br. p. 42), that "this nearby differential is devoid of any element of service of value and the appellee has suggested none;" that non-nearby producers are required to relinquish, in favor of nearby producers, higher blend prices without receiving a *quid pro quo* (App. Br. pp. 42-46). Nearby producers are afforded a differential for the very reason that their participation in the pool inures to their detriment while benefiting non-nearby producers who thereby enjoy a blend price that is computed on the basis of a higher fluid utilization. * * *

* * *

[Filed Aug. 18, 1967]

UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE
WASHINGTON

I hereby certify, pursuant to Title 28, United States Code, Section 1733, that each attached document is a true and correct copy of a document in my official custody as hereinafter described:

In re: Proposed Amendments to the Greater Boston, Springfield and Worchester, Massachusetts, Southern New England, and Connecticut Marketing Areas Milk Orders - Docket Nos. A0 14-A 35, A0 203-A 17, A0 204-A 17, A0 302-A 9 and A0 305-A 9

1. Page 2647 of the transcript of hearing held January 23, 1963, at Hartford, Connecticut, with respect to the above proceeding.

2. Pages 3928 through 3930 of the transcript of hearing held February 14, 1963, at Boston, Massachusetts, with respect to the above proceeding.

3. Pages 4375 and 4376 of the transcript of hearing held February 15, 1963, at Boston, Massachusetts, with respect to the above proceeding.

In testimony whereof I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia, this 17th day of August, 1967.

/s/ Orville L. Freeman
Secretary

By /s/ Eugene R. Meyer
Hearing Clerk

(Signed pursuant to the authority of 26 F.R. 12166)

Sec. 15 (10-64)

[2647] order marketing areas.

Benefits of government regulation

In the absence of government regulation of market milk prices during the past several years, prices received by producers for milk would be lower than they currently are in New England and other markets in the Northeastern states. A precise demonstration does not seem to be necessary to establish this fact. Government regulation has maintained prices to producers at a level more favorable than would have been the situation in the absence of such regulation.

When government regulation establishes orderly marketing and favorable prices, the question arises as to which producers should benefit from the regulations. In the absence of formal criteria for answering this question, it seems logical to assume that the producers historically furnishing milk for the market should receive this benefit. Producers shipping to the Connecticut market in receiving benefit from government regulation have not created problems for other producers by increasing their production beyond the needs of their market.

Between the prewar period, 1938-40, and 1961, annual milk production increased less in Connecticut than in any of the other Northeastern states, except New Hampshire, Massachusetts, and Rhode Island. As compared with Pennsylvania, New York and Vermont, the difference in rate * * *

* * *

[3928] EXAMINER HOLSTEIN: Off the record.

MR. HALL: No, on the record.

EXAMINER HOLSTEIN: I am not going to let you prove what the law is. That is not in issue here.

THE WITNESS: If it will save time I will withdraw the statement that we have a pretty good bonding law.

MR. HALL: I am not saying we don't but I am saying it is not what you say it is.

THE WITNESS: What I meant was I think it has worked fairly well over the years.

EXAMINER HOLSTEIN: That is all, Mr. Hall.

MR. HALL: Just a moment, Mr. Hearing Examiner.

EXAMINER HOLSTEIN: Yes, take your time.

By Mr. Hall:

Q. Do you feel, Mr. Garelick, that the existence of the Federal regulations is of benefit to the non member? A. Of benefit to the non member?

Q. Yes. A. The existence of regulations where?

Q. In any of these New England markets where they are presently in effect? A. Let me say that I don't think it is of benefit to a lot of non members in relation to the amount of regulations in New England prior to the southeast order.

Q. Would you mind repeating that? I don't quite [3929] understand. A I don't think it is a benefit to a lot of non members if we compare it to their position in 1958.

Q. Is it your view that the existence of the federal order in southeastern New England prejudices a number of producers? A. Definitely. Prejudiced some in favor and some against.

Q. Do the non members in any great numbers attend the hearings where proposals for amendment to the federal orders are being considered? A. I don't think they do anymore or any less than producers that belong to cooperatives.

Q. Producers that belong to cooperatives have representatives here? A. That is your opinion.

. . . Laughter . . .

Q. Whether you like the representatives or not is not important. They have representatives. A I have no quarrel socially with the representatives. My quarrel is whether they truly represent them.

Q. Do you think that the producers would be better off if they appeared themselves representing themselves?

MR. CHERNAUSKAS: Mr. Examiner, this is a very nice interchange, but I think we are not really helping [3930] the record.

EXAMINER HOLSTEIN: I will sustain that.

MR. CARROLL: May not like the answer.

MR. HALL: The answers don't concern me too much. I think that is all.

EXAMINER HOLSTEIN: Any further questions?

Mr. Sykes.

By Mr. Sykes:

Q. Mr. Garelick, is it your position that there is no choice as to the expenditures which a non member must make in the case of the non member marketing deductions and it is your position that there should be some choice? A. It is my position that they should not have to pay for a service they don't want, especially when it has been voted in by people who don't pay for the service.

Q. Now with reference to the calibration of bulk tank in the Commonwealth, you agree this is a function of the Division of Standards in the Bureau of Labor, and Industry? A. I don't think so.

Q. Are you familiar with the fact that the law specifies that recalibration shall be done every two years? A. I understand that there was a law recently passed within the past couple of years that more funds were appropriated and this is why we are getting this recalibration.

Q. Do you also understand that the law provides that * * *

* * *

[4375] MR. HALL: A statement as attorney for New England Milk Producers Association, Northern Farms, Maine Dairymen's Association and on behalf of the Cooperative Dairy Service, I would like to register each of those organizations as opposed to Proposal No. 57. We feel that that involves legal questions which are not appropriate to be discussed at this hearing but which we will discuss in brief.

EXAMINER HOLSTEIN: Thank you, sir.

MR. AMON: Does that statement allow me to ask one queston?

EXAMINER HOLSTEIN: You can ask him anything you want off the record.

MR. AMON: I have been doing that for too long a period of time. I want it on the record. I don't care about the fact he is not sworn.

EXAMINER HOLSTEIN: A statement made from the floor is not subject to cross examination.

MR. AMON: I wish to ask whether or not any poll of the membership of any of the organization that he has referred to has been taken authorizing the same statement that he has made.

EXAMINER HOLSTEIN: Do you care to answer that question, Mr. Hall?

MR. HALL: We have not taken a poll of the individual members of any of these organizations, any of the producer [4376] members of these organizations.

EXAMINER HOLSTEIN: All right, sir.

Mr. Lee, I understand you have a statement you wish to make or testimony you wish to give.

MR. LEE: Yes.

EXAMINER HOLSTEIN: Let the record show that Mr. Lee has been previously sworn.

Whereupon,

JAMES D. LEE

was called as a witness and, having been previously duly sworn, testified as follows:

DIRECT TESTIMONY

THE WITNESS: I wish to put in some supplementary information in opposition to Proposals 23 and 24 which simply takes the form of introducing some additional material from the Market Administrator's Review.

It will be recalled that I testified that the Administrator's Marketing Service Program was eminently successful and I referred to the checking of the calibration of non-members' bulk tanks. I wish to have official notice taken of the following articles which have appeared in issues of the Review.

MR. MAHONY: Are these issues already in evidence?

EXAMINER HOLSTEIN: Do you wish to offer them as exhibits or ask for official notice to be taken?

* * *

[Filed June 8, 1967]

[Caption Omitted in Printing]

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PROPOSED ORDER GRANTING MOTION FOR SUMMARY JUDGMENT & JUDGMENT FOR INJUNCTIVE RELIEF.

The plaintiffs, by their counsel, say as follows in reply to the defendant's Opposition to the plaintiffs' proposed order granting the plaintiffs' motion for summary judgment and judgment for declaratory and injunctive relief:

1. This suit requested a declaratory judgment and a permanent injunction, and the decision of the Court will probably be appealed by the defendant if any basis therefor can be ascertained by defendant. Under such circumstances, it is respectfully submitted that the order proposed by the plaintiffs is not only appropriate but would be of assistance to the parties and the Court of Appeals.

2. The defendant and the former applicants for intervention, Frederick T. Zuber, et al., are of the view that a successful appeal of the Court's decision on the motion for summary judgment and of the Order of this Court of March 21, 1967, denying Frederick T. Zuber, et al., leave to intervene herein as defendants, might be possible if the order and judgment to be entered herein failed to state any findings and consisted of a mere recital of the requested relief as proposed by defendant. *The defendant and the former applicants for intervention, Frederick T. Zuber, et al., would then immediately claim that the Court did not consider all of the points and arguments raised by them in granting the plaintiffs' motion for summary judgment.* The fact that this Court referred to the case of *Blair v. Freeman*, 370 F.2d 229, as dispositive authority for the granting of the plaintiffs' motion for summary judgment and does not mean that the Court did not consider the unsubstantial arguments advanced by defendant and said former applicants for intervention in granting the plaintiffs' motion. The defendant and said former applicants did raise some minor contentions that were not raised in *Blair*, but the same

were necessarily considered by the Court. The plaintiffs' proposed order merely brings out such fact, for it is a foregone conclusion that both the defendant and said former applicants would maintain that the Court's citation of the *Blair* case meant that the points and arguments not raised in that case were ignored in granting the plaintiffs' motion. This tactic is apparent from the face of the defendant's Opposition, as well as from the other pleadings herein.

3. The defendant objects to the inclusion in said Order and Judgment of any reference to the orders of this Court and to those of the Court of Appeals. It is obvious that the prior orders of this Court do have a bearing on the motion for summary judgment or the matters embraced therein would not have been raised by both defendant and plaintiffs for the Court's consideration. One example will suffice to illustrate this obvious fact. The defendant raised various defenses relating to primary jurisdiction, exhaustion of administrative remedies, etc., in his prior motion to hold the Court proceedings in abeyance and for remand to the defendant Secretary for administrative determinations. The defendant himself referred to these prior orders and motions of defendant on page one of his "Memorandum of Points and Authorities In Support Of Defendant's Opposition To Plaintiffs' Motion For Summary Judgment", and he repeated many of the arguments that had already been heard by the Court and ruled on in the case. If these matters and orders have "nothing to do with the summary judgment", as stated by defendant in his Opposition to plaintiffs' proposed order, it is submitted that he should not have brought them up himself or else should provide the real explanation for the reversal of his position in this regard. It is evident that the purpose of objection to mention of these orders in the Court's order and judgment to be entered herein is that it would preclude defendant and the former applicants from intervention from maintaining that this Court considered only the *Blair* case in granting the plaintiffs' motion for summary judgment. Even though the arguments advanced by defendant and said applicants in these proceedings were inaccurate and insubstantial, the Court of Appeals might still

remand the case for consideration of such matters if the defendant was to utilize the argument on appeal that this Court did not consider the other arguments of defendant and said applicants–such as the nearby differential being a "production" differential, that said applicants' rights to due process were violated, etc. Consequently, the plaintiffs' proposed order and judgment specifically referred to many of such arguments and also stated that the Court had fully considered all arguments and all matters embraced in the motion for summary judgment.

The reason that the plaintiffs' proposed order and judgment referred to the orders of the Court of Appeals is also self-evident. The aforesaid applicants for intervention, Frederick T. Zuber, et al., appealed the denial of their motion to the Court of Appeals, and that Court denied their motion for summary reversal of the said Order of this Court of March 21, 1967, on the 5th day of May, 1967. The Court of Appeals had the entire record of this case before it in making its decision, and its Order stated that the denial of applicants' motion for summary reversal was without prejudice "to such action as the appellants may be advised to take following final judgment in the District Court *where so far as presently appears there will have been accorded to those appellants by such judgment such recognition of their claims as they may be entitled to receive*; and thereafter this order shall not be a bar to the said appellants renewing their motion before this Court *upon a showing of the respects in which the Secretary of Agriculture shall have failed to represent the interests asserted by these appellants*". (emphasis supplied).

The plaintiffs' proposed order and judgment refers to said Order of the Court of Appeals because it is material and important for it to do so, in order to show that said former applicants' claims continued to receive consideration by the Court in respect to the granting of plaintiffs' motion. The Court's recognition of the adequacy of representation by defendant is set forth for the same reason. Otherwise, both the defendant and the said former applicants would seize upon such lack of reference thereto as reason for reversal of both

the Order of this Court of March 21, 1967 denying intervention to said former applicants and of the present granting of plaintiffs' motion for summary judgment. Both would allege that the citation of *Blair* without reference to the claims or arguments of the former applicants and without reference to adequacy of representation would mean that the Court did not consider anything else but the *Blair* case. Both would argue that this possibility existed, and the case might be sent back for rehearing with resultant continued and aggravated injury to the plaintiffs and their class, many of whom are being forced out of business by virtue of inadequate returns for their labor and who could stay in business with the increased uniform price that would exist by virtue of invalidation of the nearby differential. In addition, their counsel might request withdrawal from the case in such event, due to the fact that it has been impossible to work on any other cases during the past six months (with one exception) because of the time taken by these proceedings. These are the reasons for the defendant's opposition to inclusion of these important matters in the proposed order and judgment. It is evident that the Court did consider such matters and the defendant and said former applicants should not be allowed to utilize such intended tactic to delay the final disposition of this case. Resort to such procedural devices or tactics is necessary because of the fact that neither defendant or said former applicants have any real defense on the merits, and that the element of delay will accord them their only opportunity of jointly prevailing in this case.

The plaintiffs' proposed order and judgment refers to the fact that the plaintiffs offered to allow the said former applicants for intervention to file a brief *amicus curiae* herein if they had any position or argument that they desired to place before the Court to assure consideration of the same. This was offered after the Court's denial of said applicants' motion for intervention on March 21, 1967, and again after the denial of their motion for summary reversal of this court's order by the Court of Appeals on May 5, 1967, and a formal Consent was filed herein by plaintiffs authorizing the filing of

such brief *amicus curiae*. In answer to the said applicants' argument that they were unable to file opposing points and authorities to plaintiffs' motion for summary judgment at the time required therefor, the plaintiffs furnished to said applicants a designation of all pages of the administrative record wherein the nearby differential was referred to, although it was obvious that the claim of lack of such record from defendant was not a bona fide ground for delay. These facts are of material significance in showing that the said applicants had adequate opportunity to present their own case, and that the defendant and said former applicants should not be allowed an opportunity to claim by agreement that defendant did not adequately represent said applicants herein.

Instead of availing themselves of such opportunities, a brief *amicus curiae* was filed herein with plaintiffs consent by the Commonwealth of Massachusetts in behalf of nearby producers, i.e., the said former applicants for intervention. The same local law firm is listed on said brief, through one of its attorneys, as represented the former applicants for intervention, although the attorney whose name appears thereon is different from those whose names appear on the papers filed in behalf of said applicants for intervention. In addition, the same law firm represented the New England Milk Producers Association herein when it attempted to intervene in these proceedings. The said applicants have, in effect, utilized the opportunity to file a brief *amicus curiae* in this case through the medium of the Commonwealth of Massachusetts and this fact illustrates that the said applicants for intervention presented every claim or defense conceivable for the consideration of the Court. This is of material significance in respect to adequacy of representation and consideration of said applicants' claims in respect to the motion for summary judgment, and it would prevent defendant and said applicants from claiming that the defendant did not adequately represent applicants or that the Court did not consider applicants' claims. The plaintiffs therefore believe that such inclusion in the proposed order and judgment is entirely appropriate. They further believe that reference to modification of the prelimi-

nary injunction at the suggestion of plaintiffs to allow disbursement of those monies of said applicants and all of the other nearby milk producers is also appropriate, in that it bears on the claims of the said applicants and the Court's consideration of the same.

The reference to the present status of the said applicant's appeal in the Court of Appeals is also appropriate, as is the proposed order provision that delays distribution of the escrowed funds to plaintiffs and their class until a final decision by the Court of Appeals on denial of their motion to intervene. Such order provision protects applicants and evidences consideration by the Court of their claims as mentioned in the Order of the Circuit Court of May 5, 1967.

The defendant's objection to the findings proposed concerning the nearby differential's operation and its basis and relationship to the illegal criterion of use of fluid milk is also groundless. The defendant's own brief in the *Blair* case, quoted in part by plaintiffs' counsel during the argument on the motion for summary judgment, acknowledges that the New York-New Jersey milk order and the Greater Boston milk order, the precedent for the Massachusetts-Rhode Island milk order, contained identical nearby differential provisions "in purpose and effect". Said brief acknowledges that "both orders employ a utilization factor", and it is not disputed that the plaintiffs' proposed order and judgment sets forth an accurate and necessary statement in this respect or that it is inaccurate in any manner. The defendant's objections are therefore predicated on the obvious basis, though undisclosed, that an appeal and subsequent remand to this Court will be facilitated if the defendant's proposed order and judgment is entered, in that defendant will then be able to argue that this Court failed to consider anything but the *Blair* decision in granting the plaintiffs' motion for summary judgment. As previously stated, that case is dispositive authority for this case, but this does not mean that the other contentions or defenses have not been considered by the Court. The plaintiffs have met each of said contentions and arguments of the defendant

and applicants for intervention with irrebutable and prevailing argument, and the proposed order and judgment submitted by the plaintiffs is in accordance with the prior orders and findings of the Court. The plaintiffs further submit that the Court of Appeals will also recognize the lack of any valid argument or defense to the plaintiffs' motion if an appeal is taken by defendant, and the plaintiffs' proposed order and judgment is appropriate to the prompt and final consideration of any such appeal. In respect to the defendant's objection that reference to prior orders of the Court is an unnecessary or inappropriate provision in the order and judgment, the Court is also respectfully referred to Rule 23(c)(3) of the FRCP, which provides that "The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class". The action was maintained as a class action under the aforesaid Rule subdivision by formal order of this Court, and reference to the same and the findings set forth in plaintiffs' proposed order and judgment are not only appropriate but necessary. The entire proposed order and judgment is a logical and accurate recital of those matters necessary and appropriate for the granting of the requested relief and preservation of the same from unwarranted and improper attack upon appeal.

4. The defendant has not furnished the monthly report pertaining to milk delivered during April, 1967, and the proposed order provision regarding the furnishing of such reports containing information as to the escrowed funds is therefore still necessary.

The defendant's proposed Judgment does not contain any provision concerning the entitlement of plaintiffs and their class to the escrowed funds, even though the same have emanated entirely from the pockets of plaintiffs and their class and even though the class of nearby producers represented by defendant have received their escrowed funds through modification of the preliminary injunction. In fact, the defendant's proposed Judgment studiously avoids any mention of plaintiffs' class and ignores the requirements of Rule 23 and the

prior Order of this Court authorizing the maintenance of this suit as a class action. As previously stated, Rule 23(c)(3) requires that plaintiffs' class be included and described in the judgment and this is the reason the findings concerning the same of the Preliminary Injunction and the Order authorizing the maintenance of the suit as a class action are set forth to some degree in the proposed order and judgment.

The defendant's proposed provision concerning enjoining of the nearby farm location differential is not as detailed and specific as that required under Rule 65(d), FRCP, and it is submitted that the proposal of plaintiffs and their class is more appropriate to assure that defendant does not promulgate a like differential provision under a different guise or name.

The proposed Judgment of defendant does not state that an appeal will be taken from the order and judgment of this Court, but refers to the judgment being stayed "pending the resolution of any appellate proceedings which *might* be prosecuted by the Government. . .". It is submitted that Rule 62, FRCP, is applicable in respect to a stay of the operation and enforcement of the judgment when an appeal is taken, but that the plaintiffs and their class should not be further injured upon a contingency as to whether an appeal shall be taken by defendant. In view of the decision of the Circuit Court in *Blair*, it is apparent that there is no reason to stay the judgment, and this is especially true if no appeal is to be taken by defendant. The "nearby" producers and the "non-nearby" producers would be receiving the same uniform price for their milk if the judgment went into effect, and it is evident that only the plaintiffs and their class would continue to sustain irreparable injury if the judgment was stayed.

In the *Blair* case, the defendant represented that the case would be heard in the District Court within two weeks and the plaintiffs withdrew their request for a restraining order and preliminary injunction that related to escrow of the nearby differential payments upon the basis of such represen-

tation. Instead, the defendant delayed for 7 months before the case was heard in the District Court, and it subsequently opposed a motion for escrow of such monies filed in the Circuit Court during the pendency of the appeal, resulting in the loss of millions of dollars to plaintiffs and their class. It opposed the motion of the plaintiffs and their class filed in the Circuit Court *subsequent* to that Court's decision invalidating the differential unless the defendant was granted 90, rather than the normal 30 days, for consideration of whether to seek certiorari. The defendant was not concerned with the equity of the situation at that time, and he argued that the public interest required payment of such monies rather than escrowing of the same. The "nearby" producers would have been protected by the escrowing of such differential payments, as well as the non-nearby producers in *Blair*, but the defendant chose to pay out such monies to the producers who were not entitled thereto. Consequently, plaintiffs and their class respectfully request that their own monies be paid to them under the judgment, particularly in view of the decision of the Circuit Court in *Blair* and since such monies are solely those of the plaintiffs and their class and are required to preclude additional irreparable injury to them. The funds presently in escrow are subject to further order of the Court in respect to distribution to plaintiffs and their class pending the determination of the appeal of Frederick T. Zuber, et al., applicants for intervention, but the stay of judgment requested by the defendant should not be granted under the present circumstances without a showing by defendant of adequate grounds therefor or that an appeal will be taken by defendant.

Wherefore, the plaintiffs and their class respectfully request that their proposed order and judgment be entered herein, or that they be allowed to present the said judgment and the findings of fact and conclusions of law as separate papers but in conformity with the combined paper previously presented to the Court.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

Supreme Court of the United States

No. 861 ---- , *October Term, 19* 68

Frederick T. Zuber, et al.,

Petitioners,

v.

Russell Allen et al.

ORDER ALLOWING CERTIORARI. Filed April 7 --------- , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 1076 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

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No. ~~8001~~ 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

FREDERICK T. ZUBER, ET AL., *Petitioners,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAWRENCE D. HOLLMAN
CARLYLE C. RING, JR.
KLAGSBRUNN & HANES
710 Ring Building
Washington, D. C. 20036
Counsel for Petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

FREDERICK T. ZUBER, ET AL., *Petitioners,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on September 23, 1968 (Docket No. 21,141). In a companion case heard and decided on the same date, the Solicitor General has received

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[1] Petitioners comprise the following seven individuals: Frederick T. Zuber, George R. Medeiros, Herbert Kallman, Alexander F. Tripp, Kendall F. Crocker II, Carl W. Proctor and John T. Savage. Respondents initially comprised five individual plaintiffs below: Russell Allen, James O. Phillips, Dwight Burnham, Dwight Bessette, and Henry La Flam. Subsequent to the filing of their complaint, 163 other individuals were added as plaintiffs before the district court.

an extension of time from this Court until February 20, 1969 within which to consider the request of the Secretary of Agriculture that a petition for a writ of certiorari to review the same judgment be filed.[2]

OPINION BELOW

The order of the district court granting the plaintiffs' motion for summary judgment and judgment for declaratory and injunctive relief is unreported and is printed in Appendix B hereto at pages 21a-29a. The opinion and judgment of the Circuit Court of Appeals are unreported as of this date. They are reprinted in full in Appendix B hereto at pages 30a-62a.

JURISDICTION

The opinion and judgment of the Circuit Court were dated and entered on September 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the farm location differential provisions of the Federal milk marketing order for the Massachusetts-Rhode Island area are authorized by the Agricultural Marketing Agreement Act of 1937?

2. Whether those farm location differential provisions are supported by substantial evidence?

3. Whether, if the farm location differential provisions are not sustained, the case must be remanded to enable the Secretary of Agriculture either to review or elucidate further the premises of the differential provisions, or to determine if the order without the differ-

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[2] *Freeman* v. *Allen, et al.* (Docket No. 21,308).

ential provisions effectuates the policy of the Act or to modify the order so as to effectuate that policy?

4. If the farm location differential provisions are deemed invalid, whether the sums representing the differential which have been and are being escrowed should be paid to those producers who have been receiving and relying on them for over thirty years?

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The statutory provisions defining the authority of the Secretary of Agriculture to issue milk orders under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 601, *et seq.*) are set out in Appendix A hereto. The principal provisions involved in the instant case are §§ 608c(5)(A) and (B) set out at pages 3a-4a of Appendix A hereto.

The "farm location differential" or "nearby differential" in the Secretary's milk order for the Massachusetts-Rhode Island marketing area are set out, as included in the Secretary's 1964 Order, at pages 10a-13a of Appendix A hereto. The Secretary's findings relevant thereto are also printed at pages 13a-21a of Appendix A.

STATEMENT

This action was initiated by respondents now 168 Vermont dairy farmers, challenging a long-standing provision of the Federal milk marketing order for the Massachusetts-Rhode Island area. The jurisdiction of the district court was invoked because the case involves a question under a law relating to commerce, the Agricultural Marketing Agreement Act of 1937 ("the Act"). Respondents challenged the statutory author-

ity of the Secretary of Agriculture to provide in the marketing order for farm location differential (commonly called "nearby differential") minimum price adjustments. These adjustments have been made in favor of farmers located close to principal consumption centers. Respondents are ineligible for such adjustments in view of their distant locations from the market's core.

The marketing order provision under attack has been an integral part of Federal milk orders relating to all or a portion of the Massachusetts-Rhode Island area for over thirty years. Prior to the commencement of Federal regulation in 1933, adjustments equivalent to the differential were made in favor of "nearby" farmers as part of the classified pricing and pooling concepts developed over the prior twenty year period. These differential price adjustments were preserved by the first Federal license issued in 1933 for the Boston area under the Agricultural Adjustment Act. They were continued in a succeeding license in 1934 and again in the first milk marketing order for Boston promulgated in 1936. In the 1937 Boston milk order, the differential was again preserved, in a form virtually the same as that involved here. It simply provided, as it does today, for the adjustments of a forty-six cent differential to producers with farms located near the hub of the market, and a twenty-three cent differential to producers with farms situated at an intermediate distance.[3]

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[3] Most of the milk farmers in Massachusetts, all of those in Rhode Island and those in portions of Connecticut, Vermont and New Hampshire are included under the 1964 order in the forty-six cent zone. Producers whose farms are located in portions of Maine, Massachusetts, New Hampshire and Vermont are in the twenty-three cent zone.

The 1937 Boston order, as well as a parallel New York order, shortly became the subject of substantial litigation in which both the constitutionality of the Agricultural Marketing Agreement Act and the validity of certain order provisions were challenged. Not only was the constitutionality of the Act upheld,[4] but the farm location differential provisions of the New York and Greater Boston orders were explicitly approved by this Court and the Court of Appeals for the First Circuit respectively.[5] Consistently thereafter, the Secretary has included the differential provision in all orders for subsidiary New England markets as regulation has been extended to them. In 1964, the orders for three of these markets, Worcester, Springfield and Southeastern New England (Rhode Island and the Fall River and New Bedford areas) were consolidated with the Greater Boston order into a single order containing the same farm location differential. As in the case of all the prior orders, the 1964 order was promulgated in proposed form and submitted to the farmers in the area for a vote. It was approved by 89.3 percent of the 9,542 farmers then marketing in the area and therefore eligible to participate in the referendum. Over two-thirds of the farmers voting were not eligible for

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[4] *H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588; *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533.

[5] *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. at 567; *Green Valley Creamery, Inc.* v. *United States*, 108 F. 2d 342 (C.A. 1). For convenience, the opinion of the Court of Appeals for the First Circuit in *Green Valley* is printed at Appendix C, *infra*, pp. 63a-72a.

the differential.[6] (At present, slightly over eight thousand individual farmers serve the Massachusetts-Rhode Island milk market of which approximately two thousand are nearby farmers entitled to the differential.)

In 1966, certain amendments were proposed to the Massachusetts-Rhode Island order, among them one to delete the differential. Hearings had been held, and the proposals were pending before the Secretary when the present action was filed on December 27, 1966, just over one month following a decision by the Court of Appeals for the District of Columbia Circuit in *Blair* v. *Freeman*[7] striking down the farm location differential in the New York-New Jersey milk marketing order. Respondents opted not to participate in the 1966 proceedings before the Secretary and resisted the Secretary's request of the district court to hold the proceedings in abeyance or to dismiss them pending an administrative determination. The district court rejected the Secretary's request and, thereafter, relying wholly on the *Blair* decision, granted respondent's motion for summary judgment against the Secretary. Subsequent to entry of that judgment, the Secretary issued a recommended decision on the pending proposals in the proceedings before him, and while noting the decision of the district court, concluded that the differential "should be continued"[8] on the basis of

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[6] 29 Fed. Reg. 12237. The Agricultural Marketing Agreement Act requires that the Secretary in issuing an order must find that it will tend to effectuate the Act's policy, *i.e.*, establish and maintain orderly marketing conditions. Moreover, under the Act the order to become effective must be approved by at least two-thirds of the producers whose milk is marketed in the area.

[7] 370 F. 2d 229 (C.A.D.C.). No petition for certiorari was filed in the *Blair* case.

[8] 32 Fed. Reg. 9918-19.

the record, reliance by the "nearby" farmers consistently over the years on the differential in formulating their business decisions and the Secretary's continuing belief in the validity of the differential as explicitly approved by the Court of Appeals for the First Circuit in *Green Valley*.

Promptly after this action was instituted, the district court entered a preliminary injunction against the differential's enforcement, requiring the Secretary to escrow the sums representing the price adjustments effected by the differential. Shortly thereafter, petitioners, presently seven "nearby" dairy farmers who are entitled to receive the differential, moved to intervene as party defendants on behalf of themselves and the approximately 2,000 other "nearby" producers in the marketing area. Upon denial of their requested intervention, they appealed. Their appeal was pending at the time the district court entered summary judgment against the Secretary. Thereafter, the Court of Appeals permitted petitioners to intervene for the sole purpose of prosecuting an appeal from the district court's final judgment on condition that their appeal on intervention would become moot.[9] The Secretary

[9] Petitioners had claimed before the district court a right to intervene under Rules 19 and 24 of the Federal Rules of Civil Procedure on the grounds, among others, that they were necessary parties and had a direct interest and claim in the escrow fund. Following the lower court's judgment, petitioners sought to continue the escrow arrangement in aid of their appeal on intervention. While the Court of Appeals denied that relief, it offered the petitioners the option, by mooting their appeal on intervention, to appeal from the merits of the lower court's judgment and to seek a preservation of the status quo from the lower court which had denied that relief to the Secretary. *Zuber* v. *Allen*, 387 F. 2d 862 (C.A.D.C.). Petitioners thereafter prosecuted an appeal and obtained a continuation of the escrow arrangement pending their appeal.

subsequently perfected an appeal which was heard and decided together with petitioners' appeal.

The court below affirmed the judgment of the district court, primarily upon the authority of its opinion in *Blair* v. *Freeman,* and rejected the contentions of both the Secretary and petitioners that, at a minimum, the matter should be remanded to the Secretary. While the court recognized that the First Circuit in *Green Valley* had provided "in language at least, an explicit judicial approval of the farm location differential," it nonetheless predicated affirmance on its contrary interpretation of the provisions of the Agricultural Marketing Agreement Act. The lower court's interpretation of the Act was directly in conflict with a decision of the District Court for the Northern District of New York which, less than two months earlier, following an eight day trial in which extensive evidence regarding the legislative and administrative history of the Act was heard, considered and found to be determinative, had sustained a substantially identical differential in the Federal milk marketing order for Connecticut.[10]

To date, approximately five and one-half million dollars of net nearby differential adjustments have been escrowed.[11] Accretions to the escrow at a rate of approximately $250,000 monthly are taking place. By

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[10] *Cranston* v. *Freeman,* 290 F. Supp. 785 (N.D.N.Y.), appeal docketed, Nos. 32,793-99, C.A. 2, October 28, 1968. For convenience, the opinion of the district court in *Cranston* is printed at Appendix D, *infra,* pp. 73a-132a.

[11] Under the decision of the lower court, the major portion of the escrow fund, representing amounts accrued after the entry of final judgment by the district court on June 15, 1967 would be distributed to the distant farmers; the balance would be remitted to the nearby farmers.

order dated December 2, 1968, the lower court has stayed its mandate and continued the escrow arrangements until disposition by this Court.

REASONS FOR GRANTING THE WRIT

The decision of the court below is at odds with a well-established and consistent construction of the Agricultural Marketing Agreement Act of 1937 (the "Act"), 7 U.S.C. § 601 *et seq.*, a construction which has been maintained by the Secretary of Agriculture for over thirty years. The lower court's construction depends on a congressional intent neither expressed nor implied in the plain language of the Act and is refuted by analysis of the total environment in which Congress acted. The pervasive implications of the ruling below are detrimental to the effective and orderly regulation of milk marketing not only in the Massachusetts-Rhode Island area directly involved but in other milk markets throughout the nation. The economic livelihood of approximately 2000 New England dairy farmers entitled to the differential is at stake here, as is the viability of substantial segments of the agricultural economies of the New England states. For the milk-consuming public in these states, the decision below poses the prospect of serious instabilities in milk marketing patterns and in price levels. Furthermore, as a result of the severe limits placed on the Secretary's statutory authority by the ruling below, the validity of price adjustment provisions of many other milk marketing orders now in force elsewhere in the country have become open to serious question. In addition to overruling the Secretary's long-standing construction of the Act, the lower court's holding is directly contrary to a ruling of the Court of Appeals for the First

Circuit shortly after the statute was enacted which sustained the predecessor of the differential held illegal here.[12] The ruling below also is contrary to a most recent decision of the Federal District Court for the Northern District of New York[13] which, following thorough exploration in an eight-day trial, upheld a substantially identical differential provision in the Federal milk order for Connecticut. The holding below is equally inconsistent in principle with the leading decision of this Court in *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, earlier affirming the Secretary's authority to provide for farm location differential adjustments in favor of nearby farmers.

1. *The importance of the Federal question involved.* For over 30 years, the Secretary of Agriculture has relied on his authority under the Agricultural Marketing Agreement Act of 1937 to include farm location differentials in milk orders covering large metropolitan areas in the northeastern United States and in the Midwest. His authority is rooted in the language of the Act itself and in its legislative history. The essence of the statutory scheme is an authorization to the Secretary to issue milk marketing orders, providing for uniform minimum prices payable to all producers for their milk whether the particular milk for which such price is set is used in its most valuable form as fluid milk or in the manufacture of milk products such as butter, cheese or ice cream. Section 8c (5) (B) (ii) of the Act, 7 U.S. C. § 608c(5) (B) (ii), is at the core of the controversy here. It authorizes the Secretary to provide for the payment to the milk pro-

[12] *Green Valley Creamery, Inc.* v. *United States*, n. 5 *supra*.

[13] *Cranston* v. *Freeman*, n. 10 *supra*.

ducers for their milk deliveries of uniform prices "irrespective of the uses made of such milk by the individual handler to whom it is delivered," subject to certain adjustments. Among the permitted adjustments are those for "(a) volume, market and production differentials customarily applied by the handlers subject to such order" and "(c) the locations at which delivery of such milk is made."

Relying on this statutory foundation, the Secretary deemed it essential in the interest of orderly marketing conditions to provide in the earliest Federal milk orders in New England for a farm location differential and to preserve that differential in a substantially identical form over the years as Federal milk regulation was extended over greater areas of New England. Despite this consistent and long-standing interpretation by the Secretary in the intricate complex of milk marketing regulation, the court below has failed to accord the Secretary's construction the "considerable weight" [14] to which it is entitled. Instead, it has relied upon a single excerpt from the Act's legislative history to reach a conclusion which is the antithesis of the congressional intent reflected in the hearings, debates, antecedent regulations and the committee reports as a whole (App. 94a-104a). Moreover, the court below has substituted its own views for those of the Secretary regarding the economics of milk marketing on the basis of an incomplete record and has engaged in factual suppositions which reflect a lack of judicial comprehension regarding "an industry of labyrinthean complexity." [15]

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[14] *Lewes Dairy, Inc.* v. *Freeman*, 401 F. 2d 308 (C.A. 3); *Ideal Farms, Inc.* v. *Benson*, 288 F. 2d 608 (C.A. 3).

[15] *Blair* v. *Freeman*, 370 F. 2d at 239.

For example, the court's "guess" concerning the advent of bulk tank trucking is wrong (n. 36, App. 54a). See 23 Fed. Reg. 8227 (1958) demonstrating that the use of bulk tank trucking was a much more recent occurrence. The court also is factually in error in stating:

> ". . . the differential was never one payable over and above the transportation differential available to distant producers who delivered to a nearby zone" (App. 48a-49a). See H.R. Doc. 501, 74th Cong., 2d Sess. 183-4 (1936) establishing the contrary.

Since 1935, Congress on various occasions has been advised of the inclusion in milk orders of farm location differentials,[16] but has made no suggestion that such differentials were impermissible or that an amendment to the Act was required to authorize them. Congress' long acquiescence in the Secretary's widespread employment of farm location differentials lends great weight to the conclusion that the differentials are consistent with the authority Congress intended to confer upon the Secretary. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148; *Udall* v. *Tallman*, 380 U.S. 1, 16.

The importance of the question of Federal law involved here is accentuated by practical, economic effects if the judgment below is permitted to stand. In the Massachusetts-Rhode Island market alone, approximately 2,000 farmers in 1967 qualified for the differential amounts which accumulated in escrow at over a $3,000,000 rate in that year and now represent a total

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[16] See, *e.g.*, *Report of the Federal Trade Commission on the Distribution and Sale of Milk and Milk Products*, H.R. Doc. 501, 74th Cong., 2d Sess. 183-84 and more recently, *Hearings Before Subcommittee on Dairy and Poultry, House Committee Agriculture*, 89th Cong., 1st Sess. (1965) at p. 143.

of over $5.5 million. This averages almost $1,500 annually per nearby farmer which, with the slim margins enjoyed by most dairy farmers, will make the difference in many operations between profit and loss. For a period of more than thirty years both nearby and non-nearby farmers in the New England markets have developed their herds, planned their farming operations and made their business decisions and investments on the assumption that the farm location differential provision, which reflected traditional pricing patterns, was valid and would be continued.[17] Elimination of the differential can be expected sharply to accelerate an already significant rate of decline in nearby dairy operations. Such a decline portends serious, adverse effects for a sizable segment of the agricultural economies of Massachusetts, Rhode Island and neighboring states, and for the milk consuming public

[17] In light of this reliance, petitioners and the Secretary urged below that, at a minimum, the case be remanded to the Secretary. Instead, the lower court substituted its own views of the economics of milk marketing and of orderly marketing regulation, erroneously assuming a complete lack of viable economic aspects of the differential in the marketplace. In so doing, the court below not only undertook the burden of making the administrative determinations but further went on to order the disposition of an escrow fund now totaling over $5.5 million, diverting by far the major portion of the fund, as a windfall, to a group of distant farmers who, while voting to approve the differential since the inception of Federal regulation, have neither relied upon it nor received it. Such determinations regarding the distribution of the fund and the totality of the milk order provisions are matters which alone are for the Secretary, at least in the first instance. This Court has in the past upheld the power of cognizant administrative officials, rather than the courts, to remold the situation and to determine the disposition of escrow amounts where the validity of administrative action has been successfully challenged. *Addison* v. *Holly Hills Fruit Products*, 322 U.S. 607; *United States* v. *Morgan*, 307 U.S. 183.

in those states through a rapid elimination of a substantial portion of their sources of milk supply.[18]

The issues presented for review here are not limited in application to the Massachusetts-Rhode Island area. A substantially identical farm location differential is an integral part of Federal milk regulation in Connecticut under a discrete marketing order and has recently been sustained as a valid exercise of the Secretary's authority in that market.[19] Moreover, in the recent past, the Secretary has had occasion to use farm location differentials in two of the largest markets in the country, *i.e.,* New York and Chicago.

In petitioners' view, other implications of the ruling below may constitute a serious hindrance to orderly and effective regulation in milk markets throughout the nation. Federal milk orders in practically all markets incorporate a range of differentials. Most, if not all, of these differentials reflect, at least in part, the economic factor of value contributed by fluid use. Yet, the court below has interdicted any differential which is related to "sales advantages for fluid use" (App.

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[18] In view of the very direct economic consequences for the nearby farmers in the market, which are highlighted by their claim to the over $5.5 million of net differential amounts currently in escrow, the district court's refusal to permit petitioners to participate in the proceedings before that court constitutes a striking paradox and one which was not and could not have been remedied by an intervention limited to appellate procedures after the trial court's record had been closed. Where representatives of the nearby producers were permitted to participate as full parties before the trial court, a meaningful and complete record was created and the differential was upheld as an authorized exercise of the Secretary's statutory powers. *Cranston* v. *Freeman*, n. 10 *supra.*

[19] *Cranston* v. *Freeman, Id.*

52a) or reflects "any reliance whatsoever upon the prohibited factor of fluid use patterns." (App. 35a). Adjustments which the Secretary makes to the uniform price in Federal milk orders normally result in a higher price to some farmers than to others. These may now be subject to challenge on the grounds that the adjustments are premised at least in part on an enhancement of the value of the milk for fluid use.[20] A second implication of the lower court's ruling is equally fraught with problems for the Secretary's regulatory program. In interpreting those provisions of the Act which authorize adjustments for "volume, market and production differentials customarily applied," 7 U.S.C. § 608c(5)(A) and (B) (ii), the court below has, in effect ruled that the discussion in the congressional committee reports[21] of these terms limits the Secretary to those differentials which the reports describe and to no others. (App. 54a, 57a). If the ruling below remains unchanged, numerous differentials in existing market orders which fall outside the illustrative discussion in the committee reports, could also be invalidated. Even a "market differential" expressly noted

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[20] For example, many Federal milk orders today include a butterfat differential which is paid because it enhances the value of the milk for fluid use. Thus, the Secretary, in determining to adopt such a differential, has stated:

> "According to the findings of the study, the proposed factor would reflect more accurately the actual value of butterfat in terms of its use as fluid cream. Since the butterfat differential has been related historically to its fluid cream value, the proposed factor should be adopted." 16 Fed. Reg. 9255 (1951 Greater Boston Order).

The lower court's analysis here, if permitted to stand, might well furnish the basis for condemning this differential.

[21] H.R. Rep. No. 1241; S. Rep. No. 1011, 74th Cong., 1st Sess. 10 (1935).

and approved by this Court could succumb. See *Brannan* v. *Stark*, 342 U.S. 451 at 466 in which this Court stated:

> "Many provisions for payments to cooperatives appearing in other orders have been of a kind specifically authorized by the statute. Thus, the provision of the first Boston Milk Order for a price differential as between cooperative milk and noncooperative milk was upheld in Green Valley Creamery v. United States, as a 'market differential' authorized by § 8(5)(A)(1)." (Footnote omitted.)

2. *The conflict between the decision below and the decision of the First Circuit Court of Appeals in Green Valley Creamery, Inc.* v. *United States, 108 F.2d 342 (C.A. 1).* The decision of the court below is directly in conflict with the *Green Valley* decision. The court below held that the farm location differential of the Massachusetts-Rhode Island order was unauthorized under the Act. The *Green Valley* court, shortly after the Act was passed, explicity approved a substantially identical differential contained in the Boston milk maketing order (the predecessor to the Massachusetts-Rhode Island order) as an authorized customary market differential under the Act (App. 71a).

The *Green Valley* court noted that the factors relied upon in support of the differential were "greater accessibility to the market," "greater dependability," "a more uniform level of production throughout the year," "similar differentials" in the Boston market for many years, and the fact that nearby producers were "also potential dealers." (App. 70a). Judge Magruder concluded that:

> ". . . the differentials can readily be sustained under Section 8c (5) (B) (ii) (a) of the Act as

> market differentials which had customarily been applied by handlers subject to the Order. They are called 'location differentials' in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market." 108 F.2d at 346 (App. 71a).

The court below struck down the same nearby differential in the successor order, the Massachusetts-Rhode Island order, citing as the basis for holding the differential invalid the very advantages and factors relating to nearby milk that the *Green Valley* court relied upon as justifications for the differential.[22]

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[22] The factors enumerated by the *Green Valley* court are compared below with conflicting views of the lower court:

Green Valley	*Zuber*
". . . differentials in favor of nearby farms had existed in the Boston market for many years." (App. 70a).	". . . those 'historical price relationships by location' were the fluid use advantages which the Act expressly condemns." (App. 36a).
"greater accessibility to the market" and the fact that "[nearby] producers were also potential dealers." (App. 70a).	"The reason for this 'economic position' was, as the Secretary recognized, 'availability *for Class I* use.' We are unable to distinguish this factor from the consideration of historical fluid use patterns condemned in *Blair.*" (App. 39a).
	"Those direct marketing opportunities were, of course, for fluid use at Class I prices." (App. 43a).
". . . greater dependability as sources of supply, because, as experience showed, the nearby farms had a more uniform level of production throughout the year." (App. 70a).	"This resort to seasonability, then, was not so much in explanation of historically higher prices but rather in recognition of the fact that the nearby farmers', evenly produced milk had been sold primarily at Class I prices, *i.e.*, for fluid use." (App. 42a).

Significantly, the *Green Valley* court had a complete evidentiary record relating to the operation of the milk industry in the area and to the legislative history of the Act to aid it in comprehending the intricate complex of milk marketing regulation. The court below had no such evidentiary record before it that would have placed it in an appropriate position properly to challenge the expertise of the Secretary and his Department acquired over thirty years of regulation and as participants in the drafting of the 1935 and the 1937 Acts.

The court below dismissed the *Green Valley* approval of the farm location differential in the predecessor Boston order as dictum (App. 51a) while, at the same time, acknowledging that it was "in language at least, an explicit judicial approval of the farm location differential." (App. 60a).[23] Regardless of the manner in which the views expressed in *Green Valley* are denominated, they are entitled to great, and indeed controlling, weight, coming as they did only a short time after the Act was adopted by a distinguished Federal appellate court sitting at the hub of the market affected.

3. *The need for orderly judicial administration of pending and related litigation.* A further major reason for certiorari in this case is to enable this Court to direct the orderly disposition of related litigation in another circuit and thereby to eliminate those sub-

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[23] The court below suggested that the *Green Valley* court first held that plaintiffs there had no standing (App. 50a). In fact, the *Green Valley* court first upheld the differential as a market differential authorized under the Act, and then noted: "*Furthermore, we think* the Government is right in its contention that the present appellants have no standing to challenge the Order in this particular." (emphasis added.) (App. 71a).

stantial uncertainties regarding the Secretary's powers which currently plague all milk farmers in the affected northeastern markets. The validity of a farm location differential essentially the same as that involved in the instant case is now at issue before the Court of Appeals for the Second Circuit (Nos. 32,793-99), on appeal from a decision of the Federal District Court for the Northern District of New York in *Cranston* v. *Freeman* (App. 73a *et seq.*). The *Cranston* court upheld the validity of the differential in the Connecticut milk marketing order, 7 C.F.R. § 1015.72 (1968), finding:

> "3. The farm location differentials contained in Sections 1015.72(a) and (b) of the Order regulating the handling of milk in the Connecticut Marketing Area, 7 C.F.R. § 1015 (1968), are market differentials customarily paid by handlers subject to the Order and as such are authorized pursuant to Section 608c(5)(B) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601, *et seq.*" (App. 132a).

A full hearing was held in the *Cranston* case. Sixteen witnesses testified covering nearly 1,000 pages of transcript. Expert testimony and documentary evidence was presented as to: milk marketing practices in the '20s and '30s, including techniques later utilized in Federal regulatory programs; the economic crisis precipitating a need for Federal legislation to reestablish orderly and stable milk marketing conditions; the full legislative history of the 1933, 1935 and 1937 Acts; and the administrative history of the Secretary's use of farm location differentials under the pre-1935 licenses and, subsequently, the Federal order programs.

With the benefit of this full record and elucidation of the intricacies of milk marketing and the history of regulation, the *Cranston* court sharply differed with

the views below which were dependent on an undeveloped record compiled in summary judgment proceedings. The *Cranston* court acknowledged its conflict with the reasoning of the Court of Appeals for the District of Columbia in *Blair* v. *Freeman* (on which the same lower court relies in the instant case) and carefully analyzed the basis for its differences:

> "Despite the differences in fact, the Court recognizes that its holding is based on conclusions which are contrary to those reached in *Blair*. The Court is indeed reluctant to disagree with such a distinguished court as the Court of Appeals for the District of Columbia and does so only with the greatest respect and deference. But while the Court concurs with the Court of Appeals for the District of Columbia that the uniform price requirement was designed to eliminate ruinous competition for the fluid milk market, it cannot concur in the Court of Appeals conclusion that the requirement prohibits recognition of the historic fact that farmers located in particular areas near the market were accorded a greater share of that market." (App. 118a).

The divergence between the two courts on legislative intent, facts of milk marketing, and interpretation of prior precedents is illustrated below:

Zuber	*Cranston*
(1) *Interpreting Committee Reports.*	
"The Committee Reports in respect of the 1935 Act are explicit that 'the market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant.'" (App. 54a).	"In view of these remarks by Senator Murphy, and in view of the testimony of two of the drafters of the statutory language in question, and considering the expressions of intent in the Committee reports that local variations and past practices under cooperative and licensing agreements should continue, the Court concludes that

Zuber	*Cranston*
	the narrow definition of market differentials contained in the committee reports must be read as illustrative rather than as restrictive." (App. 100a).
(2) *Construction of Section 4 of 1937 Act.*[24]	
". . . this construction is consistent with what was clearly the sole legislative purpose underlying Section 4, namely, to prevent technical abatements which arguably might result from reenactment of the 1933 Act." (App. 49a).	"What otherwise might be a meritorious argument that Congress simply intended to prevent technical abatement of prior orders is countered by the House of Representatives committee report accompanying the proposed legislation .... [quoting report]. The first sentence makes it clear that Congress indeed wished to avoid technical abatements, but the second sentence by use of the word 'also' demonstrates that Section 4 was further designed to ratify, legalize and confirm affirmatively the provisions of past orders. In addition, the cases cited in the report all involved instances in which Congress had legalized or ratified prior executive action; none of them were concerned with mere technical abatement." (footnote omitted.) (App. 106a-107a).

[24] Section 4 of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 3672(a), expressly ratifies, legalizes and confirms earlier marketing orders. As such, it lends added and independent support to the validity of the farm location differential which was included in the 1936 Boston milk order.

Zuber

(3) *View of Rock Royal decision.*

"*Rock Royal* did not involve producers, but only handlers and therefore a different provision of the statute. Moreover, the differential payments there involved depended upon the location of the plant to which delivery was made, and not the location of the delivering farmer." (n. 40.1 at App. 57a).

Cranston

"It is true that *Rock Royal* was a suit involving handlers and not producers and that Section 8c(5)(A) applies to the former rather than the latter. But Section 8c(5)(A) provides for the same uniform prices subject to the same adjustments as set out in identical language in Section 8c(5)(B) applying to producers. Therefore, the Supreme Court's holding that Section 8c(5)(A) 'authorizes such an arrangement' is most certainly authority that Section 8c(5)(B) authorizes the same arrangement." (App. 113a).

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"Furthermore, as was pointed out in connection with a similarly worded differential in the first Boston license of 1933, delivery to plants in those counties meant that the farms from which the deliveries were made were located there. In fact those persons involved with the differential always spoke of it as a differential paid on the basis of farm location." (App. 112a).

Zuber	*Cranston*
(4) *History of Nearby Differential.*	
"First, it does not appear that a farm location differential of the kind now under attack ever appeared in a greater Boston license or order before 1937. There were differentials based on *delivery* location, and for a time farm location was one condition along with delivery location, but none seems to have been based on farm location alone." (App. 48a).	"But, as a number of witnesses testified, only producers whose farms were nearby the city could deliver to the city plants because of the delivery methods then in existence. The others had to deliver to country stations and therefore did not receive the preferential base. The result was that the license [under 1933 Act] in effect provided for a differential to producers with nearby farms." (App. 101a).
	• • •
	"Thus, this differential [1936 Order] was unquestionably based solely on the location of a producer's farm." (App. 103a).

The contrast in the views of these courts on basic aspects of milk marketing foreshadows a possible conflict between the Court of Appeals for the District of Columbia Circuit and the Second Circuit Court of Appeals, in addition to the already existing conflict of the lower court here with the First Circuit Court in *Green Valley*. Review by this Court would eliminate the anomalous prospect that the Secretary might well find himself authorized to maintain a farm location differential in the Connecticut market while being precluded from doing so in the adjacent Massachusetts-Rhode Island area.

4. *The conflict in principle between the decision below and this Court's decision in United States* v. *Rock Royal Co-op., Inc., 307 U.S. 533.* The authorized use by the Secretary of a farm location or "nearby" differential is not a novel question before this Court. In sharp contrast to the ruling below which found that ". . . any discrimination attributable to farm location would appear to be invalid" (App. 58a), this Court has expressly confirmed the validity of a differential based on farm location. In *Rock Royal,* this Court held:

> "C. *Nearby Differentials.* Provision is made by the Order for special differentials of 20 cents on milk from certain counties located most favorably to the marketing area. This is to enable handlers to pay the producers at these plants. The five cent difference is absorbed by the handlers. The Act authorizes such an arrangement. § 8c(5)(A)." (footnotes omitted). 307 U.S. at 567.

Rock Royal specifically argued on brief to this Court (Br. of Rock Royal, Oct. Term, 1938, No. 771, p. 55) that such a differential was a preference unauthorized by the statute and prohibited by the language of § 608c(5)(B)(ii) of the Act "irrespective of the uses made of such milk by the individual handler," precisely the statutory language on which the lower court here bases its concept of congressional prohibition. The Government on brief (Br. of U.S., Oct. Term, 1938, No. 771, pp. 60-61) argued "milk of producers in these counties is readily available for use in the fluid market and producers in these counties have always enjoyed an almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages," plainly admitting that the

"sales advantage for fluid use" condemned by the ruling below (App. 52a) was a factor upon which the differential depended.[25]

The district court in *Rock Royal* found the differential to be "preferential payments made to producers *living* in 18 counties . . . . The producers in those counties receive 20 cents per cwt. in addition to the location differentials, which return them a higher price for their milk *because they are located nearer New York.*" (emphasis added) 26 F.Supp. 534 at 554. The parties took no exception to this district court finding. The preference was based in fact upon *location of*

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[25] On this point, this Court in *Rock Royal* recognized that the very adjustment provisions of the Act and the New York order (which distributed differing proportions of the equalization pool to different classes of producers based upon fluid use advantages) were provisions serving to protect the Act and the order from invalidity as an exercise in arbitrary equalization.

In dealing with the defendants' challenge to the validity of the equalization pool provisions, this Court described the operation of the market wide pool of the New York order in the following terms:

> "The result of the use of the device of an equalization pool is that each producer, dealing with a proprietary handler, gets a uniform or weighted average price for his milk, with differentials for quality, location or other usual market variations, irrespective of the manner of its use. The Act, § 8c(5)(B)(ii) and (C) and the Order, Articles IV., VI. and VII. authorize such an adjustment." 307 U.S. at 571.

It is notable that this Court referred to differentials "for usual *market variations*" in the plural as contrasted with the limited interpretation placed on market differentials by the lower court here. It is also significant that this Court expressly held that § 8c(5)(B)(ii) and the particular provisions of the order setting out the nearby differential authorize the adjustment.

the farm for the reason discussed by the Government brief (Br. of U.S., Oct Term, 1938, No. 771, p. 60) to this Court in *Rock Royal*—a range of mountains made delivery to the plants feasible only for farmers residing in the 18 counties. The validity of the nearby differential was thus posed to this Court as a preference *based upon farm location.* On that basis, this Court held it to be a differential authorized by the Act.

The lower court's footnoted attempt to distinguish *Rock Royal* (n. 40.1 App. 57a) is superficial and unfounded. To say that *Rock Royal* only involved handlers and therefore a different provision of the statute is a misleading over-simplification. *Rock Royal* itself was a producer's cooperative, the membership of which consisted entirely of producers. It was, as this Court stated, considered as a handler for the purposes of payment for milk under the Act but one of its main complaints was that its members were differentiated against under § 608c(5)(B)(ii) of the Act. This Court held such differentiation to be authorized. Moreover, inasmuch as Subsection (A) provides for the *same* uniform prices subject to the *same* adjustments as set out in identical language in Subsection (B) applying to producers, this Court's holding that Subsection (A) "authorizes such an arrangement" is virtually conclusive that Subsection (B) authorizes the same arrangement.

The court below also distinguished *Rock Royal* on the grounds that the differential there depended upon plant, and not farm, location (n. 40.1 App. 57a). However, as noted above, both the district court and the parties treated the differential as what it, in fact, was —an adjustment based entirely on the location of producers' farms. In sum, the view of the court below

that any differential based on farm location must fall is irreconcilable with the holding of this Court in *Rock Royal* that a differential which in fact was based on farm location was valid.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE D. HOLLMAN
CARLYLE C. RING, JR.
Counsel for Petitioners

December 1968

APPENDIX A

Agricultural Marketing Agreement Act, 7 U.S.C. § 601 et seq. Sections 601, 602 in pertinent part, 608c(1), (3), (4), (5), (7), (9), (15), (16) (A), of Agricultural Marketing Agreement Act of 1937

§ 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. May 12, 1933, c. 25, Title I, § 1, 48 Stat. 31; June 3, 1937, c. 296, §§ 1, 2(a), 50 Stat. 246.

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above

the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

* * * * * * * * * *

§ 608c. Orders regulating handling of commodity—Issuance by Secretary

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * * * * * * *

Notice and hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and issuance of order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof

will tend to effectuate the declared policy of this chapter with respect to such commodity.

Milk and its products; terms and conditions of orders

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year. In the event a producer holding a base allocated under this clause (d) shall reduce his marketings, such reduction shall not adversely affect his history of production and marketing for the determination of future bases. Allocations to producers under this clause (d) may be transferable under an order on such terms and conditions as may be prescribed if the Secretary of Agriculture determines that transferability will be in the best interest of the public, existing producers, and prospective new producers. Any increase in class one base resulting from enlarged or increased consumption and any producer class one bases forfeited or surrendered shall first be made available to new producers and to the alleviation of hardship and inequity among producers. In the case of any producer who during any accounting period delivers a portion of his milk to persons not fully regulated by the order, provision may be made for reducing the allocation of, or payments to be received by, any such producer under this clause (d) to compensate for any marketings of milk to such other persons for such period or periods as necessary

to insure equitable participation in marketings among all producers. Notwithstanding the provisions of subsection (12) of this section and the last sentence of subsection (19) of this section, order provisions under (d) above shall not become effective in any marketing order unless separately approved by producers in a referendum in which each individual producer shall have one vote and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk

purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided,* That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(H) Marketing orders applicable to milk and its products may be limited in application to milk used for manufacturing.

* * * * * * * * * *

Terms common to all orders

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their power and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit for canning or freezing one or more representatives of processors of the commodity specified in such order.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order.

* * *

Orders with or without marketing agreement

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal

or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agree-

ment or order, in the production or market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

* * *

Petition by handler for modification of order or exemption; court review of ruling of Secretary

(15)(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance wtih regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering

to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

Termination of orders and marketing agreements

(16)(A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

Pertinent Portions of the Secretary's 1964 Order for the Massachusetts-Rhode Island Milk Marketing Area (7 C.F.R. §§ 1001.70 and 1001.72)

PAYMENTS—GENERAL

§ 1001.70 *Payments to producers.*

(a) On or before the 5th day after the end of the month, each handler shall pay each producer for the approximate value of milk received from him during the first 15 days of the month. This payment shall be at a rate not less than the applicable zone Class II price for the month.

(b) On or before the 20th day after the end of the month, each handler shall make final payment to each producer for the total value of milk received from him during the month at not less than the basic blended price per hundredweight computed under § 1001.64, adjusted by the zone, butterfat, and farm location differentials applicable under §§ 1001.62, 1001.71, and 1001.72, minus the amount of the payment made to the producer under paragraph (a) of this section.

§ 1001.72 *Farm location differentials.*

In making the payments to producers required under § 1001.70, each handler shall add any applicable farm location differential specified in this section.

(a) With respect to milk received from a producer whose farm is located within any of the places specified in this paragraph, the differential shall be 46 cents per hundredweight, unless the addition of 46 cents gives a result greater than the Class I price determined under §§ 1001.60 and 1001.62 which is effective at the plant at which the milk is received. In that event there shall be added a rate which will produce that price.

CONNECTICUT

All of the State of Connecticut east of the Connecticut River and the towns of:

Granby. Suffield.

MAINE

The towns of:

Eliot. Kittery.

MASSACHUSETTS

All counties other than Berkshire County.

NEW HAMPSHIRE

Rockingham County, and the following cities and towns: Allenstown, Amherst, Barrington, Bedford, Bow, Brookline, Chichester, Deering, Dover, Durham, Epsom, Francestown, Goffstown, Greenfield, Greenville, Hinsdale, Hollis, Hooksett, Hudson, Lee, Litchfield, Lyndeborough, Madbury, Manchester, Mason, Merrimack, Milford, Mount Vernon, Nashua, New Boston, New Ipswich, Pelham, Pembroke, Pittsfield, Rochester, Rollinsford, Strafford, Temple, Weare, Wilton, Winchester.

RHODE ISLAND

All of the State of Rhode Island.

VERMONT

The towns of:

Guilford, Halifax, Readsboro, Vernon, Whitingham.

(b) With respect to milk received from a producer whose farm is located within any of the following cities and towns, the differential shall be 23 cents per hundredweight, unless the addition of 23 cents gives a result greater than the Class I price determined under §§ 1001.60 and 1001.62 which is effective at the plant at which the milk is received. In that event there shall be added a rate which will produce that price.

MAINE

Berwick, Kennebunk, Kennebunkport, Lebanon, Lyman, North Berwick, Sanford, South Berwick, Wells, York.

MASSACHUSETTS

Becket, Florida, Hinsdale, Otis, Peru, Sandisfield, Savoy, Washington, Windsor.

NEW HAMPSHIRE

Antrim, Barnstead, Bennington, Boscawen, Bradford, Canterbury, Chesterfield, Concord, Dublin, Dunbarton, Farmington, Fitzwilliam, Gilmanton, Gilsum, Hancock, Harrisville, Henniker, Hillsborough, Hopkinton, Jeffrey, Keene, Loudon, Marlborough, Middleton, Milton, Nelson, Northfield, Peterborough, Richmond, Rindge, Roxbury, Sharon, Somersworth, Stoddard, Sullivan, Surry, Swanzey, Troy, Webster, Westmoreland, Windsor.

VERMONT

Brattleboro, Brookline, Dover, Dummerston, Marlboro, Newfane, Putney, Wilmington.

From the Secretary's Decision, 29 F.R. 11205 Promulgating the Mass.-Rhode Island Milk Order, Aug. 4, 1964

* * * * * * * * * * *

4. *Farm location differentials.* The farm location differential provisions under the present New England orders should be continued under the Massachusetts-Rhode Island order and the Connecticut order.

A group of nine cooperative associations, which represents principally producers whose farms are located outside any of the specified farm location differential areas, proposed that farm location differentials be eliminated under the New England orders. Three other cooperative associations proposed that a producer whose farm is located within New England and who is presently eligible to receive a farm location differential (either 46 cents or 23 cents depending on the location of the farm) under any New England order be eligible to receive the same differential irrespective of the New England order under which his milk is pooled. Another cooperative association proposed that the farm location differentials be increased as an offset to any reduction made in the city plant Class I zone differentials under the orders.

Farm location differentials represent payments of 46 cents and 23 cents per hundredweight to producers whose farms are located in specified "nearby" and "intermediate" areas, respectively, in addition to the applicable zone blended price which these producers receive. The payments are met by deductions from pool funds. The additional returns to producers who are eligible for these differentials are, in essence, monies which, in the absence of such differentials, would accrue through the blended price computation to all producers, including more distant producers.

Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.

While considerable testimony in support of removal of the provisions was received, it was not established that the farm location differential provisions are resulting in unstable or disruptive marketing conditions which warrant their deletion from the orders at this time. Although certain marketing problems in the nearby and intermediate market areas were referred to in the testimony, these problems are not the result of production increases on farms in these areas which logically might be attributable to the higher returns to producers in these areas. Such increases have not been significantly different from those on farms not eligible for the farm location differentials.

During a period of general incerase (sic) in milk production throughout the milksheds of the New England markets, the average daily milk deliveries per farm for those farms

located in the farm location differential areas under the Boston order and for those farms located outside such areas both increased 23 percent in 1962 over the average of such deliveries in 1960. In the Southeastern New England market the average daily deliveries per farm for those farms located in the differential areas increased about 16 percent in 1962 over 1960 while such deliveries from farms not located in any differential area under the Southeastern New England order increased about 13 percent during this period.

Comparable percentage figures for Connecticut market producers for this period are not available. A comparison of 1961 with 1960, however, shows that there was an increase of 8 percent in the average daily deliveries per farm for those farms located in the differential areas and an increase of 13 percent in such deliveries for those producer farms located outside the Connecticut differential areas. In the Springfield market the average daily deliveries per farm for those producers in the differential areas increased about 18 percent during the 1960-1962 period. In this market very few farms are located outside the differential areas. Such increase of 13 percent is not out of line with comparable increases in the other markets, however. In the Worcester market such daily average deliveries from farms located in the 46-cent differential area (there is no 23-cent differential area under the Worcester order) increased about 17 percent during this two-year period while such deliveries per farm located outside such differential area increased about 32 percent.

The average number of producers with farms located in the farm location differential areas is decreasing in the Boston, Springfield, Southeastern New England, and Connecticut markets. The farm location differential area under the Worcester order was expanded in September 1960 and this caused an increase in 1961 over 1960 in the average number of producers who were eligible to receive such

a differential. The average number of such producers decreased in 1962 from such number in 1961, however.

Marketing problems which have been attributed to the farm location differentials do not relate to the rates of the differentials as such but rather to the changes in applicable differential rates which often occur for producers when they are shifted from one market to another. Problems of this kind, however, are dealt with by the proposed merger of orders. Further, an unwarranted decrease in returns to nearby producers would result at this time if any reduction were made in the farm location differentials in conjunction with the 7-cent reduction in the city plant Class I zone differential proposed herein. It is therefore appropriate that the present levels of farm location differentials continue to be applicable under the New England orders.

The proponent cooperative associations excepted to the findings and conclusions on this issue and requested that a decision on the issue be deferred pending a suggested study of the economic and legal aspects of farm location differentials by industry and governmental representatives. As indicated above, we believe there are adequate reasons on this record for continuing the farm location differentials at their present rates. An industry study of such differentials may be made, of course, at any time or could have been made at any time in the past in preparation for their review. The matter may be reviewed when it is shown that further consideration in hearing is appropriate. We are not warranted in deferring the decision until such a study has been made.

It would not be appropriate to increase the farm location differentials under the Massachusetts-Rhode Island and Connecticut orders, however, by part or all of the proposed reduction in the city plant Class I zone differential. Proponent of this proposal contended that under a reduced transportation differential such an increase in farm location differentials should be made to reflect in the returns to nearby producers the full value of nearby producer milk as compared to country plant milk.

It is probable that the attractiveness to handlers of nearby producer sources of milk will be increased under the circumstance of a reduced city plant Class I zone differential. As described under Issue No. 3, country receiving and transportation costs have decreased in recent years, indicating that the present zone differential for city plants is excessive. Reducing the zone differential merely provides for a proper relationship between the price to the handler for producer milk received at city plants as compared with the price to the handler for milk purchased from country plants. While such action may increase the marketability of nearby milk, the intrinsic value of the milk has not been increased. Accordingly, this proposal is denied.

The present farm location differential areas under the Boston, Springfield, Worcester, and Southeastern New England orders should be combined under the Massachusetts-Rhode Island order. With minor exception as described later, all territory which is within the present 46-cent differential area under any of the four orders should constitute the 46-cent differential area under the consolidated order. Similarly, all territory (also with minor exception as described later) which would not be within this proposed common 46-cent differential area but is now within the 23-cent differential area under any of the present four orders should constitute the 23-cent differential area under the consolidated order.

Producers now under the four orders to be merged would be suppliers of a single marketing area under the Massachusetts-Rhode Island order. Because only one marketing area will be involved, producers should receive the highest farm location differentials for which their farm locations would have made them eligible under any of the present four orders, regardless of the plant to which their milk is delivered under the merged order.

The consolidation of the respective farm location differential areas now provided under the four orders would

eliminate sometimes unexpected decreases in returns to individual producers. When a distributing plant becomes pooled in another market, the producers delivering milk to that plant become associated with the new market also. This has been a disturbing condition for certain producers who were eligible for the 46-cent differential before a plant shift but who became eligible only for the 23-cent differential, or for no differential at all, after the shift was made. Handlers experience difficulty at times in handling milk with maximum efficiency because of their reluctance to shift producers from one market to another when such producers would experience a reduction in returns. Cooperative associations also may be handicapped in shifting producers to plants which have need for additional supplies. It is appropriate, therefore, that the application of farm location differentials under the Massachusetts-Rhode Island order be as described.

It is not necessary to provide that a New England producer who is eligible for a farm location differential under the Connecticut order or the Massachusetts-Rhode Island order be eligible for the same differential when his milk is pooled under the other New England order. The consolidation of the four orders and the farm location differential areas provided thereunder will remove, for all practical purposes, the problem of change in differentials for producers who shift, or are shifted, from one to the other of these markets. This is so since it is likely that there will be relatively few instances of plant shifts with only two orders in New England and since virtually all producers shipping to the merged market but readily available to the Connecticut market would be in the 46-cent differential area under either order.

As indicated, the 46-cent and 23-cent differential areas under the Boston order are proposed to constitute a part of the areas in which farm location differentials would be applicable under the consolidated order. In contrast to the other four New England orders which now define farm location differential areas in terms of city and town bound-

aries or easily distinguishable highways or rivers, the differential areas under the Boston order are defined by "40-mile" and "30-mile" airline arcs which are measured from specified locations. To facilitate the administration of the orders, it is concluded that the peripheries of the two differential areas provided under the Massachusetts-Rhode Island order should be described in terms of city and town boundaries. The use under the consolidated order of long-established, well-known, and readily ascertainable political boundaries will provide a less burdensome procedure for determining a producer's eligibility to receive a farm location differential than does the use of airline arcs measured from a base point.

Under this proposed modification of a portion of the peripheries of the Boston order farm location differential areas, all cities and towns in Maine and New Hampshire which are wholly within the present 40-mile arc, as measured from Lawrence, Massachusetts, would be included in the 46-cent differential area under the consolidated order. In addition, the modification would extend the 46-cent differential area to the entire area of the following cities and towns which are now intersected by the 40-mile arc: the cities and towns of Barrington, Chichester, Deering, Francestown, Greenfield, Pembrooke, Pittsfield, Rochester, Rollinsford, Strafford, and Weare in New Hampshire.

The 23-cent differential area under the merged order would include those cities and towns in Maine and New Hampshire which are wholly within the presently defined 80-mile arc under the Boston order but which would not be included in the Massachusetts-Rhode Island 46-cent differential area. In addition the entire area of each of the towns of Kennebunkport and Lyman in Maine and Gilmanton, Middleton, Milton, and Surry in New Hampshire would be included in the 23-cent differential area under the merged order.

The cities and towns individually listed above are those areas which are intersected by the respective airline arcs

used in defining the differential areas under the Boston order and from which one or more producers recently have delivered milk to the Boston market from farms located inside the respective arcs. The remaining cities and towns which are intersected by the respective arcs are areas from which no milk has been delivered to the Boston market since January 1, 1962. Accordingly, it is appropriate that these areas not be included within the respective differential areas. Under this arrangement, only nine Boston producers known to have farms located in the 23-cent differential area at the time of the hearing would be shifted to the 46-cent differential area and the farm of one known Boston producer not located in any differential area would be shifted to the 23-cent differential area.

Exception was taken to the proposed continued use of certain highways in defining the peripheries of the farm location differential areas under the Connecticut order. Exceptor contended that inasmuch as it was proposed in the recommended decision that the peripheries of the farm location differential areas under the consolidated order be defined in terms of political boundaries similar procedure should be used in all cases under the Connecticut order.

No proposal of this nature was presented at the hearing which would provide a basis for this action. Moreover, the highways used to describe part of the area boundaries are easily ascertainable lines of delineation. This is in contrast to the more difficult determination of area peripheries on the basis of airline arcs as currently in use under the Boston order. The principal purpose of the proposed change in the manner of defining farm location differential areas under the Massachusetts-Rhode Island order is to establish for both producers and the market administrator boundaries which can be easily determined. In many instances well-defined highways also meet this requirement for the establishment of boundaries. We know of no problem in this connection under the Connecticut order.

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APPENDIX B

[Filed May 24, 1967]

Memorandum

The plaintiffs' motion for summary judgment is granted on the authority of *Blair. et al.* v. *Freeman,* U.S. App. D.C. , No. 19,801, decided November 18, 1966.

Counsel for plaintiffs will submit an appropriate order.

JOSEPH C. MCGARRAGHY
Judge

May 24, 1967

[Filed June 15, 1967]

Order Granting Motion for Summary Judgment and Judgment for Declaratory and Injunctive Relief

This cause came on for hearing on the Motion for Summary Judgment filed herein by the plaintiffs, and the Court having considered the Motion and Opposition thereto, the verified complaint, pleadings, affidavits, points and authorities, exhibits, and other papers filed herein, and having heard argument of counsel for each party and being fully advised in the premises in respect to the entire record, the orders entered herein, the pertinent portions of the administrative record, the arguments of the amicus curiae and former applicants for intervention, and all other considerations, the Court makes the following

FINDINGS OF FACT

1. The plaintiffs and their class are dairy farmers and milk producers as defined in the Agricultural Marketing Agreement Act of 1937, as amended, and the federal milk order regulating the handling of milk in the Massachusetts-Rhode Island milk marketing area, 7 C.F.R. 1001. They have brought this action for themselves, individually, and for the benefit of all other milk producers similarly situated who produce and sell their milk under the said milk

order, which was promulgated by the defendant effective October 1, 1964, and is still in effect at the present time. The plaintiffs seek a judgment that Section 1001.72 of said milk order, the nearby farm location differential provision thereof, is invalid and void. They also request a permanent injunction against the continued enforcement of said milk order provision by the defendant.

2. The Massachusetts-Rhode Island milk order promulgated by defendant contains the aforesaid nearby farm location differential provision, 7 C.F.R. 1001.72, which provides that milk producers whose farms are located in either of two designated areas, as determined by certain enumerated towns, cities, counties and States in each area, are entitled to receive an additional payment for their milk, over and above the uniform blended price received by all milk producers serving the market, of 46 cents or 23 cents per hundredweight, respectively, depending upon in which of the two "nearby" designated areas their farms are located.

3. The nearby farm location differential payments are deducted from the equalization pool proceeds belonging in equity to all milk producers serving the market, and such deduction reduces the uniform blended price which the plaintiffs and their class would otherwise receive for their milk, 29 Fed. Reg. 5590, 29 Fed. Reg. 11213, their farms being so located that they are not in either of the two designated nearby areas which are eligible for the said nearby farm location differential payments.

4. The plaintiffs and their class are required by the operation and provisions of the said milk order nearby differential section, 7 C.F.R. 1001.72, to sustain a reduction in the uniform blended price which they would otherwise receive, in the absence of said differential provision, of approximately $3,000,000.00 per year, the total differential payments under Section 1001.72 amounting to approximately $4,000,000.00 per year.

5. The plaintiffs and their class of ineligible milk producers constitute approximately 6,600 of the 8,800 milk producers serving the market, and there is no way that the said nearby differential payments may be recovered from the "nearby" milk producers by the plaintiffs and their class once such payments are made, in that the 8,800 milk producers are located in many different jurisdictions in various New England and other States and such attempts at recovery would involve a multiplicity of parties and actions.

6. This action has been brought by the plaintiffs as a class action, that is as an action for plaintiffs, individually, and for all other milk producers similarly situated who produce and market their milk under the said milk order. The defendant, through the promulgation of said milk order provision establishing the eligible and non-eligible class of milk producers for said nearby farm location differential payments, has acted on grounds generally applicable to the class, thereby making appropriate the relief requested with respect to plaintiffs' class of milk producer as a whole. The plaintiffs' class of non-eligible milk producers are so numerous that joinder of all members is impracticable. There are questions of law common to the class, and the claims of the plaintiffs as representative parties are typical of those of the class. The Court has found that the plaintiffs as representative parties will fairly and adequately protect the interests of their class of non-eligible milk producers, and it has entered an order herein authorizing the maintenance of this suit as a class action under Rule 23 (a) and (b) (2), FRCP. The Court has also found and entered an order herein that the defendant is adequately representing any interests of the eligible or "nearby" milk producers that would be adversely affected by the invalidation of the milk order provision, by virtue of the defendant's defense of the nearby farm location differential payments, and it has considered the arguments and defenses of the applicants for intervention as set forth

in their pleadings and those of the defendant, including the defendant's motion to hold these proceedings in abeyance. The Court finds that both the plaintiffs and the defendant have adequately represented the interests of the respective classes of ineligible and eligible milk producers, and this judgment includes in its application the said two classes of milk producers, those whose farms are so located as to make them either eligible or ineligible for the nearby farm location differential payments of the milk order.

7. On January 16, 1967, pursuant to the motion of the plaintiffs, this Court entered an order granting a preliminary injunction during the pendency of this action or until further order of the Court enjoining the defendant from paying over to the eligible class of milk producers the monies representing the contested nearby farm location differential payments of the said milk order and requiring that the defendant collect, place and retain the monthly sums that would otherwise be paid over under said order provision in an escrow account subject to the control of the Court. On March 17, 1967, the said preliminary injunction was modified by a consent order to allow the disbursement from said escrow account of those monies therein attributable to the marketings of milk of the nearby or eligible class of milk producers and for the future payment to them of the said amounts that would otherwise be escrowed except for such modification of the preliminary injunction. The defendant is required by the terms of such order to make monthly reports concerning the escrow deposits and to furnish the same to the Court and to the plaintiffs' attorney, but it has failed to do so since its report pertaining to the said nearby differential payments attributable to the marketing of milk during January, 1967. The monies in the said escrow account presently consist of those withheld from the ineligible or non-nearby milk producers by virtue of the aforesaid reduction in the uniform blended price which they would otherwise receive

for their milk except for the said nearby differential provision.

8. On March 21, 1967, this Court denied the motion of Frederick T. Zuber, et al., for leave to intervene herein as defendants, and the applicants' motion for summary reversal of said order of this Court was denied by the United States Court of Appeals for the District of Columbia Circuit on May 5, 1967, "without prejudice to such action as the appellants may be advised to take following final judgment in the District Court where so far as presently appears there will have been accorded to those appellants by such judgment such recognition of their claims as they may be entitled to receive;". The said Order of the Court of Appeals further stated that the denial of their motion did not constitute a bar to renewing the motion for the purpose of showing in what respect the defendant failed to adequately represent the appellants' interests in the District Court. The proceedings in the Court of Appeals in respect to the appellants' appeal of said Order denying intervention were suspended pending decision of this Court on the plaintiffs' motion for summary judgment, in respect to designation of the record to be printed and the filing of briefs, for a period of twenty days from the date of the ruling of this Court on said motion. Said Order of the Court of Appeals of May 24, 1967, suspending the proceedings in that Court as aforesaid was unopposed by the plaintiffs, who filed a formal consent herein to the filing of a brief amicus curiae by Frederick T. Zuber, et al., for the presentation of any defense or argument that they might desire to place before this Court and who furnished the said applicants with a designation of the page references of the administrative record relating to the nearby farm location differential. The said applicants did not avail themselves of the opportunity to file such a brief in this Court as proposed by the plaintiffs or file any other response thereto, although the same local law firm that represented the applicants Frederick T. Zuber, et al.,

did file such a brief as local counsel for the Commonwealth of Massachusetts with the consent of plaintiffs on the 15th day of May, 1967, the day prior to the hearing on the plaintiffs' motion for summary judgment.

9. On November 18, 1966, the United States Court of Appeals for the District of Columbia Circuit handed down a decision in the case of *Lorton Blair, et al.* v. *Orville Freeman, Secretary of Agriculture of the United States,* No. 19,801, ... U.S. App. D.C. ...., 370 F.2d 229, in which it held that the nearby farm location differential provision of the New York-New Jersey federal milk marketing order, 7 C.F.R. 1002.71(b) was unauthorized and void, and it ordered the reversal of the decision of the District Court, C. A. No. 498-65, and the granting of a judgment declaring the invalidity of said milk order provision and the issuance of a permanent injunction against its continued enforcement by the defendant. The time for petitioning the Supreme Court of the United States for the issuance of a writ of certiorari has expired in said case. There is no substantial difference between the operation of the nearby farm location differential provision of the New York-New Jersey milk order declared invalid and void in the case of *Blair* v. *Freeman,* supra, and that of the Massachusetts-Rhode Island milk order contested in this action. Both provide for the nearby differential payments from the equalization pool proceeds through reduction of the uniform blended price, and the said payments to the nearby or eligible milk producers reduce pro tanto the amount which the plaintiffs and their class would otherwise receive for their milk under the respective milk orders.

10. On the authority of *Blair* v. *Freeman,* supra, the Court finds that the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, is invalid and void as being in excess of the statutory power of the defendant Secretary of Agri-

culture, in that the said differential is not one of the adjustments to the uniform blended price authorized under the Agricultural Marketing Agreement Act of 1937, as amended, and constitutes a diversion of that portion of the uniform blended price represented by said differential to which the plaintiffs and their class are entitled under the said Act. The said nearby differential provision does not constitute the adjustments authorized under either 608c (5)(b)(ii)(a) or (c) of the Act, nor is it authorized under 608c(7) of the Act as incidental, consistent and necessary in respect to the other terms and conditions of the Act. The said nearby differential payments to the eligible milk producers are determined on the basis of the location of their farms and are not authorized as production or market differentials under the Act. H.R. Rep. No. 1241, 74th Cong., 1st Sess. 10 (1935). Nor does eligibility for such nearby differential payments turn on the location at which delivery of the milk is made, but solely on the location of the farms in the areas designated in Section 1001.72 of the milk order.

As in *Blair,* the differential involves considerations involving the use of milk of the eligible "nearby" milk producers and the payments thereof are also geared to the use of fluid milk, thus violating the prohibitions of the Act concerning payment to all producers of a uniform price for their milk irrespective of use thereof. For these and the other reasons stated in *Blair,* the nearby farm location differential provision of the Massachusetts-Rhode Island milk order is invalid and void. The Court has fully considered the other claims and defenses of the defendant, the amicus curiae, and the applicants for intervention herein, including that claim of Frederick T. Zuber, et al., applicants for intervention, that invalidation of the nearby differential by this Court would deprive nearby milk producers of property without due process of law and concerning the alleged non-separability of the provisions of

the milk order, Section 1001.96, and the Court finds that the same do not constitute a basis for denial of the plaintiffs' motion and the relief requested in their complaint. Further, the Court has found that the plaintiffs and their class are sustaining irreparable injury by virtue of the nearby differential payments and that the issues presented are properly those for judicial determination.

Now, THEREFORE, the Court makes the following

CONCLUSIONS OF LAW

1. The plaintiffs and their class are entitled to the granting of the motion for summary judgment filed herein by them on the 24th day of February, 1967.

2. The plaintiffs and their class are entitled to the relief requested in their complaint, namely declaration of the invalidity of Section 1001.72 of the Massachusetts-Rhode Island milk order and a permanent injunction against its continued enforcement by the defendant, in order to preclude further irreparable injury to them, and they have no adequate remedy at law.

ORDER

WHEREFORE, it is by the Court this 15th day of June, 1967,

ORDERED, that the motion for summary judgment filed herein by the plaintiffs and their class be and the same hereby is granted, and it is further

ORDERED, ADJUDGED and DECREED, that the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, be and the same hereby is declared invalid and void, and it is further

ORDERED, ADJUDGED and DECREED, that the defendant Secretary of Agriculture, his Market Administrator for the Massachusetts-Rhode Island milk marketing area, their agents, attorneys, servants and employees, and all persons in active concert or participation with them, be and they hereby are restrained and enjoined from enforcing the nearby farm location differential provision of the Massa-

chusetts-Rhode Island milk order, Section 7 C.F.R. 1001.72, at any time in the future under the same or any other name or designation, either directly or indirectly, and it is further

ORDERED, ADJUDGED and DECREED, that the defendant take all necessary action to effectuate the required termination of the operation of said milk order provision, and it is further

ORDERED, that the defendant, his Market Administrator for the Massachusetts-Rhode Island milk marketing area, their agents, employees, attorneys and servants, comply with the orders of this Court of the 16th day of January, 1967, and the 21st day of March, 1967, requiring that a separate report be filed with the Court and furnished to plaintiffs' counsel, Charles Patrick Ryan, 400 Prudential Building, Washington 5, D. C., concerning the information relating to deposits of the differential payments in the escrow fund established under the control of this Court, for those months for which such a report was not filed or furnished, to and including the report relating to the milk delivered during the month of April, 1967, the said reports to be filed and furnished on or before the 30th day of June, 1967, and it is further

ORDERED, that the defendant and his said Market Administrator retain the monies representing the nearby differential payments deposited in the said escrow fund pending further order of this Court to be entered concerning distribution of the said fund after compliance with the filing and furnishing of the said monthly reports as aforesaid and after a ruling by the United States Court of Appeals for the District of Columbia Circuit in respect to the appeal of Frederick T. Zuber, et al., No. 20,931, of the Order of this Court denying them intervention in this action, dated March 21, 1967, said appeal being presently pending in the Court of Appeals.

JOSEPH C. MCGARRAGHY
District Judge.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,141

FREDERICK T. ZUBER, ET AL., *Appellants,*

v.

RUSSELL ALLEN, ET AL., *Appellees.*

No. 21,308

ORVILLE FREEMAN, SECRETARY OF AGRICULTURE, *Appellant,*

v.

RUSSELL ALLEN, ET AL., *Appellees.*

Appeals from the United States District Court
for the District of Columbia

Decided September 23, 1968

Mr. Lawrence D. Hollman, with whom *Mr. Carlyle C. Ring, Jr.,* was on the brief, for appellants in No. 21,141.

Mr. Walter H. Fleischer, Attorney, Department of Justice, with whom *Assistant Attorney General Edwin L. Weisl, Jr., Messrs. David G. Bress,* United States Attorney, and *Alan S. Rosenthal,* Attorney, Department of Justice, were on the brief, for appellant in No. 21,308. *Mr. Frank Q. Nebeker,* Assistant United States Attorney, also entered an appearance for appellant in No. 21,308.

Mr. Charles Patrick Ryan for appellees.

Mr. Edward J. Ryan filed a brief on behalf of the State of Vermont, as *amicus curiae* in No. 21,141. *Mr. Charles P. Ryan* also entered an appearance for the State of Vermont as *amicus curiae* in No. 21,141.

Mr. Franklin M. Schultz filed a brief on behalf of the State of Connecticut, as *amicus curiae* in No. 21,141.

Mr. James R. Worsley, Jr., filed a brief on behalf of the Commonwealth of Massachusetts as *amicus curiae* in No. 21,141.

Before BURGER, WRIGHT and MCGOWAN, *Circuit Judges.*

MCGOWAN, *Circuit Judge:* These are appeals by the Secretary of Agriculture and a group of dairy farmers from a judgment of the District Court declaring illegal and enjoining further enforcement of the "farm location differential" provision[1] in the 1964 federal milk marketing order for the Massachusetts-Rhode Island area. We recently invalidated a like provision of the 1957 New York-New Jersey milk marketing order on grounds of its incompatibility with the Agricultural Marketing Agreement Act of 1937.[2] *Blair* v. *Freeman,* 125 U.S. App. D.C. 207, 370 F. 2d 229 (1966). Since we find that the farm location differential of the Massachusetts-Rhode Island order is no less irreconcilable with the statute, we affirm the judgment and order of the District Court.

I

The rationale and mechanics of federal regulation of the marketing of milk and other dairy products have been fully described in *Blair* and elsewhere.[3] Briefly, the marketing order is designed to eliminate the destructive competition which grew out of the surplus conditions which characterized the milk industry before federal regulation. The de-

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[1] 7 C.F.R. § 1001.72 (1968).

[2] 7 U.S.C. §§ 601-24 (1964), *as amended,* (Supp. I, 1965).

[3] *See* Lehigh Valley Cooperative Farmers, Inc. v. United States, 370 U.S. 76 (1962); H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588 (1939); United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939); Grant v. Benson, 97 U.S. App. D.C. 191, 229 F. 2d 765 (1955), *cert. denied,* 350 U.S. 1015 (1956); Green Valley Creamery, Inc. v. United States, 108 F. 2d 342 (1st Cir. 1939).

vice chosen to this end is a uniform, "blended" price to be paid by handlers to each producer in the marketing area, regardless of whether his milk is ultimately disposed of by the handler at the high Class I price for fluid use, or at the lower Class II price paid for milk to be used in the manufacture of various milk products (butter, cheese, ice cream, and so on). An equalization pool, called the "producer settlement fund," is administered by the agent of the Secretary of Agriculture to maintain the blended price; and handlers make payments to or withdrawals from the pool in the amounts by which the use value of milk which they handle exceeds or is less than the blended price.

The Act specifies several limited exceptions which the marketing order may make to the requirement that each producer receive a uniform price. Thus, Section 8(c)(5) permits the inclusion in the order of provisions

> (B) Providing:
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> • • •
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> (ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject . . . only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made . . . .

Purportedly acting pursuant to the authority of this section, the Secretary included in the 1964 Massachusetts-Rhode Island order several differentials which operate to vary the payments to producers. These are (1) a "butterfat differential," based on the quality of the farmer's milk;[4] (2) "zone differentials," which vary inversely with

[4] 7 C.F.R. § 1001.71 (1968).

the distance from Boston of the handler's plant to which the producer delivers his milk;[5] and (3) the "farm location differentials," which are paid to producers whose farms are located near the principal consumption centers. This last form of differential, commonly known as the "nearby differential," is forty-six cents per hundredweight for farmers located in certain designated towns and twenty-three cents per hundredweight for those in more distant towns.

The plaintiffs, 168 dairy farmers who are ineligible for any farm location differential, brought this action against the Secretary of Agriculture seeking a halt to these allegedly discriminatory and unauthorized payments.[6] They are aggrieved in that the differential is paid out of the equalization pool, rather than the handler's own pocket, and consequently reduces the blended price received by all producers. The District Court granted the plaintiffs' motion for a preliminary injunction which provided for the escrowing of the challenged differential, and thereafter, relying wholly on our decision in *Blair* v. *Freeman,* granted their motion for summary judgment. The escrowing, though later amended to release amounts attributable to nearby producers, was continued pending a decision by this court. When it appeared that the Secretary might not appeal,[7] we granted Zuber and seven other nearby farmers, whose motion to intervene had been denied by the District Court, leave to intervene for the sole purpose of protecting their

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[5] 7 C.F.R. § 1001.62 (1968).

[6] The suit was filed a few weeks after our decision in *Blair.* In that case we made clear the wholly prospective nature of our decision, stating that it was "not intended to afford any basis for recovery by appellants or their class based on past payments." 370 F. 2d at 240. We reaffirm that approach here.

[7] This prospect was represented as residing in the fact that the Government had decided not to seek review in the Supreme Court of our decision in *Blair.*

rights by appeal. The Secretary subsequently perfected an appeal, which we heard together with that of Zuber.

Appellants have pressed upon us several distinct positions. They argue, first, that the farm location differential is valid because it is founded not upon the factor of fluid milk utilization condemned in *Blair* but on other considerations which are authorized by the Act. Secondly, they contend that, whatever might be the fate of another farm location differential under Section 8(c)(5), this particular provision was explicitly ratified and validated both by Congress in 1937 and by the United States Court of Appeals for the First Circuit in 1939. Thirdly, appellants assert that, if the legality of the provision is not clear, neither is its illegality; and that the case should be remanded to the Secretary to afford him an opportunity to elucidate the legal and factual premises of the nearby differential, or to determine whether, if the differential must fall, the marketing order should be continued, with or without other changes. Finally, it is argued that, even if the District Court is affirmed, considerations of equity dictate that its judgment be wholly prospective from the date of our decision, and that the escrowed monies should be distributed to the nearby farmers who have relied on the farm location differential for so many years. We deal with these points in order.

II

As we held in *Blair:*

> [T]he Act forbids consideration of the use to which the milk of a particular producer or class of producers is put, historically or potentially, in adjusting the uniform minimum price to be paid to such producers.[8]

In adopting the New York-New Jersey order in 1957, the Secretary was explicit in his reliance upon this outlawed

[8] 370 F. 2d at 237.

consideration.[9] He is certainly less so in his justification of the 1964 Massachusetts-Rhode Island order:

> Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.
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> . . . .
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> . . . [W]e believe there are adequate reasons on this record for continuing the farm location differentials at their present rates.[10]

But we do not think it can be said, as appellants now do, that this explanation does not reflect any reliance whatsoever upon the prohibited factor of fluid use patterns. To say, of the order under review, that milk produced in locations close to principal consumption centers has enjoyed "customarily somewhat higher values" above transportation costs, and that the differential is provided to reflect

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[9] The differential had been designed, he said:

> to give the nearby producer a somewhat greater share of the high-priced [fluid] milk than he would obtain through market-wide pooling without such a differential . . . .

and

> to reflect the fact that under competitive conditions milk produced in this area has a traditional outlet as fluid milk . . . .

22 Fed. Reg. 4213-14 (1957).

[10] 29 Fed. Reg. 11205, 11213-14 (1964).

"these historical price relationships by location," may be only a less direct way of saying, as in the case of the New York-New Jersey order, that the differential was designed "to reflect the fact that under competitive conditions" nearby producers got a higher price because they had a bigger share of the fluid use market. If examination is made of the "record" to which the Secretary adverted in his 1964 statement—the various New England marketing orders which preceded the 1964 order and the administrative records on which they were based—it is revealed inexorably that, as in the case of New York-New Jersey, those "historical price relationships by location" were the fluid use advantages which the Act expressly condemns.

The 1964 order consolidated the former federal orders regulating the handling of milk in four separate marketing areas: Greater Boston, Worcester, Springfield, and Southeastern New England. The oldest and most prominent of these was the Greater Boston marketing order. Under federal "licenses" pursuant to the 1933 Agricultural Adjustment Act,[11] milk in the Boston area was marketed, as it had sometimes been by cooperative associations before federal regulation, through base-rating plans. In 1934 the market administrator

> allotted preferential bases to nearby producers to give effect to the historically higher prices they had received in the market. A study was made of the eight years 1926 to 1934 to obtain the proper differential between nearby and distant producers' returns from the sale of milk. It was determined that all producers where milk was *delivered directly to plants located within 35 miles* of the State House in Boston should have bases equal to 85 percent. . . . [as compared with 61 percent for all other producers].[12]

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[11] 48 Stat. 31 (1933).

[12] Barnhardt, Federal Regulation of Milk Handling in Boston 95 (1947) (emphasis added).

Because many nearby producers refused to comply with the license, and "as a concession to win the cooperation of the Massachusetts Milk Control Board in enforcing, or trying to enforce, the terms of the federal license,"[13] in 1935 cooperative associations agreed to allow producers whose farms were within forty miles of the State House bases of 100 per cent. This forty mile radius later became official under Greater Boston Order No. 4.

This Order No. 4, promulgated in 1936 after the 1935 amendments to the Act, retained the base-rating system but abandoned the preferential bases for nearby producers. In their place it was provided that producers whose farms were located within forty miles of the State House and *who delivered to plants within the same area* be paid the full Class I price for all milk not in excess of their bases. Other farmers received only the blended price for their bases. Distant producers could, however, receive an additional twenty-one cents by delivering to a handler within the forty mile radius—a "country station" differential which (unlike the situation today) was not also available to the nearby producer. The latter differential was found by the Secretary to be a "reasonable allowance for the extra handling costs incurred by handlers operating country station plants." As to the former, the Secretary stated that

> the payment of class I prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, *due to the greater availability of their milk for class I use.* . . . (emphasis added)

The order did not expand upon this ground for the preferred treatment of nearby producers. It is a finding which appears to be derived directly from the testimony at the hearing of the representative of the U. S. Department of

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[13] *Id.* at 231.

Agriculture. In explaining the proposed order, he said this about the differential in question:

> Now, I presume that you know some reason for that special provision located in that zone. I am not sure that I made such a statement of that as we here in this brief, and so I think I might make it at this time, and then perhaps there will be further questions.
>
> With respect to this particular provision, it should be noted that a producer whose farm is located near the market is in a position to supply Class I milk for use at all times, at less cost and distances, and if necessary he can, after each twice-a-day milking, put his milk on his own truck and deliver it to a handler or to consumers. Forty miles, however, is approximately a limit of the use of such facility in handling milk.

Evenness of production was certainly not assigned as the reason, presumably because this quality was already compensated by base-rating itself. Higher local production costs had been mentioned at the hearings in support of the special treatment, but this ground was evidently rejected by the Secretary. Since nearby producers were not also to receive the "country station" differential, their preference must have been attributable in large part to transportation and handling advantages. This surmise is supported not only by the Secretary's use of the word "availability" but also by the following argument in the Department of Agriculture's Economic Brief in 1936:

> It should be noted that a producer whose farm is located near the market is in a position to supply milk for Class I use to the market more easily at all times than those at a greater distance. Much less time is required for the movement of the milk and a greater variety of transportation facilities are available to such a producer. If necessary, he can, after each twice-a-day milking and within two hours deliver it

> to a handler or even to consumers. . . . Moreover, those producers whose farms are located beyond the forty-mile line who so desire may deliver their milk to handlers within the forty-mile line, in which event they are to be paid the blended price, plus [21] cents.
> . . . .

The savings in transportation and handling expenses were not, of course, the whole story. The Agriculture Department's testimony and brief identify another element which was also heavily emphasized at the hearings, namely, the nearby producers' opportunities for direct access to the consumer. This fact was cited at the hearings as the explanation for traditionally higher prices to nearby producers ("he can sell it to the dealer or become a dealer himself, and go direct to the [consumer], and you cannot stop him") and as a potential "menace to the enforcement of the agreement."

In sum, the Secretary did not indicate that he had accorded nearby producers a preferred position because their ever-available milk supply was itself more valuable to the handlers. His action, rather, was based on the nearby producers' "economic position," a position which had enabled them to command higher prices from handlers before regulation and which enabled them to coerce this concession in the marketing order. The reason for this "economic position" was, as the Secretary recognized, "availability *for Class I* use." We are unable to distinguish this factor from the consideration of historical fluid use patterns condemned in *Blair*.

After passage of the 1937 Agricultural Marketing Agreement Act, Order No. 4 was amended to do away with base-rating. The nearby producer's preferred status was preserved, however, by the payment of farm and delivery location differentials. For the first time, the condition of nearby delivery was dropped from the farm location differential, and the farm location and delivery location dif-

ferentials were paid cumulatively. The Secretary found only:

> [t]hat in view of changes in economic conditions since the date of the original findings, the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for milk so delivered, *without the use of a base-rating plan, but with the inclusion of special location differentials,* is a fair and reasonable method of distributing to producers the proceeds of sales of milk to handlers.[14]

The farm location differential was designed to reproduce as closely as possible the nearby farmer's preferred position under base-rating. Thus, the differential was (and still is) payable only to the extent that it did not increase the producer's payment above the Class I price.[15] As the

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[14] 2 Fed. Reg. 1331 (1937) (emphasis supplied).

[15] This feature of the order is similar to a provision of the New York-New Jersey order which we found in *Blair* to indicate the connection between the differential and the prohibited consideration of fluid milk use. We there said:

> . . . that payments vary (inversely) with the extent of fluid milk utilization [in the entire market]. The differential is sensitively attuned to the supposed special place of the nearby producer in the fluid milk market, and is taken away when fluid milk utilization is so high marketwide that he merits no premium based on that special place.

370 F. 2d at 237-38. A like interaction between the amount of the differential and marketwide fluid milk utilization is achieved by the provision of the Massachusetts-Rhode Island order that if "the addition of 46 cents gives a result greater than the Class I price . . . there shall be added [only] a rate which will produce that price." Since the blend price itself rises with increased fluid utilization, the amount of the differential necessary to give the nearby farmer the Class I (fluid) price varies inversely with marketwide fluid milk use.

Agriculture Department argued in its 1937 Economic Brief:

> It is thought that the proposed plan, which gives consideration to those producers located nearby the market who are predominantly even and who as a group have very uniform deliveries, and which returns a price higher than the average to the other even producers, accomplishes the purpose for which the rating plan in Order No. 4 was intended.

Evenness of production, which was awarded on an individual basis under base-rating, was an alleged advantage of nearby farmers frequently cited by proponents of the differential during the hearings as explaining their historically higher prices. The Market Administrator's explanation is typical:

> The idea is, without regulation over a period of years producers whose farms are near the market, due to the fact that their milk is accessible to small dealers, and their milk is rather even throughout the year, have been able to obtain a price greater than the country station charges. So that, if we set up a plan which did not give them the same advantage which they would have without regulation it would be unfair to them. . . . It is the desire of the Administration to maintain the relative positions and to set that figure at a point which will do that.

This assertion about seasonality was somewhat undermined by the Department's admission that only two-thirds of the nearby producers could be classified as even, and that "even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors." The principal relevance of evenness was not that it constituted an element of value in the sense of dependability to the handler, but that nearby producers, who as a group con-

tributed less to the surplus in the market, should not share the burden of that surplus by receiving only the blended price. This resort to seasonability, then, was not so much in explanation of historically higher prices but rather in recognition of the fact that the nearby farmers' evenly produced milk had been sold primarily at Class I prices, *i.e.*, for fluid use.[16]

Aside from references to evenness of production and the unfairness to the nearby farmer of disturbing his traditionally preferred market position, the evidence revolved mostly around what would happen if nearby farmers were not favored. The New England Milk Producers Association swore they would "oppose the license with every means in their power," and the witness referred to in footnote 16 made the pregnant observation that "there is always a row in the market unless [the nearby producers] are compensated in some way." One source of their power was also recognized: "We are all within retailing distance of the market and we are potential producer-dealers." This potentiality also underlay the observations in the Department's brief and elsewhere that "their milk is accessible to small dealers." This reference to availability was limited to small dealers as it had not been in the Secretary's finding in the 1936 Order, presumably because only large handlers could afford to bring in their milk from distant farms. That nearby farmers had a

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[16] This is evident from the 1937 testimony of the president of the Nearby Producers Association, asking for a nearby differential of at least one cent per quart over the blended price:

> Now, we feel that to be protected in our special place in the market requires two things. We must be protected against seasonal surplus. Our production is even and has always been regulated closely to the requirements of our distributors. Some of them asked distributors, will ask for more or less milk as they want it. [sic] In the second place, we must have somewhere near our differential—our consumer differential over the 200-mile zone, and get that much . . . .

captive market, however, does not alone explain the higher price, without the additional fact that the farmers or handlers could dispose of the milk at Class I prices. Economist Ellsworth Bell's brief to the Secretary concisely described this economic advantage:

> Being adjacent to markets the [nearby] dairymen command a natural sales advantage whereby it is taken first at the fluid price. . . . [Historical price difference] exists due to peculiar advantages existing for disposal and sale of milk at the higher market price.

In 1949 the Secretary first promulgated orders for the Springfield and Worcester markets, both of which contained nearby farm location differentials. Those in favor of the differentials had given testimony similar to that which preceded the Boston orders, and had argued for uniformity of treatment with the Boston market. In approving the differentials, the Secretary adverted to "the customary market practice of paying somewhat higher prices to producers located near the sales area." These historically higher prices were explained as follows:

> This difference cannot be attributed to transportation cost alone. The many opportunities for dairymen to market their own milk directly influence the price which they demand for their product.[17]

Those direct marketing opportunities were, of course, for fluid use at Class I prices.

In 1951 the Secretary held hearings on a proposal to eliminate the nearby differential in the Boston order. Opponents of the differential argued that it constituted a trade barrier; that evenness of production, if compensable at all, should be recognized on an individual basis; that the

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[17] 14 Fed. Reg. 7085, 7089 (1949); 14 Fed. Reg. 7097, 7102 (1949).

validity of the differential should be reexamined in the light of contemporary economic conditions; and that if nearby milk has any extra intrinsic value it should be paid for by the handlers rather than by the pool. Proponents of the differential brought out all the old arguments, with somewhat greater emphasis this time on the disruptive market effects of eliminating the differential, and on the unfairness to nearby farmers for whom the nearby differential had become capitalized into greater land values. A major pillar of their argument was the unabashed assertion that in terms of "historical price relationships . . . producers located near the market were able to sell a larger proportion of their milk at Class I." The representative of the Massachusetts Milk Control Board, for example, testified that the differential was not discriminatory but rather had been

> adopted by way of partial compensation to nearby producers for the losses which they suffered when the equalization provisions deprived them of those natural advantages which prior to federal regulation always enabled them to sell at [sic] a relatively higher percentage of their production of Class I milk.

The Secretary concluded that "no change should be made at this time" because the opponents had "presented no material facts different from those considered in establishing specified location differentials as a part of the order provisions." [18]

In the 1958 southeastern New England order, one of those now consolidated into the 1964 Massachusetts-Rhode Island order, the Secretary for the first time gave a detailed economic justification for the nearby differential, which he described as "identical with that employed in adjacent Federal order markets," a characterization which

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[18] 16 Fed. Reg. 9250, 9255 (1951).

includes the New York-New Jersey order invalidated by us in *Blair:*

> Historically, dairy farmers in the States of Massachusetts, Rhode Island, and Connecticut, because of their location with reference to the large population concentrations of New England have disposed of a substantially larger percentage of their production for fluid uses than have dairy farmers in the upcountry area. Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. Under the marketwide pooling system herein proposed and without some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk on the milkshed rather than according to the utilization of his milk. Under a regulated market, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and has assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources. The distant producer also benefits from an established Class I price, and by the fact that he gains a larger share of the fluid market than is likely without marketwide equalization.
>
> The use of a nearby differential will return to nearby producers a somewhat greater share of the Class I price than they would otherwise obtain through marketwide pooling. Moreover such a differential will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization.[19]

This rationale—which is clearly reflected in the 1964 order's language about "historical price relationships by

[19] 23 Fed. Reg. 8238 (1958).

location''—is indistinguishable from that advanced the year before in support of the 1957 New York-New Jersey order condemned by this court in *Blair* v. *Freeman*.[20]

The testimony at the hearings preceding the 1964 order served mainly to reinforce the Secretary's reliance on historical fluid use patterns as the primary justification for the nearby differential. Most of the witnesses in favor of retaining the differential either ignored, or rejected as irrelevant, the question of whether it had ever been authorized under the Act. Their testimony dwelt upon the absence of adverse economic effects of the differential, and the dire consequences which would flow from its elimination. When their attention was directed to the issue of the differential's original justification, some reiterated the testimony of 1937 to the effect that the differentials recognized the evenness of production of nearby milk and its accessibility to small dealers; that the nearby farmers enjoyed a favorable bargaining position because of their ability to become producer-dealers; and that the differential was a necessary compromise to win the support of the nearby farmers and Massachusetts Milk Control Board for the federal order.

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[20] The following year an identical provision was incorporated in the Connecticut order. It was proposed that this order be consolidated in the 1964 Massachusetts-Rhode Island order. It was not, but there is no indication that the Secretary viewed the nearby differential in Connecticut as in any way different from those under other Federal marketing orders:

> The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes. Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated markets.

24 Fed. Reg. 1049, 1063 (1959).

Almost to a man, however, the witnesses at the hearing testified—and no one denied—that the principal reason for the differential was to preserve for nearby producers their traditionally high percentage of the fluid use market. One witness even argued as follows for an increase in the nearby differential:

> We don't feel that these market pools were set up to make it possible for distant milk to take the Class I sales that rightfully belong to nearby farmers away from them. Again I think you have to consider the use value of the milk in determining the prices to the producers.

And a committee report specially prepared for the Department of Agriculture in 1962 was read into the record. While nearby milk was claimed to have various advantages, the report concluded that:

> the major purpose of nearby differentials apparently has been to compensate nearby producers for sharing market Class I sales with more distant producers in a marketwide pool.

In view of the concurrence of all concerned—including on occasion the Secretary himself—that the differential was a recognition of historical use values, we find it impossible to conclude that the Secretary did not rely on this illegal consideration in approving the 1964 order as well as all of its predecessors. Although in patent conflict with the blended price regulatory scheme propounded by Congress, it was apparently thought that the resulting distortion was a price necessary to be paid in order to get sufficient agreement to support a marketing order, and that it was better to pay that price than to have no order at all.

III

Section 4 of the 1937 Agricultural Adjustment Act provided:

> Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any

> regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.[21]

Appellants argue that, since nearby differentials appeared in the Greater Boston order before 1937, Section 4 immunizes the farm location differential from invalidation under another section of the Act.[22] We find this contention unpersuasive for several reasons.

First, it does not appear that a farm location differential of the kind now under attack ever appeared in a greater Boston license or order before 1937. There were differentials based on *delivery* location, and for a time farm location was one condition along with delivery location, but none seems to have been based on farm location alone. Moreover, the differential was never one payable over and

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[21] 50 Stat. 249 (1937).

[22] Appellants argue alternatively (1) that nearby differentials, even if inconsistent with Section 8(c)(5), were legalized by Section 4; or (2) that Section 4 constituted a legislative determination that every feature of extant federal licenses or orders before 1937 fell under one or more of the enabling provisions of the Act—in particular, that the nearby differential was a market or location differential within Section 8(c)(5). In support of this latter construction, appellants point to language in the Committee Reports underlying the 1935 amendments to the effect that "these terms [of Section 8(c)(5)] follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act [of 1933] and the provisions of licenses issued pursuant to the present [Act] . . . ." H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 9 (1935).

above the transportation differential available to distant producers who delivered to a nearby zone.[23]

Second, Section 4 itself ratifies only those provisions and acts which were "done under the Agricultural Adjustment Act." This qualification negates any inference that Congress intended to sanction orders which were illegal under other sections of the Act. And this construction is consistent with what was clearly the sole legislative purpose underlying Section 4, namely, to prevent technical abatements which arguably might result from reenactment of the 1933 Act. In *United States* v. *Butler*, 297 U.S. 1 (1936), the Supreme Court had invalidated certain of the production control provisions of the 1933 Act; and several lower courts, construing these provisions as not severable, thought that the marketing agreement and order sections must also fall. Section 1 of the 1937 Act specifically reenacted the latter provisions of the Act in order to avoid that result.[24] Congress feared, however, that such reenactment might itself be construed as suggesting that, pending its accomplishment, the Act, and all actions taken by the Secretary under its aegis, had been illegal. Hence Section 4 of the 1937 Act.[25]

Appellants further assert that the legality of the farm location differential was established in 1939 by the United States Court of Appeals for the First Circuit in *Green Valley Creamery, Inc.* v. *United States*, 108 F.2d 342 (1st

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[23] See the descriptions of the licenses and orders, pp. 36a-38a, 39a-40a *supra*.

[24] 50 Stat. 246 (1937).

[25] The House Report stated:

> Section 4 . . . negatives any implication that [the bill's] effect is to invalidate or cast doubt on action heretofore taken under the agreements and orders provisions. The section also expressly ratifies, legalizes, and confirms such action.

H.R. Rep. No. 468, 75th Cong., 1st Sess. 4 (1937).

Cir. 1939). That case began as an action by the United States and the Secretary of Agriculture seeking a marketing injunction requiring the defendants, a group of milk *handlers*, to comply with Order No. 4 regulating milk marketing in the greater Boston area. One of the defenses was that the farm location differential was not authorized by Section 8(c)(5). After holding that *handlers* had no standing to raise this defense, the court volunteered the view that the differential could be justified under the Act either as a delivery location differential or a "market differential customarily applied." [26]

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[26] The court's rationale was as follows:

> There was evidence before the Secretary to the effect that similar differentials in favor of nearby farms had existed in the Boston market for many years. Various factors were mentioned as accounting for this, including their greater accessibility to the market, and their greater dependability as sources of supply, because, as experience showed, the nearby farms had a more uniform level of production throughout the year. These producers were also potential dealers, who might establish their own milk routes in competition with handlers in the Boston market, if prices were not acceptable. Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted in the Order so as not to disturb the status quo in this respect. Milk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market; and thus, paragraphs 3 and 4 of Section 4, Article VIII, may be said to prescribe differentials having relation to locations at which deliveries are made. This argument need not be labored, however, for the differentials can readily be sustained under Section 8(c)(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called "location differentials" in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market.

108 F. 2d at 346.

We took note of the *Green Valley* opinion in *Blair*, where it was also pressed upon us as dispositive; and at that time we expressed our disagreement with the First Circuit's analysis.[27] In any event, the opinion in that case could not control the outcome here. In the first place, only one of the orders which was consolidated into the Massachusetts-Rhode Island order in 1964 was under attack in *Green Valley*. Moreover, the defendants in that case were all handlers, and there was no representative of the class of non-nearby producers before the court. Indeed, as we said in *Blair*, the approval of the differential was a *dictum*, since "the court's holding was that the handlers lacked standing to challenge the disposition of the producer settlement fund."[28] We must conclude, therefore, that neither Congress nor the courts have validated the farm location differential of the Massachusetts-Rhode Island order.

IV

Appellants insist that, even if the Secretary had in the past relied upon historical fluid use patterns, there are other legitimate legal and factual grounds for the farm location differential. Therefore, they urge, the court should, before striking the provision from the order, in effect remand the case to the Secretary for an opportunity to offer a more explicit justification for the differential. We are not impressed with this suggestion since we do not think that a court should, in the face of what it finds to be a clear and continuingly burdensome statutory violation, albeit one of long standing, defer a declaration of its illegality. We are especially not disposed to do so where there appears to be no serious possibility of finding warrant in the statute for a preference based solely on farm location.

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[27] 370 F. 2d at 238.

[28] *Id.* at 238, n. 34.

We need not speculate as to what the Secretary would do upon such a remand, for he has already, since our decision in *Blair* and the judgment of the District Court in this case, issued a recommended decision on the farm location differential in the Massachusetts-Rhode Island order. He there concluded after further hearings on the subject that the nearby differential "should be continued." He noted that nearby farmers had received higher prices "prior to the advent of federal regulation," that this advantage had been preserved in the base-rating plans of the federal licenses and 1936 Boston order, and that it had been carried over into the nearby differential of the 1937 order. The Secretary quoted from the 1937 record to the effect that the historically higher price was:

> due to the fact that their production is relatively even, and that their milk is accessible to small dealers. . . . If we should take away from these producers a differential that they have been able to get without Government regulation, they would have a legitimate objection that we are placing them at a comparative disadvantage. . . .[29]

The fact of historically higher prices is, of course, not alone sufficient. The reason for that difference must not, under the Act, have been related to sales advantages for fluid use. To avoid this pitfall, the Secretary assigned two other explanations for the high prices: availability and evenness of production. The former is not a legitimate factor. To the extent that it reflects the nearby producers' ability to become distributors directly to the consumer, it is no more than an aspect of the high fluid utilization advantage. To the extent that availability means de-

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[29] 32 Fed. Reg. 9902, 9919 (1967).

pendability and ease of access, it is, as we held in *Blair*,[30] and as the Secretary himself recognized in the New York-New Jersey order, "related to the extra value of such milk to the handler who buys it rather than to producers generally and [is], therefore, . . . payable by handlers rather than out of the pool."[31] Nor would evenness of production appear to support a differential based on farm location. While nearby production may as a general matter be more even, there have been wide individual variations in seasonality throughout the milkshed. Moreover, as the Secretary stated in his New York-New Jersey decision,[32] uniform supply should be compensated on an individual basis. The Act makes provision for base-rating,[33] and it appears to be the only sanctioned method by which to stimulate and compensate even production by individual farmers.

None of the differentials permitted by the Act contemplate in terms preferential treatment on the basis of farm location.[34] A dual legal justification for the nearby

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[30] If this history has any current significance, if the milk has greater "value" to the handler for reasons other than quality and location of delivery, it may be a reason for the producer to receive out of the handler's own pocket a premium above the minimum price, but this would not be a justification permitted by the law for a diversion from [distant farmers] of their equal share of the blended uniform minimum price adjusted only for the statutory differentials.

370 F. 2d at 238-39.

[31] 22 Fed. Reg. 4194, 4213 (1957).

[32] *Id.*

[33] 7 U.S.C. § 608c(5)(B) (Supp. 1967).

[34] While the Secretary relies only on the provisions for market and location differentials, the other appellants have attempted to justify the nearby differential as a "volume" or "production" differential. The Committee Reports, however, show those exceptions to be clearly inapt. H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 9-10 (1935).

differential, was, however, offered in the 1967 recommended decision:

> Clearly . . . these greater returns . . . were, in the language of the statute "market differentials customarily applied by the handlers." . . . Inasmuch as these greater returns for milk were directly related to geographical source, it was considered that these differentials were also adjustments based on "location" . . . within the meaning and context of [the Act].[35]

But the only "location" differential permitted by the Act is one for "the location at which delivery" of the milk is made to the handler. Plainly, this exception was designed to recognize differences in transportation costs only, and does not encompass a preference based solely on farm location.[36]

Nor is farm location comprehended within the provision for "market . . . differentials customarily applied by the handlers." The Committee Reports in respect of the 1935 Act are explicit that "the market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant."[37] This adjustment, of which the "country

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[35] 32 Fed. Reg. 9202, 9919 (1967).

[36] It may be that in authorizing a location differential in 1935, Congress intended to preserve the preferences enjoyed by nearby farmers under pre-1935 federal licenses and under voluntary agreements before any federal regulation. Those preferences, it appears, were phrased in terms of location of *delivery* (or delivery plus farm location), and it was generally true at that time, as the First Circuit noted in *Green Valley* (see n. 26 *supra*), that delivery and farm locations coincided fairly close. It is probably safe to guess that not until bulk tank trucking thereafter made it economically feasible for distant farmers to deliver in the city did the nearby farmers, for self-protection, insist that the nearby differential be based solely on farm location.

[37] H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 10 (1935).

station" differential of the 1936 greater Boston order was an example,[38] recognized the savings in handling costs when milk in fluid form is delivered to the city rather than first to a country plant. Provision is now made for this differential in the Massachusetts-Rhode Island order as a fixed portion of the zone differential.[39] As we held in *Blair*,

> it is plain that this type of allowance turns not on the location of the producer's farms but on the nature of the market to which they deliver their milk. The "market differential" rationale is plainly not a tenable basis for thenearby differential.[40]

On August 2, 1968, the United States District Court for the Northern District of New York elected to treat a nearby differential of the kind here in issue as a "market differential." *Cranston* v. *Freeman*, —— F.Supp. ——. It recognized that the result it reached was directly in conflict with our decision in *Blair*, but it went on to say that while it "concurs with the Court of Appeals for the District of Columbia that the uniform price requirement was designed to eliminate ruinous competition for the fluid milk market, it cannot concur in [that Court's] conclusion that the requirement prohibits recognition of the historic fact that farmers located in particular areas near the market were accorded a greater share of that market." In other words, although Congress authorized a price pooling arrangement in order to eliminate revenue disparities among producers due to varying access to the fluid milk market, those who enjoyed that advantage be-

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[38] See p. 36a-37a *supra*.

[39] The purpose of establishing zone differentials is to achieve a high degree of uniformity in prices to all handlers f.o.b. the market for milk which is received from producers at plants located at various distances from the principal consumption area. To achieve this purpose, the zone differentials must closely reflect costs generally incurred in receiving milk at country plants and moving such milk to city plants.

29 Fed. Reg. 11205, 11210 (1964).

[40] 370 F. 2d at 238.

fore pooling must continue to have it because a larger percentage of their production customarily goes into fluid milk use. This is, of course, precisely what the Secretary gave as his primary reason for including the nearby differential in the Connecticut marketing order involved in *Cranston:*

> Provision should be made also for the payment of a market differential to producers in the nearby supply area. The monies for the payment of these differentials will be obtained by a deduction from the total value of all milk before completing the computation of the market-wide uniform price.
>
> . . . .
>
> Milk received from the nearby area has long represented the major part of the total Connecticut supply. *The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes.* Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern of pricing has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated market. *The differentials adopted will reflect more representative values with respect to the milk of both nearby and distant producers since the nearby producer will share in the higher-priced Class I market to an extent somewhat greater than otherwise would be the case under marketwide pooling.* (emphasis added) 24 Fed. Reg. 1049, 1063 (1959).

The *Cranston* court does not, therefore, sustain the nearby differential on some reason other than that relied upon by the Secretary in propounding it. It, rather, embraces fully the Secretary's persistent assumption that Congress did not really mean what it said about end-use

not being allowable as a factor in fixing the amount received for milk by the producer.[40.1] The *Cranston* court's acceptance of the "market differential" rationale thus flies in the face of the congressional purpose explicit in the statute, as well as the flat language of the Senate and House Committee Reports defining "market differential." See *supra* p. 54a-55a.

Even if the farm location differentials cannot be saved, appellants' argument continues, the case should be remanded to the Secretary so that he can determine whether other amendments are necessary and whether the order, without a nearby differential, effectuates the declared policy of the Act.[41] Appellants rely in this regard upon

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[40.1] The *Cranston* court purports to find some comfort in the 1939 decisions of the Supreme Court in *Hood* and *Rock Royal*, note 3 *supra*. As to the former, however, *Cranston* concedes that the Supreme Court "omitted any specific discussion of the farm location differentials" which had been challenged in the District Court—an omission of which Judge Magruder said in *Green Valley:*

> These points were raised in the District Court in the Hood and Whiting Milk cases but were not pressed before the Supreme Court. Hence, they are still open for consideration here.

108 F. 2d 342, 344 (1939).

Rock Royal did not involve producers, but only handlers and therefore a different provision of the statute. Moreover, the differential payments there involved depended upon the location of the plant to which delivery was made, and not the location of the delivering farmer.

[41] The nearby farmers also argue that, since the nearby differential is a key provision of the order, its invalidation effectively invalidates the entire order until the Secretary has readopted it *and* it has been approved in a referendum by two-thirds of the producers in the market. The Secretary, however, rejects this construction, relying on the following severability provision in the order:

> If any provision . . . is held invalid, the application of . . . the remaining provisions . . . shall not be affected thereby.

7 C.F.R. § 1001.96 (1968).

cases such as *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607 (1944), and *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952).

Those decisions do enunciate the principle that a court cannot always assume that an agency, had it been aware of the limits of its authority, would have promulgated an order differing only in the absence of the provision judicially declared unlawful. That principle, however, does not obtain here. The 1964 order contains an explicit severability clause, clearly indicating that all parties contemplated that judicial invalidation of some provisions would not upset the remainder. Moreover, unlike the provisions involved in *Addison* and *Idaho Power*, the nearby differential is discrete. There is nothing to suggest that elimination of it irretrievably impairs the Secretary's power and purpose to administer the significant regulatory scheme embodied in the remaining provisions of the order. He has simply been told to discontinue illegal payments under the order. Since any discrimination attributable to farm location would appear to be invalid, there is no reason to afford him a chance to disburse them under a different name.[42]

V.

Although we affirm the judgment of the District Court, we must deal with the distant producers' claim of equi-

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[42] The injunction is prospective only; the Secretary and the producers can do what they wish with the order hereafter. Unlike the situation in *Idaho Power*, the District Court's injunction did not constitute a command that the Secretary continue the order without the illegal provision. And, since there will be no retroactive recovery in this case, the injunction, as compared with the decision of the circuit court in *Addison*, has no impact on rights arising from events which occurred before the date of the court's judgment.

table entitlement in respect of the escrow fund.[43] The complaint was filed on December 27, 1966, and the escrowing commenced with the preliminary injunction of January 16, 1967. Final judgment was entered by the District Court on June 15, 1967. In the exercise of our duty, as a court of equity, to "tailor . . . relief with a critical and balanced view of the ramifications of [the] decision,"[44] we have decided that the monies escrowed before June 15, 1967 should be disbursed to the nearby farmers and that the distant producers are entitled to amounts thereafter collected.

In support of their claim, the nearby producers point out that the nearby differential was in operation for almost 30 years before it was challenged in court and that the nearby farmers have relied upon it over that period in making economic decisions and investments.[45] In par-

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[43] We do not think the case need be remanded—as all appellants urge—for either the Secretary or the District Court to determine in the first instance the equitable distribution of the escrow fund. Further delay is unnecessary, the facts are not in dispute, and neither possesses a peculiarly informed discretion on this question to which this court should defer.

[44] 370 F. 2d at 239.

[45] Both the Secretary and the nearby farmers had relied heavily on this line of argument in the 1964 and 1967 decisions and the 1964 hearings. Thus, the principal reason advanced for continuation of the nearby differentials was that they were "deeply embedded" in the New England milk marketing structure; to remove them would be grossly unfair to nearby producers who had relied upon them in voting for the order originally and in negotiating loans and making capital commitments. The nearby differentials had, it was asserted, become capitalized into land values; and if the differentials were to be abandoned or reduced, then it should be accomplished very gradually. Moreover, some witnesses predicted that if the differentials were removed, nearby producers would overproduce to make up for lost revenues, or even worse, they would be forced out of business by high local production costs—an event which must be forestalled in order to preserve

ticular, they allege reliance upon the First Circuit's decision in *Green Valley*.[46] Because it was, in language at least, an explicit judicial approval of the farm location differential, they suggest that the payments should not be terminated until the differential has finally been deter-

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an adequate supply of nearby milk and therefore greater economy for the urban consumer. Others hypothesized that nearby producers, deprived of their price advantage under the federal order, would go into business as producer-dealers, thereby removing many Class I sales from the pool and lowering the blended price. Such a development would also force out of business the small dealers who cannot economically import distant milk and who rely on nearby sources, this in turn would contribute to the undesirable trend toward monopolization in the distribution of milk. Finally, the Secretary was warned of the catastrophic inter-market dislocations which would accompany elimination of the nearby differentials. Such a step would attract vast supplies of milk from the surrounding areas, flooding the New England markets and eventually depressing the price. The Secretary was clearly much impressed with this line of testimony. In his 1967 recommended decision he noted that "the business decisions of nearby producers have been influenced over the years by the higher returns," and that the differential would "promote orderly marketing of milk in the Boston area, and prevent disruption in the normal supplies of milk for the Boston area and thus tend to effectuate the declared purposes and policies of the Act." 32 Fed. Reg. 9902, 9919 (1967).

We are not insensitive to the Secretary's efforts to preserve the public interest in the vastly complex regulation of milk marketing. As we said in *Blair*, however, "this may be a reason for the legislature to enlarge the Secretary's powers, but not for the court to overlook the limited nature of the authority hitherto conferred by Congress." 370 F. 2d at 239.

[46] In his 1967 recommended decision, the Secretary noted that he too had relied on *Green Valley*:

> It was subsequent to, and substantially in reliance upon, this decision that farm location differential provisions were considered to be legal and proper for inclusion in other New England orders.

32 Fed. Reg. 9902, 9920 (1967).

mined invalid by a court of at least equal rank in the federal judiciary.

We recognized in *Blair* that the plaintiffs' long acquiescence in the differential and their years of enjoyment of a blended price and stable marketing conditions in the milkshed were significant factors bearing upon their entitlement to equitable relief. In view of these factors, the nearby farmers could legitimately have expected to receive, and the distant farmers to pay, the differential until it has been held invalid, after full opportunity for the presentation of views on both sides, by a court. We think this is a fair view of the equities; and, since a preliminary injunction does not constitute a final judgment on the merits, appellant producers should receive the amounts escrowed between January 16 and June 15, 1967.

We are not persuaded that the endorsement of the nearby differential in *Green Valley* further alters the equities between the parties. The nearby producers' reliance on that opinion is amply recognized by preserving their preference until it has been finally invalidated by a responsible court having jurisdiction to do so. Their expectations cannot seriously be said to encompass a decision to that effect by a Court of Appeals but not by a District Court.

The judgment appealed from is affirmed and the case remanded to the District Court for further proceedings consistent herewith.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1968

No. 21,141

Civil 3379-66

FREDERICK T. ZUBER, *et al., Appellants*

v.

RUSSELL ALLEN, *et al., Appellees*

No. 21,308

ORVILLE FREEMAN, Secretary of Agriculture, *Appellant*

v.

RUSSELL ALLEN, *et al., Appellees*

Appeals from the United States District Court for the District of Columbia.

Before: Burger, Wright and McGowan, Circuit Judges.

Judgment

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION THEREOF, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is affirmed, and these cases are hereby remanded to the District Court for further proceedings consistent with the opinion of this court.

Per Curiam

For the Court:

NATHAN J. PAULSON,
Clerk

Dated: September 23, 1968

APPENDIX C

Opinion in Green Valley Creamery v. United States, 108 F.2d 342 (1st Cir. 1939)

Before WILSON and MAGRUDER, Circuit Judges, and McLELLAN, District Judge.

MAGRUDER, Circuit Judge.

These were suits in equity brought by the United States of America and the Secretary of Agriculture seeking mandatory injunctions requiring the defendants to comply with the provisions of Order No. 4 as amended, issued by the Secretary under the authority of the Agricultural Marketing Agreement Act of 1937. 50 Stat. 246, 7 U.S.C. § 608c, 7 U.S.C.A., § 608c. The Order regulates the marketing of milk in the Greater Boston Marketing Area. Defendants are dealers in or handlers of milk in that area. Temporary injunctions were issued by the District Court. United States v. Whiting Milk Co., D.C., 21 F.Supp. 321. Upon appeal, these injunctions were stayed in part by an order of supersedeas pending final determination on the merits. H. P. Hood & Sons, Inc. v. United States, 1 Cir., 97 F.2d 677. The District Court referred these cases together with twenty-five others of the same sort to a Master for hearing and findings of fact. The Master's report came in and was duly confirmed by the court, which issued final decrees permanently restraining the numerous defendants from violating any of the terms of Order No. 4 as amended. United States v. H. P. Hood & Sons, Inc., D.C., 26 F. Supp. 672. Thereafter, two of this group of thirty cases, the Hood and Whiting Milk cases, after being docketed on appeal in the Circuit Court of Appeals, went up on certiorari to the Supreme Court, which affirmed the decrees of the District Court. H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478. See also United States v. Rock Royal Cooperative, Inc., 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446. In view of the sweeping nature of the Supreme Court's opinions in

these cases, this court, upon motion by the Government in the cases now before us, entered an order vacating the supersedeas which the District Court had issued staying in part the operation of its final decrees pending decision on appeal. Green Valley Creamery, Inc. v. United States, 1 Cir., 105 F.2d 754.

Detailed quotations from the Act and the Order are set forth in the opinions of the Supreme Court in the Hood and Rock Royal cases, supra, and need not be repeated here. Article III of the Order sets up classifications of milk according to the use to which it is put, because such use primarily determines the market value of the milk. Class I embraces fluid milk disposed of for consumption in that form as an article of diet. Class II embraces milk disposed of for non-fluid purposes, such as the manufacture of butter or ice cream. Article IV establishes minimum prices to be paid by handlers of Class I and Class II milk, respectively. While in the net result these prices are paid by handlers for the milk that they buy and dispose of, the individual producers do not receive payment on this basis. The Order creates a market-wide pool as an equalization device under which the individual producer is paid a uniform composite price for the milk which he sells, based upon the use made of all the milk sold in the Greater Boston Marketing Area. A Market Administrator computes for each delivery period the use value of the milk sold or used by each handler, multiplying the quantity of such milk in each class by the applicable class price and adding together the two sums (Art. VII, Sec. 1). Then the Administrator combines into one grand total the respective values of the milk sold or used by each handler, and after adjustments for various differentials the adjusted total is divided by the total quantity of milk. The result is a "blended" or uniform price which all producers are to receive for milk delivered by them during the period, regardless of the use to which any particular milk is devoted.

The blended price is less than the Class I price and more than the Class II price as fixed by Article IV of the Order. A handler who has more than the market average of Class II milk sales during a particular delivery period will have to pay to his producers at the blended price an amount greater than the total amount charged to him as the use value of the milk he has received from producers during that period. Such a handler will therefore be credited with the difference in his producer settlement account on the books of the Market Administrator and becomes entitled to receive from the Administrator an equalization payment out of the pool. On the other hand, a handler who has more than the market average of Class I fluid milk sales during the same delivery period will pay to his producers at the blended price an amount less than the total amount charged to him as the use value of the milk he has received from producers during the period. Such a handler will therefore be debited with the difference in his producer settlement account, and is required by Article VIII, Section 1, of the Order to pay this amount into the pool. Omitting refinements, the debits and credits in the pool should normally balance out in each delivery period.

This market-wide equalization pool is the core of the regulatory scheme set up by Order No. 4 as amended.

Appellants may no longer question the constitutionality of the Act nor the validity of most of the terms of Order No. 4 as amended. H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478. Argument was addressed to us on three provisions of the Order which are asserted to be unauthorized by the Act. These points were raised in the District Court in the Hood and Whiting Milk cases but were not pressed before the Supreme Court. Hence, they are still open for consideration

here. The portions of the Act now relevant are set forth in the footnote.[1]

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[1] "Sec. 8c [§ 608c] (Relating to Orders).

(5) "Terms—Milk and Its Products In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"(B) Providing:

"(i) • • •

"(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

"(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased

[1] Article IV of the Order provides for two sets of minimum prices, one to be applicable if the purchase is from an association of producers, and the other if the purchase is from producers not members of an association. It is contended that under Section 8c (5) (A) of the Act the minimum price must be uniform, subject only to certain adjustments therein set forth, none of which is dependent upon the class of producers from which the milk is received. In promulgating the Order the Secretary of Agriculture found as a fact, upon evidence introduced at the administrative hearings, "that the differential in prices to associations of producers, and producers, is justified as a reasonable allowance for services actually performed by associations of producers." It is not denied that there was evidence before the Secretary warranting a finding that such a differential had customarily been applied in the market area, for the reason that milk purchased from associations of producers has an enhanced value due to the fact that many marketing services have already been performed by such associations. In view of these facts, we think that the Government is right in its contention that this differential in prices applicable to milk received from producers and milk received from

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by him at the prices fixed in accordance with paragraph (A) hereof.

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(6) "Terms—Other Commodities

* * * * * * * * * * *

(7) "Terms Common To All Orders In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

* * * * * * * * * * *

"(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order."

associations of producers is authorized by Section 8c (5) (A) (1) of the Act as a market differential customarily applied by handlers. The phrase "market differential," undefined as it is in the Act, is reasonably susceptible of such an interpretation. If further support for this conclusion were needed, it would be found in the fact that the Secretary in promulgating the original Order No. 4 on February 9, 1936, construed Section 8c (5) (A) of the Agricultural Adjustment Act of 1933, as amended (49 Stat. 754), as authorizing such a differential in price as between producers and associations of producers, and Congress subsequently re-enacted without amendment this portion of that Act in the Agricultural Marketing Agreement Act of 1937. 50 Stat. 246. It is hardly significant that this particular price differential is not specifically called a market differential in the Order.

[2] Next, the appellants take exception to a provision of Article VII, Section 2 of the Order, specifying the method of computing the blended or uniform price. This section excludes from such computation the milk of handlers who are in default in the required equalization payments "for milk received during the delivery period next preceding but one." Each month is divided into two delivery periods. By Article VII, Section 7, the Administrator is required to compute and announce on or before the twelfth day after the end of each delivery period the blended price applicable for that period. Handlers are not required to make the payments required by Article VIII until the twenty-fifth day after the end of each delivery period. Therefore, at the time the Administrator computes the blended price for the preceding delivery period, handlers are not yet in default in respect to that period. For this reason the Order requires the Administrator to ascertain whether a particular handler is in default on payments required for milk received during the delivery period next preceding but one. If such delinquency exists, the milk of that handler is excluded from

the current computation of the blended price. The purpose of this provision seems to be to minimize the risk that the equalization pool will fail to be self-liquidating for a particular delivery period on account of defaults by handlers obligated to the pool in the manner previously described in this opinion. "If a handler has so failed in one delivery period it is reasonable to expect that he may repeat his failure in the next."

The Act does not specify the detailed method by which a blended or uniform price is to be computed. The method adopted in Article VII of the Order seems reasonably adapted to promoting the successful operation of the equalization pool, which, in turn, is a device calculated to insure the payment to producers of uniform prices for all milk delivered to handlers, irrespective of the uses made of such milk by the individual handler to whom it is delivered (Act, Sec. 8c (5) (B) (ii)). Defaulting handlers are subject to penalties in the Act, and though their milk has been excluded from the computations of the pool, they are nevertheless liable to pay their producers at the announced blended price. If they later made good their pool debits, such payments will be reflected in an increased blended price for a later delivery period.

In addition to what has been said, it is questionable whether these appellants are in a position to attack the validity of the provisions of the Order dealing with the computation of the blended price. While the exclusion of milk of a defaulting handler may affect the blended price, the Master points out that the level of the blended price does not affect in any way the total charge to handlers participating in the pool, which is computed not on the basis of the blended price but rather on the basis of the minimum prices fixed in Article IV of the Order for the milk a handler receives from producers in a particular delivery period.

[3] Appellants further challenge the validity of certain differentials provided for in Article VIII, Section 4, para-

graphs 3 and 4, of the Order. The section is set forth in the footnote.[2] It is argued that differentials based upon the location of the farms of producers are not authorized by Section 8c (5) (B) (ii) (c) of the Act, which authorizes only differentials based upon "the locations at which delivery of such milk is made."[3] There was evidence before the Secretary to the effect that similar differentials in favor of nearby farms had existed in the Boston market for many years. Various factors were mentioned as accounting for this, including their greater accessibility to the market, and their greater dependability as sources of supply, because, as experience showed, the nearby farms had a more uniform level of production throughout the year. These producers were also potential dealers, who might establish their own milk routes in competition with

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[2] "Sec. 4. Location Differentials.—The payments to be made to producers by handlers pursuant to paragraph 1 of section 1 of this article shall be subject to differentials as follows:

"1. With respect to milk delivered by a producer to a handler's plant located more than 40 miles from the State House in Boston, there shall be deducted an amount per hundredweight equal to the freight (considering 85 pounds of milk per can), according to the tariff currently approved by the Interstate Commerce Commission for the transportation, in carload lots of milk in 40-quart cans, to Boston from the zone of location of the handler's plant.

"2. With respect to milk delivered by a producer to a handler's plant located not more than 40 miles from the State House in Boston, there shall be added 18 cents per hundredweight.

"3. With respect to milk delivered by a producer, whose farm is located more than 40 miles, but not more than 80 miles, from the State House in Boston, there shall be added 23 cents per hundredweight.

"4. With respect to milk delivered by a producer, whose farm is located not more than 40 miles from the State House in Boston, there shall be added 46 cents per hundredweight unless such addition gives a result greater than $3.19, in which event there shall be added an amount which will give a result of $3.19."

[3] See footnote 1, supra.

handlers in the Boston market, if prices were not acceptable. Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted in the Order so as not to disturb the status quo in this respect. Milk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market; and thus, paragraphs 3 and 4 of Section 4, Article VIII, may be said to prescribe differentials having relation to locations at which deliveries are made. This argument need not be labored, however, for the differentials can readily be sustained under Section 8c (5) (B) (ii) (a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called "location differentials" in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market.

Here again it may be observed that similar differentials were contained in the original Order No. 4, effective February 9, 1936, under an administrative interpretation of provisions of the Agricultural Adjustment Act of 1933, as amended (49 Stat. 750), which were re-enacted without change in the Agricultural Marketing Act of 1937.

[4] Furthermore, we think the Government is right in its contention that the present appellants have no standing to challenge the Order in this particular. These differentials in favor of nearby farms do not affect the net cost of the milk to handlers, computed on the basis of the minimum prices established in Article IV of the Order. They are adjustments affecting only the distribution among producers out of the equalization pool.

[5, 6] Several additional points were urged in appellants' brief. They all assumed the validity of the Act and of the Marketing Order, and related merely to details of administration as to which it was contended that the Mar-

ket Administrator did not follow the terms of the Order. Only in the exceptional case of manifest error should a court undertake to upset interpretations of a highly technical administrative order made by the responsible official to whom has been delegated the administration of the order. This is especially true where, as in this case, the Act provides machinery whereby any handler subject to the Order may obtain administrative review by the Secretary of Agriculture of the actions of the Market Administrator. At the oral argument, counsel for appellants stated that they would not ask us to pass upon these points of administrative detail but that they proposed to apply to the Secretary of Agriculture for a review on these points under Section 8c (15) (A) of the Act. Accordingly we do not now examine into them.

[7] It is further urged by appellants that the decree of the District Court should be reversed for failure of the court to make findings in accordance with Rule 52 (a) of the new Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c. The court confirmed and adopted as its own the findings of fact set forth in numbered paragraphs of the Master's report. In respect to conclusions of law the court stated, 26 F. Supp. 672, 681: "Insofar as I have dealt with questions of law, my statements in the opinion shall be regarded as conclusions of law for the purpose of the record." The decree should not be reversed for this reason, and under the circumstances no useful purpose would be served by remitting the case for a more formal statement of the district judge's conclusions of law. H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478.

In each case: The decree of the District Court is affirmed.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Civil Action No. 67-CV-38

HAROLD R. CRANSTON, DALE R. FRENCH, HELMER A. CARLSON and DAVID B. PHILLIPS, Individually and on Behalf of all Other Persons in their Class who are Similarly Situated and Affected, *Plaintiffs,*

vs.

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States, *Defendant,*

and

ALBERT GUILIAN, GROVER C. ATWOOD, and A. J. MALNATI, Individually and on Behalf of all Other Persons in their Class who are Similarly Situated and Affected, *Defendant-Interveners.*

APPEARANCES

John P. Weatherwax, Troy, N. Y. (James M. Strang, Troy, N. Y., of counsel) for plaintiffs.

J. C. Krause and John G. Liebert, Attys, Dept. of Agriculture, Wash. D. C.; Jane M. Friedman, Irwin Goldbloom, Harland F. Leathers, Attys, Dept. of Justice, Wash, D. C.; Justin J. Mahoney, U. S. Atty, and Frank A. Dziduch, Asst. U. S. Atty, Albany, N. Y., for defendant Freeman.

Frederick H. Conard, Jr., Don C. Polley, and Theodore Space of Shipman & Goodwin, Hartford, Conn., for defendant-interveners.

Memorandum of Decision After Trial

TIMBERS, District Judge.*

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* Chief Judge of the District of Connecticut, sitting by designation.

Question Presented

This action was brought by six dairy farmers residing in Rensselaer County, New York, suing for themselves individually and on behalf of all other persons in their class similarly situated and affected.[1] They seek declaratory and injunctive relief against the Secretary of Agriculture. Three other dairy farmers residing in Litchfield County, Connecticut, and Berkshire County, Massachusetts, for themselves individually and on behalf of all other persons in their class similarly situated and affected, were permitted to intervene as defendants. The essential questions presented are: (1) whether the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, et seq., authorizes the Secretary of Agriculture to include in the Connecticut Milk Marketing Order, 7 C.F.R. § 1015, et seq. (1968), certain farm location differentials, 7 C.F.R. § 1015.72 (1968), which have been in effect since 1959; (2) whether the farm location differentials are unconstitutionally discriminatory; and (3) whether there is substantial evidence in the administrative record to support the Secretary's inclusion of these differentials in the Connecticut Milk Marketing Order.

After an eight day trial, the Court holds that the Act does authorize the farm location differentials, that such differentials are not unconstitutionally discriminatory; and that there is substantial evidence in the administrative record to justify inclusion of these differentials in the Connecticut Milk Marketing Order. Accordingly, a permanent injunction enjoining the Secretary of Agriculture from administering the Connecticut Milk Marketing Order in such a way as to give effect to the farm location differentials is denied.

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[1] Since commencement of the action Roy E. Ottman and George Mesick, Jr., two of the six persons originally bringing the action, have sought leave to withdraw as plaintiffs.

Jurisdiction and Venue

Jurisdiction is founded upon 28 U.S.C. § 1331(a), 28 U.S.C. § 1337, 28 U.S.C. §§ 2201-2, 5 U.S.C. § 701-6 and 7 U.S.C. § 601, et seq.

Venue is properly laid in this District pursuant to 28 U.S.C. § 1391(e).

Propriety of Class Action and Class Action Defense; Adversary Nature of Proceedings

Pursuant to Rule 23(c)(1), Fed. R. Civ. P., the Court on October 20, 1967, after hearing evidence, entered two orders: one permitting the named plaintiffs to maintain the instant action as a class action and the other permitting the named defendant-interveners to maintain a class action defense.

With respect to the named plaintiffs, the Court determined, pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P., that they may properly represent the interests of those producers producing and selling milk produced on their respective farms to handlers operating under the order regulating the handling of milk in the Connecticut marketing area, 7 C.F.R. § 1015, et seq. (1968), where the farms of such producers are located *outside* the area described in 7 C.F.R. § 1015.72(a) (1968) (in short, those who do *not* qualify for the 46¢ differential).

With respect to the three named defendant-interveners, the Court likewise determined, pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P., that they may properly represent the interests of those producers producing and selling milk produced on their respective farms to handlers operating under the order regulating the handling of milk in the Connecticut marketing area, 7 C.F.R. § 1015, et seq. (1968), where the farms of such producers are located *within* the area described in 7 C.F.R. § 1015.72(a) (1968) (in short, those who *do* qualify for the 46¢ differential).

In view of the recent decision of the United States Court of Appeals for this Circuit in *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555 (2 Cir. 1968), the Court on April 22, 1968 directed that all members of plaintiffs' and defendant-interveners' classes be given formal notice of the pendency of the action and an opportunity to be heard with respect to the continued maintenance of the action as a class action. The notices were sent by April 24, 1968 and made returnable on May 15, 1968.

Prior to the Court's order of April 22, 1968, Kenneth Hewitt and Leonard Duncan, members of plaintiffs' class, filed two papers entitled "Motion For Leave To Intervene Under Rule 24 or to Otherwise Enter Action Under Rule 23 for Purpose of Taking Depositions, to Move Dismissal of Suit and for Other Related Relief," and "Answer of Interveners and Motion to Dismiss Action, for Disposition of Escrow Fund and Other Relief." Because these papers made allegations of collusion which if true would not only have merited reversal of the class action orders but dismissal of the action, a hearing was similarly directed on May 15, 1968.

The Court thereafter held exhaustive hearings on May 15, May 27, and June 10, 1968 at which time all questions relating to the propriety of the maintenance of this action as a class action and all questions relating to Hewitt's and Duncan's claim of collusion were explored. Every interested person was given an opportunity to be heard and to present evidence through the testimony of witnesses and by means of exhibits. The complete record of all prior proceedings in this case was available for inspection by all interested persons at the Albany seat of Court from May 9, 1968.[2]

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[2] The Court's order of April 22, 1968 provided for the immediate availability of the record at the Albany seat of Court. At the time the order was entered, the undersigned was sitting by designation in the Southern District of New York while the record was located at Bridgeport, Connecticut, the undersigned's official sta-

The evidence presented not only does not in any way justify dismissal of the action but it clearly merits reaffirmation of the Court's orders of October 20, 1967 permitting plaintiffs and defendant-interveners to maintain this action as a class action pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P. Plaintiffs' class of approximately 250 persons and defendant-interveners' class of approximately 3000 are without any doubt "so numerous that joinder of all members is impracticable." No one has, nor can, dispute that there are questions of both law and fact common to the classes and that the claims of plaintiffs and defenses of defendant-interveners are typical of the claims and defenses of their classes. Furthermore, as a practical matter, the adjudication of the differentials' validity with respect to individual members of the classes would be dispositive as to all class members because the differentials cannot be enforced or withdrawn piecemeal.

The only issue which merits discussion is the charge of collusion raised by Hewitt and Duncan. Also involved here is the issue of fairness and adequacy of representation with respect to plaintiffs' maintenance of this action as a class action. Basically, Hewitt and Duncan claim that the Consolidated Milk Producers' Association (CMPA), formerly the Connecticut Milk Producers' Association, solicited plaintiffs to bring this action in the Northern District of New York, and through payment of plaintiffs' counsel fees and other means have acted to control this action for the benefit of defendant-interveners' class who constitute the majority of the Association's members.

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tion. It was not until May 6, 1968 when the undersigned's assignment in the Southern District of New York was completed, that the undersigned found it possible to return to Bridgeport to prepare the record, comprising numerous cartons, for shipment to Albany. The undersigned, however, is completely satisfied that all who desired to examine the record were aware of its availability after May 9, 1968 and had ample opportunity to study it. No prejudice resulted from the delay.

There is no question but that CMPA as an organization is interested in the continuation of farm location differentials. The vast majority of its members receive these differentials and feel that it will be to their benefit to continue to receive them. Defendant-interveners are members of CMPA and their counsel also serves as counsel to CMPA. Furthermore, CMPA readily admits that after the farm location differentials in the neighboring New York-New Jersey Milk Marketing Order were held invalid by the Court of Appeals for the District of Columbia in 1966, the Association was troubled by the consequential uncertainty surrounding the validity of the Connecticut differentials. Part of this concern derived from the fact that a minority of its members, including all the named plaintiffs, did not receive the differentials and had vocally expressed their unhappiness with the situation. In fact, as established by the credible evidence, plaintiff Cranston had discussed the institution of a legal action to challenge the differentials with his long-time friend and neighbor, Attorney John P. Weatherwax, both before and after the decision in the District of Columbia.

It was only after Attorney Weatherwax had agreed to undertake such an action challenging the differentials, that Cranston was contacted on January 27, 1967 by a CMPA official who had heard rumors that Cranston and others intended to commence a suit. This contact was the result of a decision on January 25, 1968 by CMPA to aid any members undertaking either to challenge or defend the differentials by reimbursing such members for reasonable expenses and attorney fees. The CMPA official explained the policy and mentioned a name of a potential attorney, but Cranston said that he already had his own. The official told Cranston that he would like to check on his reputation and see what kind of an attorney he was and if he was capable, because the Association was concerned about having good attorneys on both sides of the question. Aside from the offer to reimburse for reasonable expenses

and this conversation and a subsequent meeting between CMPA officials, plaintiffs and Attorney Weatherwax, there is nothing to suggest that CMPA in any way acted improperly. But most importantly, there is not an iota of credible evidence that CMPA, defendant-interveners, or defendant, acted, attempted to act, or even desired to act, to control plaintiffs' conduct in these proceedings. On the contrary, the record clearly demonstrates that plaintiffs for a number of years have been keenly interested in the abolition of the differentials, that they are at this time just as keenly interested, and that their counsel, Attorney Weatherwax, has at all times conscientiously, expertly and with the highest professional sense of duty to plaintiffs endeavored to represent their aims. Attorney Weatherwax has forthrightly, earnestly, and unceasingly prosecuted this lawsuit to enjoin the application of the differentials. He has conducted his case as any gentleman and lawyer should and would and has never conceded a point nor failed to present a plausible argument.

The Court is fully cognizant that the payment by one side in an action of an opposing counsel's legal fees is a red flag as to collusion. See *United States* v. *Johnson,* 319 U.S. 302 (1943). But in the instant situation, the Association is in a unique position—it is a democratic institution composed of members on both sides of the question and it is duty-bound to serve the interests of all its members. Certainly under these circumstances, the Association's offer to reimburse any of its members for expenses does not give rise to collusion per se. Rather the question must be whether the Association has in any way acted to control plaintiffs' conduct of the law suit. *Cf. San Francisco* v. *Boyd,* 22 Cal. 2d 685, 140 P.2d 666 (1943). If the Court thought that there was even the slightest attempt to exert such control, it would not only reverse its class action orders but it would dismiss the entire action. The Court, however, is thoroughly convinced that no such attempt was made, that the proceedings have been of an adversary

nature on the highest level, and that plaintiffs have fairly and more than adequately represented the other members of their class. The Court therefore not only refuses to dismiss this action but reaffirms its decision to permit it to proceed as a class action.[3]

The Agricultural Marketing Agreement Act of 1937 and the Connecticut Milk Marketing Order

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, et seq., confers upon the Secretary of Agriculture the power to regulate the price and marketing of milk and milk products, as well as various other agricultural commodities. With respect to the milk industry, the Act represents the ultimate attempt by Congress to deal with a "nation-wide distress of milk farmers, a distress which had culminated in a milk farmers' 'strike'—accompanied by violence and constituting an incipient agrarian revolution—that threatened to cut off a vital part of the nation's food supply." *Queensboro Farms Products* v. *Wickard,* 137 F.2d 969, 974 (2 Cir. 1943), (J. Frank).

The basic factors giving rise to what Judge Frank described as the "exquisitely complicated 'milk problem'" were set forth by the Supreme Court in *United States* v. *Rock Royal Co-operative, Inc.,* 307 U.S. 533, 549-50 (1939):

> "It is generally recognized that the chief cause of fluctuating prices and supplies is the existence of a

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[3] Three members of plaintiffs' class have asked to be excluded therefrom and plaintiffs' counsel has asked the Court to grant this request. The action, however, is a class action pursuant to Rule 23(b)(1)(B), Fed. R. Civ. P., and, unlike a class action pursuant to Rule 23(b)(3), an otherwise proper member of the class cannot be excluded simply because he expresses such a desire.

The Court does, however, modify its order of October 20, 1967 with respect to the maintenance of this action as a class action by plaintiffs to the extent of eliminating as named plaintiffs Roy E. Ottman and George E. Mesick, Jr., who have signified their desire to withdraw as plaintiffs.

normal surplus which is necessary to furnish an adequate amount for peak periods of consumption. This results in an excess of production during the troughs of demand. As milk is highly perishable, a fertile field for the growth of bacteria, and yet an essential item of diet, it is most desirable to have an adequate production under close sanitary supervision to meet the constantly varying needs. . . . Since all milk produced cannot find a ready market as fluid milk in flush periods, the surplus must move into cream, butter, cheese, milk powder and other more or less nonperishable products. Since these manufactures are in competition with all similar dairy products, the prices for the milk absorbed into manufacturing processes must necessarily meet the competition of low-cost production areas far removed from the metropolitan centers. The market for fluid milk for use as a food beverage is the most profitable to the producer. Consequently, all producers strive for the fluid milk market."

The first far-reaching Congressional attempt to meet the problem was the Agricultural Adjustment Act of 1933. That act provided for marketing agreements and authorized the Secretary of Agriculture to issue "licenses" for the regulation of agricultural commodities including milk and milk products. In 1935, this Act was amended, partly in order to meet the delegation problems raised by the Supreme Court's decision in *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935). These amendments were subsequently reaffirmed and reenacted by Congress in the Agricultural Marketing Agreement Act of 1937 (the Act), and, as such, represent the legislative scheme extant today and that involved in this litigation.

In order to achieve such orderly marketing conditions as will establish "parity" prices for the dairy farmer and a level and sufficient flow of milk to the market (Section 2 of the Act, 7 U.S.C. § 602), the Act authorizes the Secretary of Agriculture to issue milk marketing orders for the

various sections of the country and specifies the terms and conditions which may be included in them.[4] Section 8c(5)

[4] Section 8c(5) of the Act, 7 U.S.C. § 608c(5), governing the issuance of milk marketing orders provides in relevant part as follows:

> "In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.
>
> (B) Providing:
>
> (i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them . . . ; or
>
> (ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;
>
> subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.
>
> (C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method

(A) of the Act, 7 U.S.C. § 608c(5)(A), provides for the classification of milk by each order according to milk's various uses, and for the establishment of a minimum price for each category. Thus, under the Connecticut Milk Marketing Order, which is involved in this litigation and which regulates all milk marketed in Connecticut whether produced in the state or shipped into the state from elsewhere, there are two general categories. 7 C.F.R. §§ 1015.51 and 1015.52 (1968). One category consists essentially of fluid milk used for beverage purposes while the other consists primarily of milk used for nonfluid purposes. The minimum price for the category of milk used for fluid purposes is the higher to reflect the desirable position of such milk in the marketplace. 7 C.F.R. § 1015.60 (1968). When the "handler", the party who first purchases the farmer's milk either directly or through a marketing cooperative, disposes of milk, he ultimately becomes obligated for the minimum price associated with the use to which that particular milk is put.

Section 8c(5)(B) of the Act, 7 U.S.C. § 608c(5)(B), provides, however, that the individual farmer is not to receive payment according to the use of his particular milk. Instead, he is to be paid a uniform price determined either on the basis of the total obligations of the handler to which he delivers his milk or on the basis of the total or pooled obligations of all the handlers covered by an order. Under the Connecticut Order the uniform, or blend price,

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for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

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(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

is determined under the latter alternative. 7 C.F.R. § 1015.64 (1968). Thus, each handler pays this blend price, adjusted for certain factors to be discussed subsequently, to the farmers or cooperatives from whom he makes his purchases. By paying a farmer according to the market-wide utilization of milk rather than according to the utilization of his particular milk, competition among farmers to sell their milk for fluid use is eliminated.

Since the amount for which a handler becomes obligated is determined on the basis of the use of only the milk he handles, and the amount due his farmers is determined by the use of all the milk covered by the Order, Section 8c(5)(C), 7 U.S.C. § 608c(5)(C), permits resort to a "producer settlement fund" to bring the two amounts into balance. If in any month the utilization value of a handler's milk exceeds the blend price value, the handler must pay the difference into the fund. On the other hand, if the utilization value is less than the blend price value, the handler withdraws the difference from the fund. See 7 C.F.R. §§ 1015.80—1015.82 (1968).

As already noted, the uniform price otherwise payable to each farmer is subject to certain adjustments. Section 8c(5)(B), 7 U.S.C. § 608c(5)(B), specifically authorizes adjustment for "volume, market and production differentials customarily applied by the handlers subject to [the] order" and adjustments for "the grade or quality of the milk delivered" and "the locations at which delivery of such milk is made."

The Connecticut Milk Marketing Order contains three principal adjustments to the uniform price payable to dairy farmers. Section 1015.71 of the Connecticut Milk Marketing Order, 7 C.F.R. § 1015.71 (1968), provides for a "butterfat differential". Under it a farmer receives either more or less than the uniform price according to whether and by how much the butterfat content of his milk exceeds or falls below a standard level. This differential is clearly related to the grade or quality of the milk and

is, therefore, unquestionably authorized by the Act. It is not challenged here.

Section 1015.62 of the Order, 7 C.F.R. § 1015.62 (1968), providing for "plant zone differentials", is also unchallenged. Under this section a farmer receives a lesser price as the distance from Hartford of the handler's plant receiving the farmer's milk increases. The section, however, treats all plants in Connecticut irrespective of their distance from Hartford and those plants in Rhode Island and Massachusetts which are not more than fifty miles from Hartford as if they were in Hartford. The result is that only those producers who deliver their milk to plants outside of this wide area receive a price which decreases as the actual road mileage from Hartford increases. Essentially, the purpose of the differential is to reflect in the price received by the farmer the added cost to the handler of moving the milk from the more distant receiving plants into the marketing area for distribution. Such a differential is clearly authorized as an adjustment according to "the locations at which delivery of such milk is made."

The third differential, referred to in the plural as "farm location differentials" because it consists of two parts, is found in Section 1015.72 of the Order, 7 C.F.R. § 1015.72 (1968). It is the validity of this provision which plaintiffs attack. Section 1015.72 provides:

> "(a) In making payments to producers for milk received from a farm located in Connecticut, Rhode Island, in that portion of New York State east of the Hudson River and south of the Berkshire Section of the New York State Thruway, or in that portion of Massachusetts south of the Massachusetts Turnpike, there shall be added 46 cents per hundredweight.
>
> (b) In making payments to producers for milk received from a farm located outside the area described in paragraph (a) of this section, but within that portion of New York State east of the Hudson River and south of the northern boundaries of North Greenbush,

Sand Lake, and Stephentown townships in Rensselaer County, and within that portion of Berkshire County, Massachusetts north of the Massachusetts Turnpike, there shall be added 23 cents per hundredweight.

(c) The uniform price for pool milk other than producer milk shall be subject to the applicable differentials for milk received from farms located in the areas set forth in paragraphs (a) and (b) of this section . . . ."

What this means essentially is that farmers selling milk under the Connecticut Order whose farms are located in Connecticut, Rhode Island and certain neighboring sections of New York and Massachusetts receive either 46 or 23 cents more per hundredweight for their milk than other farmers whose farms are located outside of this area but who still market their milk in Connecticut. The obligations of the handlers are not increased to provide for payment of these differentials. Rather the uniform blended price is decreased so that the total or pooled obligation of all the handlers will be sufficient to cover payment of both the uniform blend price to all farmers under the Order and the additional 46 and 23 cents per hundredweight payable to those designated under this section. Therefore, because the provision results in a lower uniform blend price, those who receive only this price and no differential have standing to attack the provision. *Stark* v. *Wickard*, 321 U.S. 288, 302-311 (1944); *Blair* v. *Freeman*, 370 F.2d 229, 234 (D.C. Cir. 1966). Furthermore, those farmers now receiving the 23 cent differential would receive a still higher price for their milk if there were no "farm location differentials" at all. Consequently these farmers have a similar interest and standing to challenge the provision. For this reason the Court has permitted plaintiffs who are composed both of farmers not receiving any differential and of farmers receiving the 23 cent differential to represent all such farmers as a single class in this action.

Claimed Lack of Authorization For Farm Location Differentials

1. *Uniform Price Requirement*

Plaintiffs' primary contention in challenging the validity of the farm location differentials is that the differentials are unauthorized departures from the requirement of Section 8c(5)(B)(ii) of the Act, 7 U.S.C. § 608c(5)(B)(ii), that farmers receive a "uniform" price for all their milk "irrespective of the uses made of such milk by the individual handler to whom it is delivered. . . ." The farm location differentials do, of course, result in a variation in the price received by different farmers. But as agreeable as the concept of price uniformity may be in the abstract, Congress quite obviously did not look upon price uniformity as an absolute rule or even as a goal in itself. For one thing, Congress specifically provided in Section 8c(5)(B) of the Act for adjustments to the uniform price. Furthermore, Congress drafted the Act to allow marketing orders to provide for individual handler pools rather than a market wide pool. Section 8c(5)(B)(i) of the Act. In other words, at the option of the Secretary and with the approval of the dairy farmers, the Connecticut Order could simply direct that each farmer receive payment from his handler according to the utilization of all the milk disposed of by only that particular handler instead of according to the utilization of all the milk disposed of in the entire market. If this were done there would be no uniformity of price among farmers selling their milk to different handlers.

What Congress hoped to achieve was orderly marketing conditions and higher prices. Sections 1 and 2 of the Act, 7 U.S.C. § 602. The attainment of these aims depends in large part upon the elimination of the incentive among dairy farmers to compete for the higher priced fluid milk market. For this reason, Congress set down the general principle that the price paid a farmer for his milk should remain the same "irrespective of the uses made of such

milk." Therefore, a variation from price uniformity is not repugnant to the Act simply because it is a variation but will be considered so if the effect of the variation is to increase competition. As the Supreme Court stated in *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76, 79 (1962), "[i]t is in order to avoid destructive competition among milk producers for the premium outlets that the statute authorizes the Secretary to devise a method whereby uniform prices are paid by milk handlers to producers for all milk received, regardless of the form in which it leaves the plant and its ultimate use." The farm location differentials do not in any manner stimulate competition for the fluid milk market since the differentials are paid solely on the basis of the location of a producer's farm and without any regard to the particular use made of the individual producer's milk.

This is to not to say that the Secretary can include in a milk marketing order any adjustments to the uniform price which he thinks advantageous and which do not bring about ruinous competition or a disorderly market. Quite the opposite is true. The plaintiffs correctly point out that in enacting the 1935 amendments to the Agricultural Adjustment Act of 1933, Congress was greatly concerned lest milk marketing regulation fall prey to the delegation infirmities noted by the Supreme Court's then recent opinion in *A.L.A. Schechter Poultry Corp.* v. *United States*, *supra*. Congress carefully attempted to delineate and circumscribe the Secretary's powers.[5] Section 8c(5) provides

[5] H.R. Rep. No. 1241, 74th Cong., 1st Sess. 8 (1935), issued in connection with the 1935 amendments to the Agricultural Adjustment Act of 1933, states that, "To eliminate questions of improper delegation of legislative authority raised by the decisions in *Schechter, et al.* v. *United States*, the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing and terminating orders, and specify the terms which may be included in orders dealing with the enumerated commodities."

that milk marketing orders shall contain only provisions specified in that section or terms incidental to and consistent with those specified provisions if necessary for their effectuation, and no others. Of even greater relevance is that part of Section 8c(5)(B) which makes payment of the uniform price "subject . . . only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to [the] order, (b) the grade or quality of the milk delivered, [and] (c) the locations at which delivery of such milk is made. . . ." Congressional intent is clear that the only authorized departures from the uniform price are those enumerated in Section 8c(5)(B).

The Court therefore concludes that although the farm location differentials are not incompatible with the marketing concept underlying the uniform price principle, the Court cannot uphold their validity unless they fall within one of the specified permissible adjustments. But even if one of the enumerated adjustments does allow such differentials the Court can only affirm the differentials as contained in the Connecticut Order if the Secretary of Agriculture offered that specific adjustment as justification when he promulgated the Order. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

2. *The Secretary's Justification*

The farm location differentials were contained in the Connecticut Milk Marketing Order when the Secretary of Agriculture first promulgated the order in 1959. 24 F.R. 1049 (1959). That promulgation and the Secretary's Final Decision issued in connection therewith were the result of extensive hearings held in 1958 in accordance with Sections 8c(3) and (4) of the Act, 7 U.S.C. §§ 608c (3) and

(4).[6] In his Final Decision, the Secretary set forth detailed findings with respect to the farm location differentials:

> "Provision should be made also for the payment of a market differential to producers in the nearby supply area. The monies for the payment of these differentials will be obtained by a deduction from the total value of all milk before completing the computation of the market-wide uniform price . . . .
>
> "Milk received from the nearby area has long represented the major part of the total Connecticut supply. The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes. Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern of pricing has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated

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[6] Section 8c(3) provides:

> "Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order."

Section 8c(4) provides:

> "After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity."

markets. The differentials adopted will reflect more representative values with respect to the milk of both nearby and distant producers since the nearby producer will share in the higher-priced Class I market to an extent somewhat greater than otherwise would be the case under market-wide pooling.

"In addition, the use of a nearby differential will assist in providing appropriate price alignments for direct delivery producers which will permit Connecticut handlers to continue to compete in the purchase of milk on reasonable terms with dealers in adjacent markets. The amounts of such differentials are very similar to those employed in other New England Federal order markets and are in reasonable alignment with the schedule employed in the New York-New Jersey market. Such differentials were proposed and generally supported by both producers and handlers at the hearing. Their employment will tend to promote orderly marketing in the milkshed." 24 F.R. 1049, 1063 (1959).

These findings were reaffirmed by the Secretary in 1960 after lengthy hearings on the New England orders. 25 F.R. 7819, 7833-34 (1960). Most recently in 1964, after further hearings, the Secretary again ruled in favor of continuation of the differentials.

"4. *Farm location differentials.* The farm location differential provisions under the present New England orders should be continued under the Massachusetts-Rhode Island order and the Connecticut order . . . .

"Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally re-

flected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed." 29 F.R. 11205, 11213 (1964).

The findings quoted above indicate that the Secretary considered the Connecticut farm location differentials to be "adjustments for (a) . . . market . . . differentials customarily applied by the handlers . . ." as provided in Section 8c(5)(B) of the Act. For example, at the very outset of the discussion of farm location differentials in the 1959 Final Decision, the Secretary refers to the need for the payment of a "market differential." He then discusses the differential in terms of past practice and as a "historical pattern of pricing . . . typical in the markets of this region" and point out that "market differentials of this type have been adopted in the nearby regulated markets." The Secretary's later Final Decisions contain similar references.

Plaintiffs, however, ignore this language and stress the statement by the Secretary that the differentials will permit the nearby producer to "share in the higher-priced Class I market to an extent somewhat greater than otherwise would be the case under market-wide pooling." 24 F.R. 1049, 1063 (1959). Plaintiffs argue that this is an admission that the differentials are in fact based on the utilization of milk. As previously stated, however, the differentials are paid on the basis of farm location. The use made of the milk by the handler is totally irrelevant. The proper meaning to be accorded the Secretary's statement was explained at the trial by Mr. Herbert L. Forest, Director of the Dairy Division of the United States Department of Agriculture:

"A differential in an order for any purpose means that some farmer or some farmers who get the differential get a higher price, and the only way they can get

a higher price as compared with other farmers is to take it out of the higher utilization, because it is the class 1 higher value added to the pool which gives any basis for farmers getting a higher value. So that when one producer gets a differential as compared to another, in effect he is drawing out of this higher value which class 1 has put into it. Some other farmers get less. So when we talk about differentials, we usually say he gets a bigger cut of class 1 sales, because in effect that is what it means. That is the only place the differential can come from."

Furthermore, the Secretary's conclusion that the differentials would assist in providing proper price alignments so that Connecticut handlers could compete for milk supplies with handlers in adjacent markets, far from showing that the differentials are incompatible with the Act, indicates that they are vital to achieve orderly markets, an avowed objective of the Act.

Defendant-interveners suggest that farm location differentials can also be classified as production differentials or adjustments depending on the location of delivery of milk. While the Court recognizes that arguments along these lines might be made, no such findings were made by the Secretary in his Final Decisions. As the Secretary states in his brief in the instant action:

> "Either the farm location differential is a proper adjustment to the uniform price within the express provisions of 8c(5)(B)(ii), i.e. a 'market differential customarily applied', or it is not. That is the real question in issue. The Secretary's finding leaves no doubt as to his justification."

The Court must therefore confine itself to consideration of whether farm location differentials are in fact market differentials customarily applied by handlers.

3. *Legislative and Administrative History*

If the phrase "market . . . differentials customarily applied by the handlers" either clearly did or did not on its face encompass farm location differentials, the Court's task would be simple. The plaintiffs, on the one hand, contend that in view of Congressional concern over the delegation problem only the explicit use in the Act of the words "farm location differentials" could be taken as authorization of such differentials, and therefore the phrase relied on by the Secretary patently does not authorize these differentials. On the other hand, defendant-interveners argue that the statutory language plainly includes farm location differentials. The Court, however, disagrees with both of these claims. A desire to delineate and circumscribe an administrator's powers does not automatically result in or insure clear, precise and self-defining statutory language. When the language does not measure up to the ideal standard the courts would be doing a disservice to the legislative branch if instead of using available means at arriving at the true intent of Congress they refrained from giving the language any effect at all. A similar disservice would obtain if the courts went to the other extreme and held the language to include everything that any conceivable reading could find it to include. It is perfectly obvious to the Court that the term "market differentials" is sufficiently broad and indefinite when used in connection with marketing orders to encompass many types of differential; but by the same token this broadness does not necessarily mean that Congress intended it to have such a wide scope. The Court therefore finds entirely proper the suggestion of the Secretary that the Court resort to the usual aids to legislative interpretation in order to ascertain whether Congress intended farm location differentials to be encompassed by "market . . . differentials customarily applied by the handlers subject to such order."

Examination of the House of Representatives report, H.R. Rep. No. 1241, 74th Cong., 1st Sess. (1935), and the

similar Senate report, S. Rep. No. 1011, 74th Cong., 1st Sess. (1935), which accompanied the 1935 amendments to the Agricultural Adjustment Act of 1933, does not result in immediate clarification of the issue. On the one hand, the reports evidence a clear Congressional intent to affirm the varied marketing efforts and practices attempted by the cooperatives prior to the 1933 Act and continued pursuant to licenses issued under that Act and to encourage local variations in marketing plans.

> "The proposed amendments substitute the word 'order' for 'license' in order more accurately to describe the nature of the Secretary's regulatory power. The operations of cooperative marketing associations will be reenforced by the new sections of the bill dealing with these matters and these provisions will assure the cooperation of processors and distributors in programs intended to raise farm prices. The marketing agreements and licenses which have been issued and entered into pursuant to the Agricultural Adjustment Act have contained a great variety of provisions in order to adapt each particular program to the peculiar problems and circumstances presented in a given area by a particular commodity.
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> "So that proper recognition may be given to local differences which may exist in production or marketing methods or conditions, orders are required to be limited in their application to the smallest practicable regional production or marketing areas, and orders applicable to the same commodity or product are required to prescribe such terms applicable to different production or marketing areas as will recognize local production and marketing differences. Orders relating to milk and its products are exempted from the requirement that they be limited in their application to the smallest practicable regional production or marketing areas.
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> * * *

"Third. Subsection (5) of the proposed section 8c states specifically the terms which may be included in orders relating to milk and its products. These terms follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present section 8 (3) of the Agricultural Adjustment Act." H. R. Rep. No. 1241 at 7 and 9; see S. Rep. No. 1011 at 9.

On the other hand, the definitions of volume, production, and market differentials given in the reports would, if followed, make invalid many of the local adjustments and variations achieved by cooperatives and continued under the licenses.

"Minimum prices fixed in such orders are required to be uniform as to all handlers, subject to adjustments for differences in the grade and quality of the milk delivered, for differences in transportation costs from the place at which delivery is made to the handler to the distributing or processing plant, and for volume, market, and production differentials customarily applied by handlers. The volume differential is a differential which is paid when the operations of several country plants are consolidated into one plant. The inconvenience which is caused to producers by closing up plants to which they have been delivering and requiring that all of their milk be handled by one plant, is compensated by an additional payment to the producers. The production differential is the differential which is paid to a producer, compensating him for keeping his farm and milk qualified for a city market even though his milk may actually be going into manufactured use. It is necessary to keep this supply of reserve milk available for periods in which consumption of milk goes up so that the effect is that the producers must keep their farm in the same condi-

tion as if they were shipping milk into the city every day. The production differential is a payment to the farmer for performing this function in the market.

"The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a 'location' differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets." H.R. Rep. No. 1241 at 9-10; S. Rep. No. 1011.

At the trial, witnesses thoroughly familiar with milk marketing both prior to and after the enactment of the 1933 Act testified that these definitions not only excluded differentials in use under the licensing programs but that at least one of the definitions failed to describe any differential then in existence. Richard D. Aplin, who was Assistant Market Administrator under the first federal milk license for the Boston market beginning in 1933 and who is now Market Administrator under the Massachusetts-Rhode Island Order, testified that a volume differential as defined in the reports was paid only by the Dairymen's League Cooperative in New York in the late 1920's and early 1930's, but that a differential for large volume producers was common practice. Mr. Aplin further stated that he knew of no differential that fell within the definition of production differentials as provided in the reports although here again he knew of differentials in existence which could be called production differentials, as for example, payments for maintaining evenness of production throughout the year. With respect to market differentials, Mr. Aplin testified that while the definition given might apply to higher payments made at city plants, such payments, contrary to the reports, were made only in primary markets and not in secondary ones. He himself thought

that the farm location differentials, which he stated were customarily paid in New England, were really market differentials.

Donald Hammerberg, Market Administrator under the Connecticut Order, essentially affirmed Mr. Aplin's testimony although he was not familiar with the volume differential paid by the Dairymen's League and knew of no differentials which would in any way fit the definition of market differentials contained in the reports.

Two men who participated in drafting the 1935 amendments, Reuben Hall and Donald Kane, testified that the language with respect to volume, market and production differentials was not decided upon until the day before the legislation was introduced and that the problem had been to choose language specific enough to satisfy delegation requirements and yet broad enough to permit the Secretary to adapt the orders to meet varying conditions and to create stability. They stated that the language settled upon was purposely chosen for its breadth and it was definitely contemplated by the drafters that the words "market differentials customarily applied" should include farm location differentials.[7]

That Congress did not in fact intend to be restrictive in its authorization of differentials is most strikingly illustrated by a colloquy which took place on the Senate floor between Senator Copeland of New York and Senator Murphy, the floor manager of the bill, after issuance of the Committee reports. 74 Cong. Rec. 1139-1140 (1935). Senator Copeland first inquired about the effect of equalization on the supply of milk.

"Mr. Copeland. What has the Senator to say to the suggestion that in a number of communities in up-

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[7] Justice Frankfurter in his dissenting opinion in *Stark* v. *Wickard*, 321 U.S. 288, 315 (1944), noted that the Act was "devised by those who know the needs of the industry and drafted by legislative specialists. . . ."

State New York there is not a sufficient supply of milk surrounding the market to take care of the demand; therefore, milk must be brought into the market from more distant points? The provisions of the equalization which we are now discussing provide that a producer who is producing his milk on farms near to cities would receive the same price for his product as a farmer who produces his milk, say, 40 or 50 miles away from the same community."

Senator Murphy replied that Senator Copeland was generally correct.

"Mr. Murphy. If they were embrased in the same marketing area, that would be true. Let us keep in mind what the situation is. There is a deficiency of consumer demand. There is a surplus of milk. The price is greatly depressed, and has been for 5 years. The only way in which one can determine how each one of the producers included in the plan provided here shall bear his share of the cost of effecting a higher price is to divide the milk by classification uses."

Senator Copeland, however, was not satisfied with this response.

"Mr. Copeland. I do not think the Senator has quite stated all the conditions. He does not take into consideration the difference in the cost of production. Taxes and values of property near the city are very much higher than in the case of property farther away from the city. The transportation differential does not compensate for the difference in cost, as I see it."

The answer then given by Senator Murphy demonstrates that differentials, such as farm location differentials, were contemplated.

"Mr. Murphy. If the Senator will refer to page 12, line 13, he will see that there is this qualification:

'Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order—'

They adopt the present practice of business—

'(2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.'" (emphasis added)

In view of these remarks by Senator Murphy, and in view of the testimony of two of the drafters of the statutory language in question, and considering the expressions of intent in the Committee reports that local variations and past practices under cooperative and licensing agreements should continue, the Court concludes that the narrow definition of market differentials contained in the committee reports must be read as illustrative rather than as restrictive.

At the trial much evidence was introduced by the Secretary and defendant-interveners as to differentials received in the 1920's and 1930's by milk producers whose farms were located in close proximity to the Boston market. While this evidence does not directly justify the inclusion of similar differentials in the Connecticut Order, it is relevant insofar as it establishes that payment of farm location differentials was in fact an approved "practice of business" at the time of the enactment of the 1935 amendments to the Agricultural Adjustment Act of 1933 and that such differentials were therefore contemplated by Congress.

Reuben Hall testified that beginning in the mid-1920's and continuing right up until the advent of federal licensing in 1933 it was the voluntarily agreed upon practice of handlers under contract with the New England Milk Producers Association to pay a premium to nearby farmers of about 46 cents per hundredweight which was derived from an amount otherwise payable to all producers. Sometimes this was achieved by what was called a preferential base rating plan which meant that a greater proportion of a nearby producer's milk was treated as being used as higher priced Class I or fluid milk. The premium was over and above any additional amounts paid to nearby producers by handlers because of savings in transporting the milk to market. It was simply part of a self-imposed self-regulating program designed to stabilize the market.

The first federal license under the Agricultural Adjustment Act was issued by the Secretary on October 30, 1933 and became effective on November 3, 1933. Under the license, a preferential base was used to maintain the approximately forty-six cent differential above transportation cost savings which had previously been paid to nearby farmers. Admittedly, under the language of the license the preferential base was granted to farmers who delivered their milk directly to the handlers' city plants. But, as a number of witnesses testified, only producers whose farms were nearby the city could deliver to the city plants because of the delivery methods then in existence. The others had to deliver to country stations and therefore did not receive the preferential base. The result was that the license in effect provided for a differential to producers with nearby farms. That those administering the license thought they were doing just this is evident from a pamphlet entitled "The Boston Milk License" issued August 1, 1934 by the Boston Market Administrator. Although the pamphlet was distributed in connection with a second Boston license which had replaced the first on March 16, 1934, the

pamphlet's author, who was in fact the witness Richard Aplin, was referring to the provisions of the first license and the conditions surrounding its issuance when he stated:

> "It was found that in past years the producers who were located near Boston had consistently received the fluid milk price for a larger proportion of their milk on account of their having been able to adjust their production more closely to the requirements of their distributors. A careful study by the Administrator, covering the eight-year period from 1926 to 1934, showed that the assignment of 85% bases to these producers would result in giving to them the same relative advantage that they have had during the past over producers who were located at a greater distance from the market. Consequently producers whose milk was delivered directly to a distributor's city plant within 35 miles of the State House in Boston were assigned base ratings equal to 85% of their average deliveries of milk in September, October and November, 1933, or 85% of their average daily deliveries of milk for the entire year 1933, whichever amount was greater in each case. A few groups of producers who were delivering milk to plants more than 35 miles, but less than 100 miles, from the State House at Boston, were given bases less than 85%, but more than 61% of their 1933 production."

Actually, the preferential treatment accorded nearby farmers was continued under the second license although that license left it to the Market Administrator to determine each individual farmer's base.

The second Boston license was declared invalid on May 17, 1935 by the United States District Court for the District of Massachusetts in *United States* v. *Seven Oaks Dairy Co.*, 10 F. Supp. 995 (D. Mass. 1935). The license however remained on the books until February 9, 1936

when it was replaced by the first order under the 1935 amendments to the Agricultural Adjustment Act of 1933. Under the order there were no preferential bases as such —all farmers' bases were determined by the same formula —but those producers whose farms were within forty miles of the State House in Boston and who delivered to a plant within forty miles of the State House received a higher price for all their base milk than those farmers delivering to a plant within forty miles of the State House but whose farms were located more than forty miles away. Thus, this differential was unquestionably based solely on the location of a producer's farm.

The first Boston order was suspended by the Secretary on July 31, 1936 when the District Court for the District of Massachusetts held the Agricultural Adjustment Act unconstitutional in *United States* v. *David Buttrick Co.*, 15 F. Supp. 655 (D. Mass. 1936), *rev'd*, 91 F.2d 66 (1 Cir. 1937). After the passage of the Agricultural Marketing Agreement Act on June 3, 1937, the Secretary reinstated the order in part effective July 1, 1937. The order was then amended and as amended became fully effective on August 1, 1937. 2 F.R. 1588 (1937). The amended order eliminated base ratings entirely and simply provided for the payment of a forty-six cent differential to producers with farms located near the State House, and a twenty-three cent differential to producers with farms situated at an intermediate distance. 2 F.R. 1588, 1590 (1937). This provision in essence remained in effect in all orders regulating the Boston market until it was declared invalid in *Allen* v. *Freeman*, Civil Action 3379-66 (D.D.C., June 15, 1967), appeal pending. See *Zuber* v. *Allen*, 387 F.2d 862 (D.C. Cir. 1967). The farm location differentials contained in the Connecticut Marketing Order are the equivalent of the Boston differentials.

This fundamental continuity in the use of farm location differentials beginning in a period of attempted self-

regulation and progressing through various stages of government regulation clearly suggests that Congress recognized the need for such differentials and intended to authorize them.

Certainly those people in the industry and government most intimately involved in drafting the regulatory language and in administering the resulting legislation believed that Congress intended to authorize farm location differentials, and they continue to believe so. Their opinions cannot be ignored. As the Supreme Court stated in *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549 (1940):

> "In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'"

See also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 367 U.S. 396, 408 (1961); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). Indeed, such deference is to be accorded administrative interpretation of statutory language that to sustain such an interpretation, the Court "need not find that [the administrative] construction is the only reasonable one, or even that it is the result [the Court] would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Comm'n of Alaska* v. *Aragon*, 329 U.S. 143, 153 (1946). See also, *e.g.*, *Udall* v. *Tallman*, *supra* at 16.

Congressional reenactment of the 1935 amendments to the Agricultural Adjustment Act of 1933 in the Agricultural

Marketing Agreement Act of 1937 is, of course, an indication that Congress approved the use of farm location differentials since the 1936 Boston order issued under those amendments contained such differentials. In *Queensboro Farms Products* v. *Wickard*, 137 F.2d 969 (2 Cir. 1943), an attack on a provision of the milk order regulating the New York metropolitan milk market placed in question the meaning of the phrase "use classification" in Section 8c(5)(A) of the Act. Judge Frank upheld the Secretary's interpretation of the language of the Act and in so doing alluded to the significance of the 1937 reenactment of the 1935 amendments:

> "After the Act was amended in 1935, the Secretary issued several regional milk orders. In some of them, he adopted as a measure of 'use,' and as a basis for classification, the form in which milk was sold by, or moved from, the plants of, handlers. While those orders were in effect, Congress (because of the decision in *United States* v. *Butler*, 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914, holding certain aspects of the Act unconstitutional) after reconsidering inter alia, the provisions which had been added in 1935 and pursuant to which these orders had been made, re-enacted those 1935 provisions with amendments not here pertinent. It is true, of course, that bald re-enactment of statutory provisions, without more, need not be given much weight as indicating an adoption of preceding administrative interpretation; but where careful consideration has—as in the case of the statute before us—been given by Congress in connection with a re-enactment, much is to be said for a contention that Congress intended to adopt the intervening administrative interpretation." (Footnotes omitted) *Id.* at 976-77.

Judge Frank's conclusion is equally applicable here.

Furthermore, the 1937 reenactment goes a step beyond implicit approval of the differentials. Section 4 of the Act, 50 Stat. 249, provides:

> "Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, r order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed."

What otherwise might be a meritorious argument that Congress simply intended to prevent technical abatement of prior orders is countered by the House of Representatives committee report accompanying the proposed legislation.

> "Section 4 of the bill negatives any implication that its effect is to invalidate or cast doubt on action heretofore taken under the agreements and orders provisions. The section also expressly ratifies, legalizes, and confirms such action. Judicial sanction for such a provision is found in *Mattingly* v. *District of Columbia* ((1878), 97 U.S. 687, 690); *United States* v. *Heinzen* ((1907), 206 U.S. 370, 382); *Tiaco* v. *Forbes* ((1913), 228 U.S. 549, 556); *Rafferty* v. *Smith, Bell & Co.* ((1921), 257 U.S. 226, 232); *Isbrandtsen-Moller Company, Inc.* v. *United States et al.* (No. 307, October term, 1936, United States Supreme Court, decided Feb. 1, 1937); and *Swayne & Hoyt, Ltd., et al.* v. *United States* (No. 494, October term, 1936, United States Supreme Court, decided Mar. 1, 1937)." H. Rep. No. 468, 75th Cong., 1st Sess. 4 (1937).

The first sentence makes it clear that Congress indeed wished to avoid technical abatements, but the second sentence by use of the word "also" demonstrates that Section 4 was further designed to ratify, legalize and confirm affirmatively the provisions of past orders. In addition, the cases cited in the report all involved instances in which Congress had legalized or ratified prior executive action; none of them were concerned with mere technical abatement.[8]

Finally, it is important to note that in all the years since passage of the 1935 amendments and the 1937 Act farm location differentials have been used in a number of marketing orders by the Secretary, and Congress has taken no action to put an end to the practice. *Cf. Udall* v. *Tallman, supra,* at 408-09.

This history of reenactment, confirmation, and acquiescence does not directly establish that farm location

[8] In *Brannan* v. *Stark*, 342 U.S. 451, 465-66 (1952), the Supreme Court was presented with the argument that Section 4 of the Act validated all provisions in future orders which were similar to provisions in orders existing at the time of passage of the 1937 Act. The Supreme Court in holding that a particular type of payment to cooperatives was unauthorized by the Act stated that "[e]ven if we were to accept the proposition that Congress there intended to confer statutory authority for all future provisions like any of those then existing in any marketing order, we would reach the same conclusion because neither the provisions for these particular payments nor any closely analogous provisions were at that time present in any marketing orders." The situation is different here where the equivalent of farm location differentials were contained in an order in effect when the 1937 Act was passed. Furthermore, this Court in no way accepts the proposition that Section 4 automatically validates the inclusion of farm location differentials in any order. The Court simply is of the opinion that Section 4 represents Congressional reiteration of its intent to authorize the inclusion of farm location differentials in orders governing marketing areas where such differentials have customarily been paid.

differentials as contained in the Connecticut Order are a proper exercise of administrative power. That depends in part upon whether there is substantial evidence in the record to support the Secretary's findings. The history does, however, lend great weight to the conclusion that farm location differentials as a general proposition are authorized by the Act and approved by Congress for use in marketing areas where they have been historically paid by handlers and their continued payment will tend to effectuate the purposes of the Act.

4. *Not a Trade Barrier*

Plaintiffs further contend that farm location differentials constitute a trade barrier in violation of Section 8c(5)(G) of the Act, 7 U.S.C. §608c(5)(G). That section provides that milk marketing orders shall not "prohibit or in any way limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

Plaintiffs' argument is without merit. The record is devoid of evidence showing that payment of the differential in any way prohibits or limits the flow of milk or its products into or within the Connecticut market. See *Freeman* v. *Lewes Dairy, Inc.*, 337 F.2d 827 (3 Cir. 1964), *cert. denied*, 379 U.S. 1000 (1965); *cf. Lewes Dairy, Inc.* v. *Freeman*, 260 F. Supp. 921 (D.Del. 1966, appeal pending In fact plaintiffs admitted at trial that they had switched from shipping into other markets to ship into Connecticut because they obtained a better price for their milk under the Connecticut Order.

It must also be noted that farms receiving the benefit of the differential are not limited to Connecticut farms but include farms in Rhode Island and neighboring portions of New York and Massachusetts—areas from which milk can be directly shipped to market in Connecticut. Thus, the

differential is clearly not designed to limit the flow of out-of-state milk.

Furthermore, even if the payment of the differential could in some potential way limit the flow of milk, Section 8c(5)(G) was not designed to prevent such limitations where they result from the exercise of express authority in Sections 8c(5)(A) and (B) to classify, price and pool milk and to make adjustments. Apparently Section 8c(5)(G) originated in the House of Representatives as an amendment to the bill. As first introduced by Congressman Andresen it simply provided that no marketing order shall "prohibit" the marketing in that area of any "milk or milk product" produced in any area of the United States. 79 Cong. Rec. 9572 (1935). Congressman Southoff then suggested that the provision be strengthened by substituting the words "limit or tend to limit" for the word "prohibit." *Id.* Congressman Jones, the floor manager of the bill, immediately pointed out that if the words "limit or tend to limit" were substituted, it "would absolutely wreck the whole milk program." He then offered an explanation for his position:

> "In order to get away from the terrific conditions that have prevailed in the milk industry there is provided in the bill authority to fix a minimum price to producers. That, at least in a measure, would limit or tend to limit shipment, and yet the gentleman, I am sure, does not want to interfere with the price to producers. Then it is a universal custom in the marketing of milk to classify milk. This, in a way, is a limitation.
>
> "I am perfectly willing to adopt the first amendment suggested, because that simply treats all areas alike, for you could not prohibit someone from an outside area coming in so long as he complied with the conditions prescribed for that area; but if you said that no restrictions or limitations could be required, it would wreck the program, it would destroy every vestige of a program we have for milk."

The result was that the finally chosen wording of Section 8c(5)(G) carefully avoided the problem alluded to by Congressman Jones. This is made quite clear in the conference report accompanying the proposed legislation:

> "Amendment no. 24: Under the House bill, no marketing agreement or order applicable to milk and its products in any marketing area could prohibit the marketing in that area of any milk or product thereof produced in any production area in the United States. The Senate amendment extended this provision so that no marketing agreement or order so applicable could limit in any manner the marketing in the marketing area of milk or its products produced anywhere except that certain limitations on the marketing of milk were specifically permitted. The conference agreement retains the House provision with respect to prohibitions on marketing of both milk and products of milk. The conference agreement also denies the authority to limit in any manner the marketing in any area of milk products (butter, cheese, cream, etc.) produced anywhere in the United States. *The language adopted by the conference agreement does not refer to milk, and so does not negative the applicability to milk, for use in fluid form or for manufacturing purposes, of the provisions of the bill relating to milk, such as the provisions on price fixing, price adjustment, payments for milk, etc.*" H. R. Rep. No. 1757, 74th Cong., 1st Sess. 21 (1935) (emphasis added)

Thus farm location differentials, permitted as they are as market differentials, are not prohibited by Section 8c(5)(G).

Lehigh Valley Cooperative Farmers, Inc. v. *United States*, 370 U.S. 76 (1962), is not authority to the contrary. In that case the Supreme Court held invalid as a trade barrier in violation of Section 8c(5)(G) a provision in the New York-New Jersey Order which required special payments to be made on certain otherwise unregulated milk shipped

into the marketing area. The Supreme Court found that this requirement in effect precluded or severely curtailed the shipment of such milk into the market. *Id.* at 86-87. Just as importantly, the only authorization offered by the Secretary for the requirement was Section 8c(7)(D) of the Act, 7 U.S.C. §608c(7)(D), which permits the Secretary to include terms in Orders which are incidental to the provisions specified in Section 8c(5) of the Act only if those terms are not inconsistent with those provisions and are necessary to effectuate them. The Supreme Court concluded that since the requirement was inconsistent with Section 8c(5)(G) it could not be justified by Section 8c(7)(D). *Id.* at 98. In the present case the differentials do not exclude milk from the area nor does the Secretary attempt to justify them as being incidental to other authorized provisions.

5. *Judicial Interpretation*

The validity of farm location differentials was passed upon and approved by the courts shortly after the passage of the 1937 Act. Numerous handlers in the Boston area refused to comply with the Greater Boston Milk Marketing Order when it became effective in its amended form on August 1, 1937. In response, the government sought and obtained temporary injunctions against the handlers in the District Court. *United States* v. *Whiting Milk Co.,* 21 F. Supp. 321 (D. Mass. 1937); *United States* v. *H. P. Hood & Sons, Inc.,* 26 F. Supp. 672 (D. Mass. 1939). These cases after being docketed on appeal in the Circuit Court of Appeals for the First Circuit went directly to the Supreme Court on certiorari where they were considered along with cases challenging the validity of the milk marketing order regulating the handling of milk in the New York metropolitan area. The result was that the Supreme Court handed down two opinions. In the first, *United States* v. *Rock Royal Co-operative, Inc.,* 307 U.S. 533 (1939), the Supreme Court considered extensive attacks on the constitutionality of the 1937 Act and the validity of the New

York Milk Marketing Order and upheld both the Act and the Order. In the second, *H. P. Hood & Sons, Inc.* v. *United States,* 307 U.S. 588 (1939), the Supreme Court sustained the Boston Order.

The New York Order considered in *Rock Royal* contained provisions for the payment of a twenty-five cent differential to farmers delivering their milk to handlers' plants located in eighteen counties near New York City. While five cents of the differential was paid out of the handlers' own pockets, the other twenty cents was obtained by deducting that amount from the price which otherwise would be paid to all farmers, the method employed by the Connecticut farm location differentials. Furthermore, as was pointed out in connection with a similarly worded differential in the first Boston license of 1933, delivery to plants in those counties meant that the farms from which the deliveries were made were located there. In fact those persons involved with the differential always spoke of it as a differential paid on the basis of farm location. Thus, the District Court in the *Rock Royal* case in discussing the differential stated:

> "[The handlers] are also required to pay into the Producers Settlement Fund to provide preferential payments made to producers living in 18 counties, under the provisions of Article 6, Section 8. The producers in those counties receive 20 cents per cwt. in addition to the locational differentials, which return them a higher price for their milk because they are located nearer New York." 26 F. Supp. 534, 555 (N.D.N.Y. 1939).

The District Court held the differential invalid and refused enforcement of the Order on this and other grounds. On appeal to the Supreme Court the government defended the differential as one based on farm location:

> "There was ample evidence before the Secretary to justify the reasonableness of the nearby differentials.

> The 18 counties to which the nearby differentials apply are all very close to the marketing area and are separated from the rest of the milkshed by non-productive mountainous territory * * *. The milk of producers in these counties is readily available for use in the fluid market and producers in these counties have always enjoyed an almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages. Accordingly, it was reasonable that these producers should receive a special differential." Brief for the United States, Oct. Term, 1938, No. 771, at 60-61.

The appellee, on the other hand, argued as plaintiffs do in the instant action that the differential was "neither contemplated nor authorized by the Act", was "repugnant to 'equalization', which the statute sought to accomplish" and was the "basis of inequality". Brief for Rock Royal Co-operative, Oct. Term, 1938, No. 777, at 76.

The Supreme Court in reversing the District Court held that "[t]he Act authorizes such an arrangement", citing Section 8c(5)(A). 307 U.S. at 567.

It is true that *Rock Royal* was a suit involving handlers and not producers and that Section 8c(5)(A) applies to the former rather than the latter. But Section 8c(5)(A) provides for the same uniform prices subject to the same adjustments as set out in identical language in Section 8c(5)(B) applying to producers. Therefore, the Supreme Court's holding that Section 8c(5)(A) "authorizes such an arrangement" is most certainly authority that Section 8c(5)(B) authorizes the same arrangement.

It is also true that the Supreme Court refrained from considering the District Court's finding that the differential was discriminatory as to producers since only handlers were involved in the action. The Supreme Court did, however, reject contentions of discrimination against handlers

made by appellees because they were "fanciful and remote" and "would not justify a court in overturning the Secretary's determination of the propriety of the differentials on evidence found by the lower court to be substantial." 307 U.S. at 567. The Supreme Court further concluded that "[s]uch an administrative determination carries a presumption of the existence of a state of facts justifying the action far too strong to be overturned by such suggestions as are made here." 307 U.S. at 567-68.

While generally upholding the validity of the Boston Milk Marketing Order in *H. P. Hood & Sons, Inc.* v. *United States, supra,* the Supreme Court omitted any specific discussion of the farm location differentials contained in the Order. These differentials had been challenged in the lower court but the challenge apparently was not pressed on review by the high court. See *Green Valley Creamery, Inc.* v. *United States,* 108 F.2d 342, 344 (1 Cir. 1939). The Supreme Court did, however, note that pursuant to the Order, adjustments were made for differentials. 307 U.S. at 594. In view of this and the Court's simultaneous decision in *Rock Royal* it may be assumed that the Court was not struck by any essential distinction between the differentials in *H. P. Hood & Sons* and the differential it upheld in *Rock Royal.*

If there is any doubt as to whether the Supreme Court gave full consideration to the validity of farm location differentials, there can be no doubt that the differentials received such consideration by the Court of Appeals for the First Circuit. Approximately six months after the Supreme Court rendered its decisions in *H. P. Hood & Sons* and *Rock Royal,* the Court of Appeals for the First Circuit decided *Green Valley Creamery, Inc.* v. *United States,* 108 F.2d 342 (1 Cir. 1939). In that opinion the court first noted that because of the prior Supreme Court decisions appellants, who were milk handlers, were no longer free to question the constitutionality of the Act nor the validity of most of the terms of the Boston Order.

The court, however, did permit them to challenge three provisions of the Boston Order because attacks on these provisions had not been pressed before the Supreme Court. One of these provisions established the farm location differentials and another specified two sets of minimum prices, the higher applicable to milk purchased from associations of producers, and the lower applicable to milk purchased directly from individual producers.

The court found that the two sets of minimum prices were justified as "a market differential customarily applied by handlers." *Id.* at 345. The court held that the evidence before the Secretary supported a finding that a higher price had customarily been paid in the market area to producers associations because such milk had "an enhanced value" due to the fact that many marketing services had already been performed by the associations. The court further held that "[t]he phrase 'market differential', undefined as it is in the Act, is reasonably susceptible of such an interpretation." *Id.* Thus the court rejected the narrow definition of "market differential" suggested by some of the language in the Senate and House Committee reports and argued here by plaintiffs.[9] As a further ground for its decision the court noted that the provision existed in the Boston Order prior to the 1937 Congressional re-

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[9] The Supreme Court apparently approves of the First Circuit's view of the proper scope to be accorded the term "market differential". In *Brannan* v. *Stark*, 342 U.S. 451, 466 (1952), the Supreme Court found a certain type of payment to producers' associations unauthorized by any provision of the Act but stated that:

> "Many provisions for payments to cooperatives appearing in other orders have been of a kind specifically authorized by the statute. Thus, the provision of the first Boston Milk Order for a price differential as between cooperative milk and non-cooperative milk was upheld in *Green Valley Creamery* v. *United States*, as a 'market differential' authorized by § 8c (5)(A)(1)." (footnote omitted)

enactment without change of the 1935 amendments to the Agricultural Adjustment Act of 1933.

In considering the farm location differentials, the court placed heavy emphasis on the fact that such differentials had been paid historically.

> "There was evidence before the Secretary to the effect that similar differentials in favor of nearby farms had existed in the Boston market for many years. Various factors were mentioned as accounting for this, including their greater accessibility to the market, and their greater dependability as sources of supply, because, as experience showed, the nearby farms had a more uniform level of production throughout the year. These producers were also potential dealers, who might establish their own milk routes in competition with handlers in the Boston market, if prices were not acceptable. Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted in the Order so as not to disturb the status quo in this respect." *Id.* at 346.

The court recognized that "[m]ilk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market", and therefore the differentials could be authorized pursuant to Section 8c(5)(B)(ii) of the Act as differentials based upon "the locations at which delivery of such milk is made." *Id.* But the court found it unnecessary to further develop this point because it concluded that

> ". . . the differentials can readily be sustained under Section 8c(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called 'location differentials' in the Order, and so they are; but

they are also customary market differentials based upon the location of farms nearby the market." *Id.*

The court also observed that the farm location differentials were part of the Boston order at the time of the 1937 reenactment of the 1935 amendments to the Agricultural Adjustment Act of 1933.

Thus the Court of Appeals clearly found, as the Secretary contends here, that farm location differentials are market differentials authorized by the Act where such differentials customarily have been paid. It was only after the Court had set this out that it noted that handlers lacked standing to raise the issue because the differentials affected only producers. This Court is of the opinion that the Court of Appeals' final point in no way weakens the authority of its prior conclusions concerning the validity of the differentials and that these conclusions should be afforded great weight coming as they did such a short time after the enactment of the legislation in question. Certainly a court sitting contemporaneously with a legislature is in a better position to ascertain the true intent of that legislature than a court sitting some thirty years later.

Plaintiffs place great reliance on the recent decisions of *Blair* v. *Freeman*, 370 F.2d 229 (D.C. Cir. 1966), and *Allen* v. *Freeman*, Civil Action 3379-66 (D.D.C., June 15, 1967), appeal pending. See *Zuber* v. *Allen*, 387 F.2d 862 (D.C. Cir. 1967).

In *Blair*, the Court of Appeals for the District of Columbia Circuit held invalid the farm location differentials then contained in the New York-New Jersey Milk Marketing Order, 7 C.F.R. 1002 (1968). Certain factual differences exist between the circumstances found by the court in *Blair* and the circumstances in the instant case. For example, the differentials in the New York-New Jersey Order varied in amount according to the total utilization of fluid milk in the market, a factor which bore heavily

on the Court of Appeals conclusion that the differentials represented impermissible variations in price based on the use of milk. The Connecticut differentials, however, remain constant in amount. Another example is that the Secretary attempted to justify the New York-New Jersey differentials as "adjustments for the locations at which delivery of such milk is made." No such attempt is made here by the Secretary. Instead the Secretary squarely places his reliance on "market differentials customarily applied by the handlers."

Despite the differences in fact, the Court recognizes that its holding is based on conclusions which are contrary to those reached in *Blair*. The Court is indeed reluctant to disagree with such a distinguished court as the Court of Appeals for the District of Columbia and does so only with the greatest respect and deference. But while the Court concurs with the Court of Appeals for the District of Columbia that the uniform price requirement was designed to eliminate ruinous competition for the fluid milk market, it cannot concur in the Court of Appeals conclusion that the requirement prohibits recognition of the historic fact that farmers located in particular areas near the market were accorded a greater share of that market. Similarly, the Court agrees with the Court of Appeals that Congress was concerned in 1935 with the delegation problem and attempted to make the provisions of the Act specific. But the fact remains, as noted in *Green Valley Creamery, Inc.* v. *United States, supra,* at 345, that the phrase "market differential" remains undefined in the Act. And while the court in *Blair*, at 238, concluded that "[t]he 'market differential' rationale is plainly not a tenable basis for the nearby differential" because "it is plain that this type of allowance turns not on the location of the producer's farms but on the nature of the market to which they deliver their milk," the court in *Green Valley Creamery,* just several years after the provision's enactment, found the op-

posite.[10] Therefore faced with conflicting authority and an action involving an independent order and separate differentials, the Court believes it is justified, for the reasons it has previously attempted to develop, in holding that farm location differentials are authorized by the Act as market differentials.

The plaintiffs in *Allen* v. *Freeman, supra,* attacked the farm location differentials contained in the Massachusetts-Rhode Island Milk Marketing Order, 7 C.F.R. 1001 (1968). The District Court for the District of Columbia granted plaintiffs' motion for summary judgment without opinion on the basis of the *Blair* decision, and that judgment is currently on appeal to the Court of Appeals for the District of Columbia. As to this decision nothing need be added to what has already been said with respect to the decision in *Blair.*

Claim of Unconstitutional Discrimination

Another claim made by plaintiffs is that the Connecticut farm location differentials are unconstitutionally discriminatory because they result in certain farmers receiving more for their milk than others. If the differentials were paid without reference to any rational basis this claim would be correct. But the Act only authorizes such differentials if they have been customarily paid, and customary payment is alone a sufficient rationale for continued payment under a scheme of regulation. *Secretary of Agriculture* v. *Central Roig Refining Co.,* 338 U.S. 604, 616-18 (1950). Therefore, a critical question with respect to both the authorization of the Connecticut farm location differentials and the issue of discrimination is whether the evidence before the

[10] If the *Blair* court's definition of market differentials were followed, it would necessarily mean that the double set of minimum prices upheld in *Green Valley Creamery* and cited with approval by the Supreme Court in *Brannan* v. *Stark,* 342 U.S. 451 (1952), would also be invalid. See supra note 9.

Secretary supported the Secretary's findings that the differentials were customarily paid in the Connecticut area and that their continued payment would tend to effectuate the policies of the Act.

Claim of Insubstantial Evidence

After an extensive review of the voluminous record of the administrative hearings held in connection with the promulgation of the Connecticut Milk Marketing Order, the Court is of the opinion that the evidence before the Secretary in support of his findings that farm location differentials were customarily paid in the Connecticut area and that their continued payment would tend to effectuate the policies of the Act was substantial and fully justified those findings.

In 1958 a proposed federal milk marketing order for the Connecticut market was considered in hearings held at Hartford, Connecticut. The proposed order included a farm location differentials provision. Dr. C. W. Swonger, an economist for the New England Milk Producers' Association testified at length concerning the differentials—their basis and the need for them. Hearing Record, 1958 Basic Connecticut Promulgation Proceeding 1261-1269 (hereafter 1958 H.R.). He demonstrated how "producers located near the market have been able to obtain prices for their milk higher than could be explained solely on the basis of handling and transportation costs." 1958 H.R. 1267. With specific reference to the Connecticut market Dr. Swonger stated that

> "[d]espite the competition of unregulated milk, and the lack of any control over prices paid for such milk, nearby producers in Connecticut have continued to receive blended prices higher than those paid to nearby producers in Boston, and from 1 to 2 cents per quart higher than the freight and handling costs reflected in the Class I and blend price differentials." 1958 H.R. 1264-1265.

The reasons that these differentials existed, according to Dr. Swonger, were the availability of alternative marketing opportunities to nearby producers, greater evenness of production in the nearby area, historical pricing patterns, and the need for alignment with the various neighboring, competing New England and Middle Atlantic markets. 1958 H.R. 1962-1965. In addition, as pointed out by George C. Dudley, a dairy farmer and chairman of the dairy commodity committee of the Connecticut Farm Bureau Association, Connecticut farmers had higher taxes and other costs. 1958 H.R. 554.

After presenting a number of exhibits showing the historic price differential paid in the Connecticut market, Dr. Swonger stated:

> "These exhibits bear out the fact that producers located near the market have been able to obtain prices for their milk higher than could be explained solely on the basis of handling and transportation costs. The differentials have probably been wider than can be maintained under present marketing conditions. There may be groups in Northern New England or New York who will argue for 'no differential', in excess of handling and transportation costs, and other groups in southern New England who will argue that the differentials have not been high enough. We say merely that a substantial differential has existed, and that this fact has to be recognized under any federal order." 1958 H.R. 1267-1268.

It is relevant in considering Dr. Swonger's testimony that he did not simply propose farm location differentials in isolation but as part of an integral plan designed to achieve equitable results for all producers.

Dr. Swonger did not feel qualified to testify with respect to the "specific definition of the differential areas." As he stated:

> "Such testimony must come from those in Connecticut who are more familiar with the nearby supply area

> and the relative prices paid to producers. The definition of the differential areas depends not on political boundaries, but on the competitive pressure of other markets seeking milk in the same area. In general, the boundaries should be drawn in such a way as to affect the fewest number of neighboring producers, in much the same way as the boundaries of a marketing area are defined to 'minimize competition' between regulated and unregulated handlers." 1958 H.R. 1268-1269.

Testimony as to what the specific differential areas should be was, however, provided by Fred S. Raymond, Director of the Cooperative Dairy Economic Service (1958 H.R. 623-632), Kenneth E. Geyer, General Manager of the Connecticut Milk Producers Association, and others. Mr. Geyer testified that "the Hudson River and the Massachusetts Turnpike and its New York extension" would be proper boundaries "closely conform[ing] to the Connecticut direct delivery milkshed area." 1958 H.R. 1312. The direct delivery milkshed area is that area from which milk is delivered directly to Connecticut handlers rather than to plants outside of the state from where the milk must be transshipped. Not only Mr. Geyer but the other witnesses analyzed the differential in terms of nearby direct delivery areas.

The Secretary's 1959 Final Decision affirmed the need for farm location differentials on the basis of the prior hearing, making certain changes in the areas covered by the proposed differentials so that they would conform to what had been suggested by the witnesses. 24 F.R. 1049, 1063 (1959). The differentials as modified were included in the first federal Connecticut order promulgated at the time of this Final Decision. The differentials were reviewed at hearings held in 1959 and 1963 and reaffirmed in 1960 and 1964 on the original basis.

The Court is completely satisfied that the Secretary's finding that the differentials were customarily paid is

supported by substantial evidence. Therefore, the differentials are authorized by the Act as market differentials customarily paid and are not unconstitutionally discriminatory. Furthermore, substantial evidence supports the Secretary's findings that the employment of the differentials "will tend to promote orderly marketing in the milkshed." *Id.* The differentials are therefore a valid provision of the Connecticut order. Section 8c(4) of the Act.

Conclusion

The Court concludes that this action presents a justiciable controversy over which the Court has jurisdiction. Plaintiffs and defendant-interveners are properly representative of the classes of dairy farmers previously designated by the Court.

The Court further concludes that the farm location differentials in the Connecticut Milk Marketing Order, 7 C.F.R. § 1015.72 (1968), are authorized by Section 8c(5)(B) of the Agricultural Adjustment Act of 1937, 7 U.S.C. § 608c(5)(B), and are otherwise legal and completely valid provisions of that Order. Therefore the Court denies a permanent injunction enjoining the Secretary of Agriculture from continuing the differentials and directs that judgment be entered in favor of defendant and defendant-interveners.

This Memorandum of Decision together with separately stated Findings of Fact and Conclusions of Law constitute the Court's findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. P.

Plaintiffs' motions to strike evidence, including renewal of motions made at the trial and motions which they were granted leave to file subsequent to trial have been carefully considered. The Court denies the motions insofar as they are directed at evidence which supports the Court's findings of fact and conclusions of law made herein pursuant to Rule 52, Fed. R. Civ. P.; in all other respects the motions are dismissed as moot.

Since this is a class action and judgment will therefore bind all members of plaintiffs' class, the Court deems it advisable to direct the Clerk to delay entry of judgment in favor of defendant and defendant-interveners for a period of fifteen days and to direct that within that period plaintiffs' counsel shall mail to all members of plaintiffs' class notice of this Court's decision together with an explanation of the effect thereof and a statement as to whether plaintiffs intend to prosecute an appeal. If plaintiffs do not intend to prosecute an appeal, notice must be given of the means by which members of the class may seek leave to file such an appeal and the time limit involved.

Furthermore, because this is an action for an injunction, entry of judgment will automatically and immediately terminate the preliminary injunction granted by order of this Court, Foley, C.J., on March 9, 1967, unless the Court directs otherwise. Rule 62(a), Fed. R. Civ. P. Therefore, in order to fully protect the rights of all parties and to maintain the status quo to permit an appeal, the Court orders that the injunction granted on March 9, 1967 shall continue in force until entry of judgment and thereafter for a period of sixty days upon such terms and conditions as contained in the order of March 9, 1967, unless otherwise directed by the Court. If within sixty days a notice of appeal is filed, the injunction shall continue in force during the pendency of the appeal unless dissolved or modified by the appropriate court.

ORDER

ORDERED as follows:

(1) That the Court's orders of October 20, 1967 with respect to maintenance of this action as a class action by plaintiffs and defendant-interveners are affirmed in all respects except that Roy E. Ottman and George Mesick, Jr. are eliminated as named plaintiffs.

(2) That all motions to strike evidence, insofar as they are directed at evidence which supports the Court's findings of fact and conclusions of law herein pursuant to Rule 52, Fed. R. Civ. P., are denied; in all other respects the motions to strike evidence are dismissed as moot.

(3) That upon the expiration of fifteen days the Clerk shall enter final judgment in favor of defendant and defendant-interveners dismissing plaintiffs' complaint with costs.

(4) That plaintiffs' counsel within fifteen days shall mail to each member of plaintiffs' class a notice of this Court's decision herein together with an explanation thereof and with a statement as to whether plaintiffs will prosecute an appeal. In the event that plaintiffs do not intend to appeal, notice must also be given as to the means by which members of plaintiffs' class may seek leave to file such an appeal and the time limit involved.

(5) That the injunction granted pursuant to an order of this Court dated March 9, 1967 shall continue in effect until entry of judgment and thereafter for a period of sixty days under such terms and conditions as contained in the Court's order of March 9, 1968, unless the Court directs otherwise.

(6) That if a notice of appeal is filed in this action within sixty days after entry of judgment the injunction granted on March 9, 1967 shall continue thereafter during the pendency of the appeal subject to dissolution or modification at any time by the appropriate court.

Dated at Albany, New York, this 2nd day of August, 1968.

WM. H. TIMBERS
William H. Timbers
United States District Judge
Sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Civil Action No. 67-CV-38

HAROLD R. CRANSTON, DALE R. FRENCH, HELMER A. CARLSON and DAVID B. PHILLIPS, Individually and on Behalf of all Other Persons in their Class who are Similarly Situated and Affected, *Plaintiffs*,

v.

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States, *Defendant*,

and

ALBERT GUILIAN, GROVER C. ATWOOD, and A. J. MALNATI, Individually and on Behalf of all Other Persons in their Class who are Similarly Situated and Affected, *Defendant-Interveners*.

Findings of Fact and Conclusions of Law

The Court, after full hearing, makes the following Findings of Fact and Conclusions of Law which, together with the Court's Memorandum of Decision filed herein, constitute the Court's findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. P.

FINDINGS OF FACT

1. Plaintiffs are four dairy farmers (milk producers) located in New York State. They bring this action individually, and as representatives of the class of approximately 250 milk producers who do not receive "farm location differentials" pursuant to Section 1015.72(a) of the Order regulating the handling of milk in the Connecticut Milk Marketing Area, 7 C.F.R. § 1015 (1968).

2. Three other dairy farmers located in Connecticut and Massachusetts were permitted to intervene as defendants on behalf of themselves as individuals, and as representa-

tives of the class of approximately 3000 milk producers receiving farm location differentials pursuant to Section 1015.72(a) of the Connecticut Marketing Order.

3. Plaintiff Cranston has for eight years been opposed to the Connecticut Farm Location Differentials. In 1966 Cranston discussed with his long-time friend and neighbor, attorney John P. Weatherwax, the possibility of bringing legal proceedings challenging the differentials. On January 27, 1967, after Cranston, French and Carlson had definitely decided to commence an action, Cranston was informed by the Consolidated Milk Producers' Association (CMPA), formerly Connecticut Milk Producers' Association, that CMPA would reimburse members for reasonable expenses incurred in maintaining or defending an action involving the validity of the farm location differentials. CMPA, a democratic organization, was motivated by the fact that its members included both those who did, and those who did not, receive the differentials and by the fact that great uncertainty surrounded the differentials. Cranston informed CMPA that he had his own attorney, Mr. Weatherwax. The Association official told Cranston that they would like to check the attorney out as to his reputation since the Association was concerned that both sides should be well represented by competent attorneys. CMPA's official position favors the differentials, and a majority of its members receive them; CMPA's counsel represents defendant-interveners. CMPA officials, plaintiffs, and plaintiffs' attorney met once prior to the filing of this action.

4. Neither defendant nor defendants' counsel knew that this suit would be instituted prior to its actual institution, nor did they have any contact with plaintiffs or plaintiffs' counsel prior to the institution of this action.

5. CMPA at no time has influenced, attempted to influence or in any way affected or controlled plaintiffs' conduct of this action. Nor have defendant-interveners or defendant attempted to exercise control over or influence plaintiffs' conduct of this suit.

6. Plaintiffs and defendant interveners have faithfully, earnestly and forthrightly represented the interests of their respective classes. The attorneys for each class have likewise acted in a thoroughly professional and expert manner. The entire record indicates that this action has been conducted as an adversary proceeding on the highest level. In short, plaintiffs and defendant-interveners have more than fairly and adequately represented the members of their respective classes.

7. The complaint, filed on February 9, 1967, alleges the invalidity, on several grounds, of an action of the Secretary of Agriculture in promulgating the aforementioned provision in the Connecticut Order under the authority contained in the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, *et seq.*

8. The challenged order provision results in producers whose farms are located in two specified geographical areas receiving a differential over and above the uniform price for milk of 46¢ and 23¢ per hundredweight, respectively, for their milk which is priced under the Order depending upon the designated area in which their farms are located. The Order describes the marketing area as follows:

> "§1015.2 Connecticut marketing area.
>
> 'Connecticut marketing area', referred to in this part as the 'marketing area', means all territory within the State of Connecticut, together with all waterfront facilities connected therewith and craft moored thereat, and all territory therein occupied by government (municipal, State or Federal) installations, institutions or other establishments."

The Order sets forth the provisions relating to the farm location differentials, including the areas affected, as follows:

> "1015.72 Farm location differentials.
>
> (a) In making payments to producers for milk received from a farm located in Connecticut, Rhode

Island, in that portion of New York State east of the Hudson River and south of the Berkshire Section of the New York State Thruway, or in that portion of Massachusetts south of the Massachusetts Turnpike, there shall be added 46 cents per hundredweight.

(b) In making payments to producers for milk received from a farm located outside the area described in paragraph (a) of this section, but within that portion of New York State east of the Hudson River and south of the northern boundaries of North Greenbush, Sand Lake, and Stephentown townships in Rensselaer County, and within that portion of Berkshire County, Massachusetts north of the Massachusetts Turnpike, there shall be added 23 cents per hundredweight."

9. In accordance with the provisions of the Act, the Secretary of Agriculture promulgated the Connecticut Milk Order, including the challenged provision partially effective on March 1, 1959, and fully effective April 1, 1959, following notice, public hearing, findings based on the evidence introduced at the hearing, and a favorable referendum among producers supplying the proposed marketing area.

10. The Final Decision published by the Secretary incident to the promulgation of the Order on February 11, 1959, discloses that the Secretary included the "farm location differential" provisions under his authority to make adjustments to the uniform producer price contained in Section 608c(5)(B)(ii) of the Act as an adjustment for "market differentials customarily applied by handlers."

11. The Secretary of Agriculture, in subsequent findings based on evidence adduced at subsequent public hearings, reaffirmed and rejustified his original findings in February 1959, with respect to the economic necessity for and the validity of the "farm location differential" provisions in the Connecticut Milk Marketing Order.

12. Where the circumstances warranted it, the Secretary of Agriculture has included provisions in other marketing

orders for preferential payments to producers based solely on the location of their farms nearby the market.

13. Federal price regulation of milk was first authorized by the Agricultural Adjustment Act of 1933. This Act provided for marketing agreements and for the issuance of licenses by the Secretary of Agriculture regulating the pricing of milk to producers by handlers. Pursuant to this authority, the Secretary of Agriculture issued many licenses regulating the handling and pricing of milk throughout the United States in the areas described in the licenses.

14. Among the stated purposes of the amendments to the Agricultural Adjustment Act in 1935, as they affected milk, were those which were designed to reinforce the existing practices of cooperative associations and to carry forward the methods employed under licenses issued pursuant to the 1933 Act. They were also intended to adopt the present practices of business. These amendments, among others, provided for the adjustments to the uniform producer price for "volume, market and production differentials customarily applied by handlers."

15. Prior to 1933, cooperative associations, as a part of their voluntary methods of pricing milk to producers, gave preferential treatment to nearby producers. This practice was also reflected in the licenses issued under the Agricultural Adjustment Act of 1933. The practice of giving preferential price treatment to producers whose farms were located nearby the market was carried over in some orders issued following the 1935 amendments.

16. The Agricultural Marketing Agreement Act of 1937, re-enacted the provisions, as they affected milk marketing orders, of the 1935 amendments to the Agricultural Adjustment Act. Section 4 of the 1937 Act expressly validated existing orders, regulations issued pursuant thereto, and the acts of the Secretary in connection with licenses and orders issued under the AAA. The Conference Committee Report incident to the amendatory legislation ex-

pressly stated that Section 4 was to remove all doubts about the validity of actions of the Secretary as reflected in existing orders.

17. The draftsmen of the language of Section 608c-(5)(B)(ii) considered the terms "volume, market and production differentials customarily applied by handlers" as embracing the existing practices of cooperatives and the existing methods in licenses which gave recognition to many and varied differentials which could be described as associated with the words, "volume", "marketing" and "production" practices.

18. There were in existence in the various marketing areas in 1935 many different differentials which could be described as based upon or associated with "volume", "market", and "production".

19. The language in the Committee Reports dealing with marketing orders which accompanied the AAA of 1935, when read in its entirety discloses that, in order to reinforce the many and varied existing practices of cooperative associations and the methods employed in licenses in pricing producer milk, the words of "volume", "market", and "production" as used to describe differentials in Section 608c(5)(B)(ii) were descriptive of types of differentials.

20. Among the existing differentials practiced by cooperatives and methods employed in licenses were those which gave preferential price treatment to producers based upon the location of their farms nearby the market. This type of differential is within the category of "market differentials customarily applied by handlers".

21. There has been no showing by plaintiffs that the differentials established by Section 1015.72(a) and (b) prohibit the movement of their milk into the Connecticut Marketing Area or that such differentials otherwise constitute a "trade barrier" within the meaning of Section 608c(5)(G) of the Act.

22. The administrative record contains evidence sufficiently substantial to justify the Secretary's promulgation of a nearby differential in his Connecticut order.

CONCLUSIONS OF LAW

1. This is an adversary action presenting justiciable issues over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331(a), 1337, 2201-2, 5 U.S.C. § 701-6 and 7 U.S.C. § 601 *et seq.*

Venue is properly laid in this District pursuant to 28 U.S.C. § 1391(e).

2. This is a proper class action pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P., with respect to plaintiffs' and defendant-interveners' classes as set forth in this Court's orders of October 20, 1967.

3. The farm location differentials contained in Sections 1015.72(a) and (b) of the Order regulating the handling of milk in the Connecticut Marketing Area, 7 C.F.R. § 1015 (1968), are market differentials customarily paid by handlers subject to the Order and as such are authorized pursuant to Section 608c(5)(B) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601, *et seq.*

4. The farm location differentials are not "trade barriers" and do not violate Section 608c(5)(G) of the Act.

5. The farm location differentials are not unconstitutionally discriminatory.

6. The Secretary's findings with respect to the inclusion of the farm location differentials in the Connecticut Order is supported by substantial evidence in the administrative record.

Dated at Albany, New York, this 2nd day of August, 1968.

/s/ WM. H. TIMBERS
William H. Timbers
United States District Judge
Sitting by designation.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE, PETITIONER

v.

RUSSELL ALLEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Clifford M. Hardin, Secretary of Agriculture, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 23, 1968.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–34a) is reported at 402 F. 2d 660. The findings and conclusions of the district court and its order granting summary judgment (App. B, *infra*, pp. 37a–47a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1968 (App. A, *infra*, pp. 35a–36a). By

order of December 14, 1968, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including February 20, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Agriculture has authority, under § 8c(5)(B)(ii) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c (5)(B)(ii), to include in a Federal Milk Marketing Order a provision for a farm location differential based on the distance of the producer's farm from the center of the market.[1]

STATUTE INVOLVED

Section 8c(5) of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 247, as amended, 7 U.S.C. (Supp. III) 608c(5), provides in pertinent part:

> Milk and its products; terms and conditions of orders.
>
> (5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of

[1] See note 11 *infra*, p. 17.

producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the

milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year. * * *

STATEMENT

This is an action by respondents, farmers residing in Vermont, to enjoin the operation of the "farm location differential" provision of the Massachusetts-Rhode Island Milk Marketing Order, 7 C.F.R. 1001.72. Under this provision farmers residing close to the centers of the market receive added payments for their milk above the uniform price payable to all farmers whose milk is marketed under the Order. The provision is the direct successor of a differential based on location of farms, which took effect as part of the Boston Milk Marketing Order, on February 9, 1936.[2]

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[2] The 1936 Order provided as follows J.A. 69–70:

ARTICLE VIII—PAYMENTS FOR MILK

SECTION 1. *Time and Method of Payment.*—On or before the 25th day after the end of each delivery period, each handler shall make payments, subject to the butterfat differential set forth in section 3 of this article, for the total value of milk received during such delivery period as required to be computed pursuant to section 1 of article VII, as follows:

1. To producers, except as set forth in paragraph 2 of this

For years prior to federal regulation of the marketing of milk in the Boston area, farmers residing near Boston had received higher prices for their milk than farmers residing at more distant points. From 1923–1932, "nearby" farmers received, on the average, in excess of $1.00 per hundredweight more for their milk than the distant farmers received (J.A. 81, 89).[3] This premium has been attributed to the fact that nearby farmers' milk production was relatively even for all months of the year and was accessible to small dealers, and that these producers were a more reliable and ready source of production for the city market (J.A. 75, 76, 101).

In 1933, with the advent of regulation under the Agricultural Adjustment Act (AAA), this premium was preserved, in part, in the federal license for the Boston area, by the use of a "base rating" system, which gave farmers residing within a specified distance of Boston a higher base for their milk (J.A. 18).

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section, at the blended price per hundredweight computed pursuant to section 2 of article VII, subject to the differentials set forth in paragraphs 1 and 2 of section 4 of this article, for that quantity of milk delivered by each producer not in excess of the base of such producer;

2. To any producer, whose farm is located within forty (40) miles of the State House in Boston and who delivers milk to such handler at a plant located within forty (40) miles of the State House in Boston, at $3.30 per hundredweight for that quantity of milk delivered by such producer not in excess of the base of such producer;

* * * * *

[3] "J.A." references are to the Joint Appendix in the court of appeals which has been filed in this Court in connection with the petition in No. 874, this Term. "App." refers to the appendix to this petition.

In 1935, that Act was amended to authorize the Secretary of Agriculture to issue orders for specified marketing areas, setting a uniform minimum price which all handlers[4] must pay producers for their milk, irrespective of whether the particular handler uses the milk in its most valuable form, *i.e.*, as fluid ("Class I") milk, or in the less valuable manufactured ("Class II") form, such as cheese or butter.

Section 8c(5)(B)(ii) of the Act, 7 U.S.C. 608c(5)(B)(ii), provides for the payment to all producers "delivering milk to all handlers of uniform prices for all milk * * * irrespective of the uses made of such milk by the individual handler to whom it is delivered," and specifies that such uniform prices are made * * *.

> only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made * * *.

---

[4] The term "handler" is defined in the present Massachusetts-Rhode Island Order to mean (7 C.F.R. 1001.9):

> (a) Any person who operates a pool plant;
>
> (b) Any person who operates any other plant, or a pool bulk tank unit as defined under another Federal order, from which fluid milk products are disposed of, directly or indirectly, in the marketing area;
>
> (c) Any person who does not operate a plant but who engages in the business of receiving fluid milk products for resale and distributes to retail or wholesale outlets packaged fluid milk products received from any plant described in paragraph (a) or (b) of this section; or
>
> * * * * *

When the Boston Order was issued, effective February 9, 1936, it essentially preserved to any producer "whose farm is located within forty (40) miles of the State House in Boston" (J.A. 70), the differential which had existed under the 1933 federal license.[5] The order explained that "the payment of Class I prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, due to the greater availability of their milk for Class I use * * *."

In June 1937, the AAA was essentially reenacted in the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, which retained the provisions of the AAA providing for marketing orders. This reenactment was designated to overturn several district court decisions, which had held that the processing tax provisions of the AAA invalidated in *United States* v. *Butler,* 297 U.S. 1, were inseparable from the rest of the AAA, and, thus, that the entire Act was invalid. See H. Rep. No. 468, 75th Cong. 1st Sess., p. 2. Section 4 of the 1937 Act, 50 Stat. 249,

[5] The Boston order actually remained in effect only until August 1, 1936, when the District Court for the District of Massachusetts ruled the AAA unconstitutional. *United States* v. *David Buttrick Co.*, 15 F. Supp. 655, reversed, 91 F. 2d 66 (C.A. 1). At that time, the Secretary suspended the Boston order until after passage of the Agricultural Marketing Agreement Act of 1937. See *H.P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588, 592, in which the constitutionality of both the 1937 Act and the Boston order was upheld. See also *United States* v. *Rock Royal Co-op., Inc.* 307 U.S. 533.

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further "expressly ratified, legalized and confirmed" all existing marketing orders and their provisions.

On August 1, 1937, the Boston Order was, with some changes, reinstated. It again provided for a differential based on location of farms (2 Fed. Reg. 1331, 1333):

Sec. 4. Location differentials.

* * * * *

3. With respect to milk delivered by a producer whose farm is located more than 40 miles, but not more than 80 miles, from the State House in Boston, there shall be added 23 cents per hundredweight.

4. With respect to milk delivered by a producer whose farm is located not more than 40 miles from the State House in Boston, there shall be added 46 cents per hundredweight unless such addition gives a result greater than $3.19, in which event there shall be added an amount which will give a result of $3.19.

Subsequently, the Secretary extended the regulation of milk marketing to subsidiary markets in New England; he issued Marketing Orders for the Springfield and Worcester, Massachusetts, areas (14 Fed. Reg. 7085, 7097, Nov. 23, 1949), and for the Southeastern New England area (consisting of Rhode Island and portions of Southeastern Massachusetts, including the Fall River and New Bedford areas) (23 Fed. Reg. 8225, Oct. 24, 1958). Each of these orders contained, in substantially the same form as the Boston Order, the farm location differential.

In August 1964, these orders were consolidated with the Boston Order, to form the present "Massachusetts-

Rhode Island" Order. 29 Fed. Reg. 11205. At the time that such consolidation was proposed, certain cooperatives whose members were non-nearby producers, urged that the farm location differential be eliminated. Groups representing nearby producers, on the other hand, urged that the amount of the differential be increased. The Secretary rejected both proposals, stating (29 Fed. Reg. 11213):

> Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.

The proposed order consolidating the prior orders, and retaining the farm location differential, was approved by a vote of 89.3 per cent of the producers who participated in the referendum,[6] the farms of two-thirds of whom are outside the areas for which the differential is payable.

Respondents instituted this suit attacking the differential on December 27, 1966. On January 16, 1967, the district court entered a preliminary injunction against

[6] See 29 Fed. Reg. 12237.

the operation of the differential,[7] and on June 15, 1967, granted summary judgment for respondent holding the differential invalid. The court of appeals affirmed. It held that the differentials (1) were barred by the provision in Section 8c(5)(B) that the prices paid to producers be uniform "irrespective of the use of such milk by the individual handler," and (2) were not one of the variations from uniformity of price that Section 8c(5)(B)(ii) permits (App. A, *infra*, pp. 6a-8a, 26a–27a).

REASONS FOR GRANTING THE WRIT

1. The holding below that the farm location differentials in the Boston Milk Marketing Order are not authorized under Section 8c(5)(B)(ii) of the Agricultural Marketing Agreement Act of 1937 conflicts with *Green Valley Creamery, Inc.* v. *United States*, 108 F. 2d 342 (C.A. 1). In that case, decided shortly after the Act was passed, the Court of Appeals for the First Circuit upheld the farm location differentials in the predecessor Boston Milk Marketing Order. Noting that there was evidence before the Secretary "that similar differentials in favor of nearby farms had existed in the Boston market for many years," the court ruled that "the differentials can readily be sustained under Section 8c(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order" (108 F.

[7] The order granting a preliminary injunction required payment of the differential into an escrow fund. This arrangement has been continued in effect by further orders of the district court and court of appeals. The fund now totals roughly $6,000,000.

2d at 346). In the present case, the District of Columbia Circuit reached precisely the opposite conclusion: it held that the differentials could not be sustained under that section. Although the court of appeals below distinguished the ruling in *Green Valley* as dictum, on the ground that the holding there was that the handlers lacked standing to raise the issue, the standing point was more accurately an alternative ground of decision: the First Circuit's brief discussion of the issue was prefaced with the word "Furthermore" (108 F. 2d at 346).

These two circuits are thus in disagreement as to the Secretary's statutory authority to establish farm location differentials. The conflict is particularly acute since it relates to earlier and later versions of the same order that are basically indistinguishable insofar as such differentials are concerned. Cf. *Denver & Rio Grande Western RR Co.* v. *Union Pacific RR Co.*, 351 U.S. 321, 326–327. The issue also is pending in the Court of Appeals for the Second Circuit in *Cranston* v. *Freeman*, Nos. 32793–32799, in which the district court upheld similar differentials in the Connecticut Milk Marketing Order. 290 F. Supp. 785 (N.D.N.Y.). Moreover, in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 567, this Court found the payment of a nearby differential to be authorized by Section 8c(5)(A) of the Act, which uses identical language to 8c(5)(B), and rejected the same arguments which were adopted by the court below. See Brief for Rock Royal Co-op., No. 771, October Term, 1938, pp. 55, 76. See also Petition for a Writ of Certiorari, No. 861, this Term, pp. 24-27.

2. The decision below, if allowed to stand, will have a substantial impact upon the milk business in important areas of New England. As described in the brief *amicus curiae* of the Commonwealth of Massachusetts in No. 861, in which the milk producers in whose favor the differentials have operated are also seeking review of this decision, the invalidation of the differentials will significantly reduce the income of a large number of milk producers in the area. The margin of profit for many dairy farmers is already low, and it is feared that the elimination of the differentials is likely to result in many of them abandoning farming. Many of the farmers who receive the differentials are located close to growing metropolitan areas, and it is a commonplace that more and more farm land in such areas is being shifted from farming to residential, commercial and industrial uses. Any substantial reduction in the number of farmers operating in the areas covered by the differentials would threaten the availability of a steady and assured supply of milk for the important and growing urban areas which they now supply—and particularly during the winter, when milk production is at a low point.

For almost thirty years following the decision in *Green Valley,* the farm location differentials in the milk marketing orders, covering Massachusetts and Rhode Island, have been an integral part of the milk industry there. Presumably, all segments of the industry have assumed and anticipated the continuation of these differentials, and have developed their businesses upon that basis. A decision that upsets such a

long-standing practice and that will have such a significant effect upon an important milk producing and consuming section of the country should be reviewed by this Court.

3. In view of the direct conflict between circuits and the importance of the question, there is no occasion at the petition stage for any extensive discussion of the merits. We therefore merely summarize the reasons why we believe that the Act authorizes the Secretary to provide for farm location differentials in milk-marketing orders.

Section 8c(5)(B), after requiring the payment to all producers of uniform prices for all milk delivered to handlers "irrespective of the uses made of such milk by the individual handler to whom it is delivered," provides that such uniformity of price is "subject * * * to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order." In *Blair* v. *Freeman,* 370 F. 2d 229, 237 (C.A.D.C.), in which it invalidated the farm location differentials in the New York-New Jersey milk-marketing order, the court of appeals had ruled that "the Act forbids consideration of the use to which the milk of a particular producer or class of producers is put, historically or potentially, in adjusting the uniform minimum price to be paid to such producers." Applying that principle here, the court held that since the farm location differentials in the Boston order reflected the fact that historically farmers closer to the market were able to obtain higher prices for their milk because of the larger portion

thereof that could be sold for more valuable uses,[8] the differentials violated the statutory limitation that uniform prices must be paid "irrespective of the uses made of such milk" by the handler. It further held that the differentials were not "market differentials customarily applied by the handlers subject to" the order. Both conclusions reflect an erroneous view of the meaning, purpose and history of the Act.

The statutory provisions relating to "volume, market, and production differentials" first appeared in the 1935 amendments to the Agricultural Adjustment Act. The legislative history of those amendments indicates that they were designed to give "proper recognition * * * to local differences which may exist in production or marketing methods or conditions * * *." The accommodation of milk-marketing orders "to the peculiar problems and circumstances presented in a given area" was to be accomplished through permitting adjustments to the uniform price; such adjustments were described as "follow[ing] the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to" the original Agricultural Adjustment Act. H. Rep. No. 1241 (1935), pp. 7, 9; S. Rep. No. 1011 (1935), p. 9. As noted (*supra*, p. 5), the Boston license under the original Act contained a differential based upon farm location.

The debate in the Senate similarly reflects the congressional intention to permit continuation of then existing marketing and pricing practices in the milk industry. Senator Copeland expressed concern that the

[8] In this regard, the court did not fully understand the reasons for the higher prices received by the nearby farmers. See n. 10, p. 17, *infra*.

"equalization" provisions would require that the same price be paid for farmers producing milk near the city as those who produce it 40 or 50 miles away, providing only for differences in transportation costs, without reflecting the higher production costs and values of the former. In reply Senator Murphy, the floor manager of the bill, explained that the provisions permitting "adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order * * * adopt the present practice of business * * *" (79 Cong. Rec. 11139–11140 (1935)). Moreover, in Section 4 of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 249, Congress "expressly ratified, legalized, and confirmed" all provisions of existing marketing orders. One such provision was a differential contained in the 1936 Boston order payable to farmers residing within 40 miles of Boston (*supra*, p. 7).[9] Although the court of appeals viewed the congressional ratification as being

[9] The court of appeals noted the statement in the House and Senate Committee Reports that "the market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant" (H. Rep. No. 1241, 74th Cong., 1st Sess., p. 10; S. Rep. 1011, 74th Cong., 1st Sess., p. 10) and concluded that the Act permits only those market differentials based on that distinction. We submit, however, that in view of the other legislative history, referred to above, which shows that Congress intended to adopt the pricing practices then in existence in the milk industry and the fact that a failure to provide a farm location differential would radically change the incomes of the farmers subject to a milk-marketing order, the court below should not have read the language in the committee reports as limiting the term "market differential" to the one illustration given. See *Cranston* v. *Freeman*, *supra*, 290 F. Supp. at 796–800.

designed merely to avoid technical abatements (App. 21a), the legislative history of Section 4 shows a clear congressional intent to approve the provisions of the existing orders. H. Rep. No. 468, 75th Cong., 1st Sess., p. 4. See also *Cranston* v. *Freeman, supra* 290 F. Supp. at 802–803.

In the light of this legislative history and Congressional purpose, the statutory requirement that uniform prices be paid to all producers "irrespective of the uses made of such milk by the individual handler" cannot properly be interpreted, as the court of appeals read it, to prohibit well established historic differentials merely because they developed in part as a result of the higher prices obtained by certain producers whose milk was more readily available for the more valuable Class I use. There is nothing to indicate that Congress, when it enacted either the original 1935 Act or the 1937 amendments, intended the radical change in the historic price relationships that existed in various milk-marketing areas that would result from the decision below. The "irrespective of the uses" provision was designed to eliminate the cut-throat competition among producers seeking to sell their milk to those handlers who used the most milk in fluid form—competition that had driven down the price received by all producers. See *United States* v. *Rock Royal Coop., Inc.,* 307 U.S. 533, 549–550. The provision does not, however, preclude price adjustments from the uniform price that constitute "customarily applied" "market dif-

ferentials" because the producers have been receiving them since before the advent of federal regulation.[10]

Indeed, the farm location differentials here involved do not result in any producer being paid a price dependent upon the "uses made of [his] milk by the individual handler to whom it is delivered." Under the Massachusetts-Rhode Island order, no producer receives a higher price because of the uses made of the milk by the particular handler with whom he deals. If he is a member of the class entitled to receive the differential, he gets it whether his handler sells his milk at the highest or the lowest price. In short, payment of the differential here does not violate even the literal terms of the statute; it certainly does not lead to the evil of cut-throat competition at which the provision was aimed.[11]

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[10] The court below, in finding that the differential reflected the "uses made of * * * milk by the individual handler to whom it is delivered" misconstrued the Secretary's statement that the differential was justified "due to the greater availability of [nearby producers'] milk for class I use * * *" (App. 9a). As the court noted in *Green Valley* (108 F. 2d at 346), the differential was accorded nearby producers not just because a greater percentage of their milk historically had been used in fluid form (though that was true), but because they "in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located."

[11] Even if the court below was correct in holding that the Secretary placed unwarranted reliance on historic price relationships in authorizing the payment of farm location differentials, it should not have enjoined the payment but should have remanded the matter to the Secretary for a determination whether other considerations, such as differences in costs of production, justified the payment of a differential to the producers whose farms are located close to the center of the market. See *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 200.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
ALAN S. ROSENTHAL,
WALTER H. FLEISCHER,
Attorneys.

FEBRUARY 1969.

APPENDIX A

Court of Appeals Opinion and Judgment

United States Court of Appeals for the District of Columbia Circuit

No. 21141

FREDERICK T. ZUBER, ET AL., APPELLANTS

v.

RUSSELL ALLEN, ET AL., APPELLEES

No. 21308

ORVILLE FREEMAN, SECRETARY OF AGRICULTURE, APPELLANT

v.

RUSSELL ALLEN, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

Decided September 23, 1968

Mr. Lawrence D. Hollman, with whom *Mr. Carlyle C. Ring, Jr.,* was on the brief, for appellants in No. 21141.

Mr. Walter H. Fleischer, Attorney, Department of Justice, with whom *Assistant Attorney General Edwin L. Weisl, Jr., Messrs. David G. Bress,* United States Attorney, and *Alan S. Rosenthal,* Attorney,

Department of Justice, were on the brief, for appellant in No. 21308. *Mr. Frank Q. Nebeker,* Assistant United States Attorney, also entered an appearance for appellant in No. 21308.

Mr. Charles Patrick Ryan for appellees.

Mr. Edward J. Ryan filed a brief on behalf of the State of Vermont, as *amicus curiae* in No. 21141. *Mr. Charles P. Ryan* also entered an appearance for the State of Vermont as *amicus curiae* in No. 21141.

Mr. Franklin M. Schultz filed a brief on behalf of the State of Connecticut, as *amicus curiae* in No. 21141.

Mr. James R. Worsley, Jr., filed a brief on behalf of the Commonwealth of Massachusetts as *amicus curiae* in No. 21141.

Before BURGER, WRIGHT and MCGOWAN, *Circuit Judges.*

MCGOWAN, *Circuit Judge:* These are appeals by the Secretary of Agriculture and a group of dairy farmers from a judgment of the District Court declaring illegal and enjoining further enforcement of the "farm location differential" provision[1] in the 1964 federal milk marketing order for the Massachusetts-Rhode Island area. We recently invalidated a like provision of the 1957 New York-New Jersey milk marketing order on grounds of its incompatibility with the Agricultural Marketing Agreement Act of 1937.[2] *Blair* v. *Freeman,* 125 U.S. App. D.C. 207, 370 F. 2d 229 (1966). Since we find that the farm location differential of the Massachusetts-Rhode Island order is no less irreconcilable with the statute, we affirm the judgment and order of the District Court.

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[1] 7 C.F.R. § 1001.72 (1968).

[2] 7 U.S.C. §§ 601–24 (1964), *as amended,* (Supp. I, 1965).

I

The rationale and mechanics of federal regulation of the marketing of milk and other dairy products have been fully described in *Blair* and elsewhere.[3] Briefly, the marketing order is designed to eliminate the destructive competition which grew out of the surplus conditions which characterized the milk industry before federal regulation. The device chosen to this end is a uniform, "blended" price to be paid by handlers to each producer in the marketing area, regardless of whether his milk is ultimately disposed of by the handler at the high Class I price for fluid use, or at the lower Class II price paid for milk to be used in the manufacture of various milk products (butter, cheese, ice cream, and so on). An equalization pool, called the "producer settlement fund," is administered by the agent of the Secretary of Agriculture to maintain the blended price; and handlers make payments to or withdrawals from the pool in the amounts by which the use value of milk which they handle exceeds or is less than the blended price.

The Act specifies several limited exceptions which the marketing order may make to the requirement that each producer receive a uniform price. Thus,

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[3] See *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76 (1932); *H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588 (1939); *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 533 (1939); *Grant* v. *Benson*, 97 U.S. App. D.C. 191, 229 F. 2d 765 (1955), *cert. denied*, 350 U.S. 1015 (1956); *Green Valley Creamery, Inc.* v. *United States*, 108 F. 2d 342 (1st Cir. 1939).

Section 8(c)(5) permits the inclusion in the order of provisions

> (B) Providing:
>
> * * * * *
>
> (ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject * * * only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made * * *.

Purportedly acting pursuant to the authority of this section, the Secretary included in the 1964 Massachusetts-Rhode Island order several differentials which operate to vary the payments to producers. These are (1) a "butterfat differential," based on the quality of the farmer's milk;[4] (2) "zone differentials," which vary inversely with the distance from Boston of the handlers' plant to which the producer delivers his milk;[5] and (3) the "farm location differentials," which are paid to producers whose farms are located near the principal consumption centers. This last form of differential, commonly known as the "nearby differential," is forty-six cents per hundredweight for farmers located in certain designated towns and twenty-three cents per hundredweight for those in more distant towns.

The plaintiffs, 168 dairy farmers who are ineligible for any farm location differential, brought this action against the Secretary of Agriculture seeking a halt to these allegedly discriminatory and unauthorized

[4] 7 C.F.R. § 1001.71 (1968).

[5] 7 C.F.R. § 1001.62 (1968).

payments.[6] They are aggrieved in that the differential is paid out of the equalization pool, rather than the handler's own pocket, and consequently reduces the blended price received by all producers. The District Court granted the plaintiffs' motion for a preliminary injunction which provided for the escrowing of the challenged differential, and thereafter, relying wholly on our decision in *Blair* v. *Freeman,* granted their motion for summary judgment. The escrowing, though later amended to release amounts attributable to nearby producers, was continued pending a decision by this court. When it appeared that the Secretary might not appeal,[7] we granted Zuber and seven other nearby farmers, whose motion to intervene had been denied by the District Court, leave to intervene for the sole purpose of protecting their rights by appeal. The Secretary subsequently perfected an appeal, which we heard together with that of Zuber.

Appellants have pressed upon us several distinct positions. They argue, first, that the farm location differential is valid because it is founded not upon the factor of fluid milk utilization condemned in *Blair* but on other considerations which are authorized by the Act. Secondly, they contend that, whatever might be the fate of another farm location differential under Section 8(c)(5), this particular provision was explicitly ratified and validated both by Congress in

[6] The suit was filed a few weeks after our decision in *Blair.* In that case we made clear the wholly prospective nature of our decision, stating that it was "not intended to afford any basis for recovery by appellants or their class based on past payments." 370 F. 2d at 240. We reaffirm that approach here.

[7] This prospect was represented as residing in the fact that the Government had decided not to seek review in the Supreme Court of our decision in *Blair.*

1937 and by the United States Court of Appeals for the First Circuit in 1939. Thirdly, appellants assert that, if the legality of the provision is not clear, neither is its illegality; and that the case should be remanded to the Secretary to afford him an opportunity to elucidate the legal and factual premises of the nearby differential, or to determine whether, if the differential must fall, the marketing order should be continued, with or without other changes. Finally, it is argued that, even if the District Court is affirmed, considerations of equity dictate that its judgment be wholly prospective from the date of our decision, and that the escrowed monies should be distributed to the nearby farmers who have relied on the farm location differential for so many years. We deal with these points in order.

II

As we held in *Blair:*

> [T]he Act forbids consideration of the use to which the milk of a particular producer or class of producers is put, historically or potentially, in adjusting the uniform minimum price to be paid to such producers.[8]

In adopting the New York-New Jersey order in 1957, the Secretary was explicit in his reliance upon this outlawed consideration.[9] He is certainly less so in his

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[8] 370 F. 2d at 237.

[9] The differential had been designed, he said:

"* * * to give the nearby producer a somewhat greater share of the high-priced [fluid] milk than he would obtain through market-wide pooling without such a differential * * *.

and

"* * * to reflect the fact that under competitive conditions milk produced in this area has a traditional outlet as fluid milk * * *." 22 Fed. Reg. 4213–14 (1957).

justification of the 1964 Massachusetts-Rhode Island order:

> Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.
>
> * * * * *
>
> * * * [W]e believe there are adequate reasons on this record for continuing the farm location differentials at their present rates.[10]

But we do not think it can be said, as appellants now do, that this explanation does not reflect any reliance whatsoever upon the prohibited factor of fluid use patterns. To say, of the order under review, that milk produced in locations close to principal consumption centers has enjoyed "customarily somewhat higher values" above transportation costs, and that the differential is provided to reflect "these historical price relationships by location," may be only a less direct way of saying, as in the case of the New York-New Jersey order, that the differential was designed "to reflect the fact that under competitive conditions" nearby producers got a higher price because they had a bigger share of the fluid use market. If examination is made of the "record" to which the Secretary adverted in his 1964 statement—the various New England marketing orders which preceded the 1964

[10] 29 Fed. Reg. 11205, 11213–14 (1964).

order and the administrative records on which they were based—it is revealed inexorably that, as in the case of New York-New Jersey, those "historical price relationships by location" were the fluid use advantages which the Act expressly condemns.

The 1964 order consolidated the former federal orders regulating the handling of milk in four separate marketing areas: Greater Boston, Worcester, Springfield, and Southeastern New England. The oldest and most prominent of these was the Greater Boston marketing order. Under federal "licenses" pursuant to the 1933 Agricultural Adjustment Act,[11] milk in the Boston area was marketed, as it had sometimes been by cooperative associations before federal regulation, through base-rating plans. In 1934 the market administrator

> allotted preferential bases to nearby producers to give effect to the historically higher prices they had received in the market. A study was made of the eight years 1926 to 1934 to obtain the proper differential between nearby and distant producers' returns from the sale of milk. It was determined that all producers whose milk was *delivered directly to plants located within 35 miles* of the State House in Boston should have bases equal to 85 percent. * * * [as compared with 61 percent for all other producers].[12]

Because many nearby producers refused to comply with the license, and "as a concession to win the cooperation of the Massachusetts Milk Control Board in enforcing, or trying to enforce, the terms of the federal license,"[13] in 1935 cooperative associations agreed

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[11] 48 Stat. 31 (1933).

[12] Barnhardt, Federal Regulation of Milk Handling in Boston 95 (1947) [Emphasis added.]

[13] *Id.* at 231.

to allow producers whose farms were within forty miles of the State House bases of 100 per cent. This forty mile radius later became official under Greater Boston Order No. 4

This Order No. 4, promulgated in 1936 after the 1935 amendments to the Act, retained the base-rating system but abandoned the preferential bases for nearby producers. In their place it was provided that producers whose farms were located within forty miles of the State House and *who delivered to plants within the same area* be paid the full Class I price for all milk not in excess of their bases. Other farmers received only the blended price for their bases. Distant producers could, however, receive an additional twenty-one cents by delivering to a handler within the forty mile radius—a "country station" differential which (unlike the situation today) was not also available to the nearby producer. The latter differential was found by the Secretary to be a "reasonable allowance for the extra handling costs incurred by handlers operating country station plants." As to the former, the Secretary stated that

> the payment of class I prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, *due to the greater availability of their milk for class I use.* * * * [Emphasis added.]

The order did not expand upon this ground for the preferred treatment of nearby producers. It is a finding which appears to be derived directly from the testimony at the hearing of the representative of the U.S. Department of Agriculture. In explaining the proposed order, he said this about the differential in question:

> Now, I presume that you know some reason for that special provision located in that zone.

> I am not sure that I made such a statement of that as we here in this brief, and so I think I might make it at this time, and then perhaps there will be further questions.
>
> With respect to this particular provision, it should be noted that a producer whose farm is located near the market is in a position to supply Class I milk for use at all times, at less cost and distances, and if necessary he can, after each twice-a-day milking, put his milk on his own truck and deliver it to a handler or to consumers. Forty miles, however, is approximately a limit of the use of such facility in handling milk.

Evenness of production was certainly not assigned as the reason, presumably because this quality was already compensated by base-rating itself. Higher local production costs had been mentioned at the hearings in support of the special treatment, but this ground was evidently rejected by the Secretary. Since nearby producers were not also to receive the "country station" differential, their preference must have been attributable in large part to transportation and handling advantages. This surmise is supported not only by the Secretary's use of the word "availability" but also by the following argument in the Department of Agriculture's Economic Brief in 1936:

> It should be noted that a producer whose farm is located near the market is in a position to supply milk for Class I use to the market more easily at all times than those at a greater distance. Much less time is required for the movement of the milk and a greater variety of transportation facilities are available to such a producer. If necessary, he can, after each twice-a-day milking and within two hours deliver it to a handler or even to consumers. * * * Moreover, those producers whose farms are located beyond the forty-mile line who so desire may

> deliver their milk to handlers within the forty-mile line, in which event they are to be paid the blended price, plus [21] cents. * * *

The savings in transportation and handling expenses were not, of course, the whole story. The Agriculture Department's testimony and brief identify another element which was also heavily emphasized at the hearings, namely, the nearby producers' opportunities for direct access to the consumer. This fact was cited at the hearings as the explanation for traditionally higher prices to nearby producers ("he can sell it to the dealer or become a dealer himself, and go direct to the [consumer], and you cannot stop him") and as a potential "menace to the enforcement of the agreement."

In sum, the Secretary did not indicate that he had accorded nearby producers a preferred position because their ever-available milk supply was itself more valuable to the handlers. His action, rather, was based on the nearby producers' "economic position," a position which had enabled them to command higher prices from handlers before regulation and which enabled them to coerce this concession in the marketing order. The reason for this "economic position" was, as the Secretary recognized, "availability *for Class I* use." We are unable to distinguish this factor from the consideration of historical fluid use patterns condemned in *Blair*.

After passage of the 1937 Agricultural Marketing Agreement Act, Order No. 4 was amended to do away with base-rating. The nearby producer's preferred status was preserved, however, by the payment of farm and delivery location differentials. For the first time, the condition of nearby delivery was dropped from the farm location differential, and the farm location and delivery location differentials were paid cumulatively. The Secretary found only:

> [t]hat in view of changes in economic conditions since the date of the original findings, the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for milk so delivered, *without the use of a base-rating plan, but with the inclusion of special location differentials,* is a fair and reasonable method of distributing to producers the proceeds of sales of milk to handlers.[14]

The farm location differential was designed to reproduce as closely as possible the nearby farmer's preferred position under base-rating. Thus, the differential was (and still is) payable only to the extent that it did not increase the producer's payment above the Class I price.[15] As the Agriculture Department argued in its 1937 Economic Brief:

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[14] Fed. Reg. 1331 (1937) [Emphasis supplied.]

[15] This feature of the order is similar to a provision of the New York-New Jersey order which we found in *Blair* to indicate the connection between the differential and the prohibited consideration of fluid milk use. We there said:

"* * * that payments vary (inversely) with the extent of fluid milk utilization [in the entire market]. The differential is sensitively attuned to the supposed special place of the nearby producer in the fluid milk market, and is taken away when fluid milk utilization is so high marketwide that he merits no premium based on that special place."

370 F. 2d at 237–38. A like interaction between the amount of the differential and marketwide fluid milk utilization is achieved by the provision of the Massachusetts-Rhode Island order that if "the addition of 46 cents gives a result greater than the Class I price * * * there shall be added [only] a rate which will produce that price." Since the blend price itself rises with increased fluid utilization, the amount of the differential necessary to give the nearby farmer the Class I (fluid) price varies inversely with marketwide fluid milk use.

> It is thought that the proposed plan, which gives consideration to those producers located nearby the market who are predominantly even and who as a group have very uniform deliveries, and which returns a price higher than the average to the other even producers, accomplishes the purpose for which the rating plan in Order No. 4 was intended.

Evenness of production, which was awarded on an individual basis under base-rating, was an alleged advantage of nearby farmers frequently cited by proponents of the differential during the hearings as explaining their historically higher prices. The Market Administrator's explanation is typical:

> The idea is, without regulation over a period of years producers whose farms are near the market, due to the fact that their milk is accessible to small dealers, and their milk is rather even throughout the year, have been able to obtain a price greater than the country station charges. So that, if we set up a plan which did not give them the same advantage which they would have without regulation it would be unfair to them. * * * It is the desire of the Administration to maintain the relative positions and to set that figure at a point which will do that.

This assertion about seasonality was somewhat undermined by the Department's admission that only two-thirds of the nearby producers could be classified as even, and that "even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors." The principal relevance of evenness was not that it constituted an element of value in the sense of dependability to the handler, but that nearby producers, who as a group contrib-

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uted less to the surplus in the market, should not share the burden of that surplus by receiving only the blended price. This resort to seasonability, then, was not so much in explanation of historically higher prices but rather in recognition of the fact that the nearby farmers' evenly produced milk had been sold primarily at Class I prices, *i.e.*, for fluid use.[16]

Aside from references to evenness of production and the unfairness to the nearby farmer of disturbing his traditionally preferred market position, the evidence revolved mostly around what would happen if nearby farmers were not favored. The New England Milk Producers Association swore they would "oppose the license with every means in their power," and the witness referred to in footnote 16 made the pregnant observation that "there is always a row in the market unless [the nearby producers] are compensated in some way." One source of their power was also recognized: "We are all within retailing distance of the market and we are potential producer-dealers." This potentiality also underlay the observations in the Department's brief and elsewhere that "their milk is accessible to small dealers." This reference to availability was limited to small dealers as it had not been in the Secretary's finding in the 1936 Order, presumably because only large handlers could afford to bring

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[16] This is evident from the 1937 testimony of the president of the Nearby Producers Association, asking for a nearby differential of at least one cent per quart over the blended price:

"Now, we feel that to be protected in our special place in the market requires two things. We must be protected against seasonal surplus. Our production is even and has always been regulated closely to the requirements of our distributors. Some of them asked distributors, will ask for more or less milk as they want it. [sic] In the second place, we must have somewhere near our differential—our consumer differential over the 200-mile zone, and get that much * * *."

in their milk from distant farms. That nearby farmers had a captive market, however, does not alone explain the higher price, without the additional fact that the farmers or handlers could dispose of the milk at Class I prices. Economist Ellsworth Bell's brief to the Secretary concisely described this economic advantage:

> Being adjacent to markets the [nearby] dairymen command a natural sales advantage whereby it is taken first at the fluid price. * * * [Historical price difference] exists due to peculiar advantages existing for disposal and sale of milk at the higher market price.

In 1949 the Secretary first promulgated orders for the Springfield and Worcester markets, both of which contained nearby farm location differentials. Those in favor of the differentials had given testimony similar to that which preceded the Boston orders, and had argued for uniformity of treatment with the Boston market. In approving the differentials, the Secretary adverted to "the customary market practice of paying somewhat higher prices to producers located near the sales area." These historically higher prices were explained as follows:

> This difference cannot be attributed to transportation cost alone. The many opportunities for dairymen to market their own milk directly influence the price which they demand for their product.[17]

Those direct marketing opportunities were, of course, for fluid use at Class I prices.

In 1951 the Secretary held hearings on a proposal to eliminate the nearby differential in the Boston order. Opponents of the differential argued that it constituted a trade barrier; that evenness of produc-

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[17] 14 Fed. Reg. 7085, 7089 (1949); 14 Fed. Reg. 7097, 7102 (1949).

tion, if compensable at all, should be recognized on an individual basis, that the validity of the differential should be reexamined in the light of contemporary economic conditions; and that if nearby milk has any extra intrinsic value it should be paid for by the handlers rather than by the pool. Proponents of the differential brought out all the old arguments, with somewhat greater emphasis this time on the disruptive market effects of eliminating the differential, and on the unfairness to nearby farmers for whom the nearby differential had become capitalized into greater land values. A major pillar of their argument was the unabashed assertion that in terms of "historical price relationships * * * producers located near the market were able to sell a larger proportion of their milk at Class I." The representative of the Massachusetts Milk Control Board, for example, testified that the differential was not discriminatory but rather had been

> adopted by way of partial compensation to nearby producers for the losses which they suffered when the equalization provisions deprived them of those natural advantages which prior to federal regulation always enabled them to sell at [sic] a relatively higher percentage of their production of Class I milk.

The Secretary concluded that "no change should be made at this time" because the opponents had "presented no material facts different from those considered in establishing specified location differentials as a part of the order provisions."[18]

In the 1958 southeastern New England order, one of those now consolidated into the 1964 Massachusetts-Rhode Island order, the Secretary for the first time gave a detailed economic justification for the nearby

[18] 16 Fed. Reg. 9250, 9255 (1951).

differential, which he described as "identical with that employed in adjacent Federal order markets," a characterization which includes the New York-New Jersey order invalidated by us in *Blair:*

> Historically, dairy farmers in the States of Massachusetts, Rhode Island, and Connecticut, because of their location with reference to the large population concentrations of New England have disposed of a substantially larger percentage of their production for fluid uses than have dairy farmers in the upcountry area. Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. Under the marketwide pooling system herein proposed and without some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk on the milkshed rather than according to the utilization of his milk. Under a regulated market, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and has assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources. The distant producer also benefits from an established Class I price, and by the fact that he gains a larger share of the fluid market than is likely without marketwide equalization.
>
> The use of a nearby differential will return to nearby producers a somewhat greater share of the Class I price than they would otherwise obtain through marketwide pooling. Moreover such a differential will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization.[19]

[19] 23 Fed. Reg. 8238 (1958).

This rationale—which is clearly reflected in the 1964 order's language about "historical price relationships by location"—is indistinguishable from that advanced the year before in support of the 1957 New York-New Jersey order condemned by this court in *Blair* v. *Freeman*.[20]

The testimony at the hearings preceding the 1964 order served mainly to reinforce the Secretary's reliance on historical fluid use patterns as the primary justification for the nearby differential. Most of the witnesses in favor of retaining the differential either ignored, or rejected as irrelevant, the question of whether it had ever been authorized under the Act. Their testimony dwelt upon the absence of adverse economic effects of the differential, and the dire consequences which would flow from its elimination. When their attention was directed to the issue of the differential's original justification, some reiterated the testimony of 1937 to the effect that the differentials recognized the evenness of production of nearby milk and its accessibility to small dealers; that the nearby farmers enjoyed a favorable bar-

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[20] The following year an identical provision was incorporated in the Connecticut order. It was proposed that this order be consolidated in the 1964 Massachusetts-Rhode Island order. It was not, but there is no indication that the Secretary viewed the nearby differential in Connecticut as in any way different from those under other Federal marketing orders:

"The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes. Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated markets."

24 Fed. Reg. 1049, 1063 (1959).

gaining position because of their ability to become producer-dealers; and that the differential was a necessary compromise to win the support of the nearby farmers and Massachusetts Milk Control Board for the federal order.

Almost to a man, however, the witnesses at the hearing testified—and no one denied—that the principal reason for the differential was to preserve for nearby producers their traditionally high percentage of the fluid use market. One witness even argued as follows for an increase in the nearby differential:

> We don't feel that these market pools were set up to make it possible for distant milk to take the Class I sales that rightfully belong to nearby farmers away from them. Again I think you have to consider the use value of the milk in determining the prices to the producers.

And a committee report specially prepared for the Department of Agriculture in 1962 was read into the record. While nearby milk was claimed to have various advantages, the report concluded that:

> the major purpose of nearby differentials apparently has been to compensate nearby producers for sharing market Class I sales with more distant producers in a marketwide pool.

In view of the concurrence of all concerned—including on occasion the Secretary himself—that the differential was a recognition of historical use values, we find it impossible to conclude that the Secretary did not rely on this illegal consideration in approving the 1964 order as well as all of its predecessors. Although in patent conflict with the blended price regulatory scheme propounded by Congress, it was apparently thought that the resulting distortion was a price necessary to be paid in order to get sufficient agreement to support a marketing order, and that it

was better to pay that price than to have no order at all.

III

Section 4 of the 1937 Agricultural Adjustment Act provided:

> Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.[21]

Appellants argue that, since nearby differentials appeared in the Greater Boston order before 1937, Section 4 immunizes the farm location differential from invalidation under another section of the Act.[22]

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[21] 50 Stat. 249 (1937).

[22] Appellants argue alternatively (1) that nearby differentials, even if inconsistent with Section 8(c)(5), were legalized by Section 4; or (2) that Section 4 constituted a legislative determination that every feature of extant federal licenses or orders before 1937 fell under one or more of the enabling provisions of the Act—in particular, that the nearby differential was a market or location differential within Section 8(c)(5). In support of this latter construction, appellants point to language in the Commmittee Reports underlying the 1935 amendments to the effect that "these terms [of Section 8(c)(5)] follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act [of 1933] and the provisions of licenses issued pursuant to the present [Act]. * * *" H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 9 (1935).

We find this contention unpersuasive for several reasons.

First, it does not appear that a farm location differential of the kind now under attack ever appeared in a greater Boston license or order before 1937. There were differentials based on *delivery* location, and for a time farm location was one condition along with delivery location, but none seems to have been based on farm location alone. Moreover, the differential was never one payable over and above the transportation differential available to distant producers who delivered to a nearby zone.[23]

Second, Section 4 itself ratifies only those provisions and acts which were "done under the Agricultural Adjustment Act." This qualification negates any inference that Congress intended to sanction orders which were illegal under other sections of the Act. And this construction is consistent with what was clearly the sole legislative purpose underlying Section 4, namely, to prevent technical abatements which arguably might result from reenactment of the 1933 Act. In *United States* v. *Butler*, 297 U.S. 1 (1936), the Supreme Court had invalidated certain of the production control provisions of the 1933 Act; and several lower courts, construing these provisions as not severable, thought that the marketing agreement and order sections must also fall. Section 1 of the 1937 Act specifically reenacted the latter provisions of the Act in order to avoid that result.[24] Congress feared, however, that such reenactment might itself be construed as suggesting that, pending its accomplishment, the Act, and all actions

[23] See the descriptions of the licenses and orders, pp. 7–8, 10–11 *supra*.

[24] 50 Stat. 246 (1937).

taken by the Secretary under its aegis, had been illegal. Hence Section 4 of the 1937 Act.[25]

Appellants further assert that the legality of the farm location differential was established in 1939 by the United States Court of Appeals for the First Circuit in *Green Valley Creamery, Inc.* v. *United States*, 108 F. 2d 342 (1st Cir. 1939). That case began as an action by the United States and the Secretary of Agriculture seeking a marketing injunction requiring the defendants, a group of milk *handlers*, to comply with Order No. 4 regulating milk marketing in the greater Boston area. One of the defenses was that the farm location differential was not authorized by Section 8(*c*)(5). After holding that *handlers* had no standing to raise this defense, the court volunteered the view that the differential could be justified under the Act either as a delivery location differential or a "market differential customarily applied."[26]

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[25] The House Report stated:

"Section 4 * * * negatives any implication that [the bill's] effect is to invalidate or cast doubt on action heretofore taken under the agreements and orders provisions. The section also expressly ratifies, legalizes, and confirms such action."
H.R. Rep. No. 468, 75th Cong., 1st Sess. 4 (1937).

[26] The court's rationale was as follows:

"There was evidence before the Secretary to the effect that similar differentials in favor of nearby farms had existed in the Boston market for many years. Various factors were mentioned as accounting for this, including their greater accessibility to the market, and their greater dependability as sources of supply, because, as experience showed, the nearby farms had a more uniform level of production throughout the year. These producers were also potential dealers, who might establish their own milk routes in competition with handlers in the Boston market, if prices were not acceptable. Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted

We took note of the *Green Valley* opinion in *Blair*, where it was also pressed upon us as dispositive; and at that time we expressed our disagreement with the First Circuit's analysis.[27] In any event, the opinion in that case could not control the outcome here. In the first place, only one of the orders which was consolidated into the Massachusetts-Rhode Island order in 1964 was under attack in *Green Valley*. Moreover, the defendants in that case were all handlers, and there was no representative of the class of non-nearby producers before the court. Indeed, as we said in *Blair*, the approval of the differential was a *dictum*, since "the court's holding was that the handlers lacked standing to challenge the disposition of the producer settlement fund."[28] We must conclude, therefore, that neither Congress nor the courts have validated the farm location differential of the Massachusetts-Rhode Island order.

IV

Appellants insist that, even if the Secretary had in the past relied upon historical fluid use patterns, there

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in the Order so as not to disturb the status quo in this respect. Milk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market; and thus, paragraphs 3 and 4 of Section 4, Article VIII, may be said to prescribe differentials having relation to locations at which deliveries are made. This argument need not be labored, however, for the differentials can readily be sustained under Section 8(c)(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called 'location differentials' in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market."

[27] 108 F. 2d at 346.

[28] 370 F. 2d at 238.

[29] *Id.* at 238, n. 34.

are other legitimate legal and factual grounds for the farm location differential. Therefore, they urge, the court should, before striking the provision from the order, in effect remand the case to the Secretary for an opportunity to offer a more explicit justification for the differential. We are not impressed with this suggestion since we do not think that a court should, in the face of what it finds to be a clear and continuingly burdensome statutory violation, albeit one of long standing, defer a declaration of its illegality. We are especially not disposed to do so where there appears to be no serious possibility of finding warrant in the statute for a preference based solely on farm location.

We need not speculate as to what the Secretary would do upon such a remand, for he has already, since our decision in *Blair* and the judgment of the District Court in this case, issued a recommended decision on the farm location differential in the Massachusetts-Rhode Island order. He there concluded after further hearings on the subject that the nearby differential "should be continued." He noted that nearby farmers had received higher prices "prior to the advent of federal regulation," that this advantage had been preserved in the base-rating plans of the federal licenses and 1936 Boston order, and that it had been carried over into the nearby differential of the 1937 order. The Secretary quoted from the 1937 record to the effect that the historically higher price was:

> due to the fact that their production is relatively even, and that their milk is accessible to small dealers * * *. If we should take away from these producers a differential that they have been able to get without Government regulation, they would have a legitimate objection

> that we are placing them at a comparative disadvantage. * * *[29]

The fact of historically higher prices is, of course, not alone sufficient. The reason for that difference must not, under the Act, have been related to sales advantages for fluid use. To avoid this pitfall, the Secretary assigned two other explanations for the high prices: availability and evenness of production. The former is not a legitimate factor. To the extent that it reflects the nearby producers' ability to become distributors directly to the consumer, it is no more than an aspect of the high fluid utilization advantage. To the extent that availability means dependability and ease of access, it is, as we held in *Blair*,[30] and as the Secretary himself recognized in the New York-New Jersey order, "related to the extra value of such milk to the handler who buys it rather than to producers generally and [is], therefore, * * * payable by handlers rather than out of the pool."[31] Nor would evenness of production appear to support a differential based on farm location. While nearby production may as a general matter be more even, there have been wide individual variations in seasonality throughout the milkshed. Moreover, as the Secretary stated

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[29] 32 Fed. Reg. 9902, 9919 (1967).

[30] If this history has any current significance, if the milk has greater "value" to the handler for reasons other than quality and location of delivery, it may be a reason for the producer to receive out of the handler's own pocket a premium above the minimum price, but this would not be a justification permitted by the law for a diversion from [distant farmers] of their equal share of the blended uniform minimum price adjusted only for the statutory differentials.

370 F. 2d at 238–39.

[31] 22 Fed. Reg. 4194, 4213 (1957).

in his New York-New Jersey decision,[32] uniform supply should be compensated on an individual basis. The Act makes provision for base-rating,[33] and it appears to be the only sanctioned method by which to stimulate and compensate even production by individual farmers.

None of the differentials permitted by the Act contemplate in terms preferential treatment on the basis of farm location.[34] A dual legal justification for the nearby differential, was, however, offered in the 1967 recommended decision:

> Clearly * * * these greater returns * * * were, in the language of the statute "market differentials customarily applied by the handlers." * * Inasmuch as these greater returns for milk were directly related to geographical source, it was considered that these differentials were also adjustments based on "location" * * * within the meaning and context of [the Act].[35]

But the only "location" differential permitted by the Act is one for "the location at which delivery" of the milk is made to the handler. Plainly, this exception was designed to recognize differences in transportation costs only, and does not encompass a preference based solely on farm location.[36]

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[32] *Id.*

[33] 7 U.S.C. § 608c(5)(B) (Supp. 1967).

[34] While the Secretary relies only on the provisions for market and location differentials, the other appellants have attempted to justify the nearby differential as a "volume" or "production" differential. The Committee Reports, however, show those exceptions to be clearly inapt. H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 9–10 (1935).

[35] 32 Fed. Reg. 9202, 9919 (1967).

[36] It may be that in authorizing a location differential in 1935, Congress intended to preserve the preferences enjoyed by nearby farmers under pre-1935 federal licenses and under voluntary

Nor is farm location comprehended within the provision for "market * * * differentials customarily applied by the handlers." The Committee Reports in respect of the 1935 Act are explicit that "the market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant." [37] This adjustment of which the "country station" differential of the 1936 greater Boston order was an example,[38] recognized the savings in handling costs when milk in fluid form is delivered to the city rather than first to a country plant. Provision is now made for this differential in the Massachusetts-Rhode Island order as a fixed portion of the zone differential.[39] As we held in *Blair*,

> it is plain that this type of allowance turns not on the location of the producer's farms but on the nature of the market to which they de-

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agreements before any federal regulation. Those preferences, it appears, were phrased in terms of location of *delivery* (or delivery plus farm location), and it was generally true at that time, as the First Circuit noted in *Green Valley* (see n. 26 *supra*), that delivery and farm locations coincided fairly closely. It is probably safe to guess that not until bulk tank trucking thereafter made it economically feasible for distant farmers to deliver in the city did the nearby farmers, for self-protection, insist that the nearby differential be based solely on farm location.

[37] H.R. Rep. No. 1241, S. Rept. No. 1011, 74th Cong., 1st Sess. 10 (1935).

[38] See p. 7 *supra*.

[39] The purpose of establishing zone differentials is to achieve a higher degree of uniformity in prices to all handlers f.o.b. the market for milk which is received from producers at plants located at various distances from the principal consumption area. To achieve this purpose, the zone differentials must closely reflect costs generally incurred in receiving milk at country plants and moving such milk to city plants.
29 Fed. Reg. 11205, 11210 (1964).

liver their milk. The "market differential" rationale is plainly not a tenable basis for the nearby differential.[40]

On August 2, 1968, the United States District Court for the Northern District of New York elected to treat a nearby differential of the kind here in issue as a "market differential." *Cranston v. Freeman*, —— F. Supp. ——. It recognized that the result it reached was directly in conflict with our decision in *Blair*, but it went on to say that while it "concurs with the Court of Appeals for the District of Columbia that the uniform price requirement was designed to eliminate ruinous competition for the fluid milk market, it cannot concur in [that Court's] conclusion that the requirement prohibits recognition of the historic fact that farmers located in particular areas near the market were accorded a greater share of that market." In other words, although Congress authorized a price pooling arrangement in order to eliminate revenue disparities among producers due to varying access to the fluid milk market, those who enjoyed that advantage before pooling must continue to have it because a larger percentage of their production customarily goes into fluid milk use. This is, of course, precisely what the Secretary gave as his primary reason for including the nearby differential in the Connecticut marketing order involved in *Cranston*:

> Provision should be made also for the payment of a market differential to producers in the nearby supply area. The monies for the payment of these differentials will be obtained by a deduction from the total value of all milk before completing the computation of the market-wide uniform price.
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> * * * * *

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[40] 370 F. 2d at 238.

> Milk received from the nearby area has long represented the major part of the total Connecticut supply. *The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes.* Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern of pricing has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated market. *The differentials adopted will reflect more representative values with respect to the milk of both nearby and distant producers since the nearby producer will share in the higher-priced Class I market to an extent somewhat greater than otherwise would be the case under market-wide pooling.* [Emphasis added.] 24 Fed. Reg. 1049, 1063 (1959).

The *Cranston* court does not, therefore, sustain the nearby differential on some reason other than that relied upon by the Secretary in propounding it. It, rather, embraces fully the Secretary's persistent assumption that Congress did not really mean what it said about end-use not being allowable as a factor in fixing the amount received for milk by the producer.[40.1] The *Cranston* court's acceptance of the "mar-

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[40.1] The *Cranston* court purports to find some comfort in the 1939 decisions of the Supreme Court in *Hood* and *Rock Royal*, note 3 *supra*. As to the former, however, *Cranston* concedes that the Supreme Court "omitted any specific discussion of the farm location differentials" which had been challenged in the District Court—an omission of which Judge Magruder said in *Green Valley:*

"These points were raised in the District Court in the Hood and Whiting Milk cases but were not pressed before the Su-

ket differential" rationale thus flies in the face of the congressional purpose explicit in the statute, as well as the flat language of the Senate and House Committee Reports defining "market differential." See *supra* p. 23.

Even if the farm location differentials cannot be saved, appellants' argument continues, the case should be remanded to the Secretary so that he can determine whether other amendments are necessary and whether the order, without a nearby differential, effectuates the declared policy of the Act.[41] Appellants rely in this regard upon cases such as *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607 (1944), and *FPC* v. *Idaho Power Co.,* 344 U.S. 17 (1952).

Those decisions do enunciate the principle that a court cannot always assume that an agency, had it been aware of the limits of its authority, would have promulgated an order differing only in the absence of the provision judicially declared unlawful. That principle, however, does not obtain here. The 1964

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preme Court. Hence, they are still open for consideration here." 108 F. 2d 342, 344 (1939).

Rock Royal did not involve producers, but only handlers and therefore a different provision of the statute. Moreover, the differential payments there involved depended upon the location of the plant to which delivery was made, and not the location of the delivering farmer.

[41] The nearby farmers also argue that, since the nearby differential is a key provision of the order, its invalidation effectively invalidates the entire order until the Secretary has readopted it *and* it has been approved in a referendum by two-thirds of the producers in the market. The Secretary, however, rejects this construction, relying on the following severability provision in the order:

" If any provision * * * is held invalid, the application of * * * the remaining provisions * * * shall not be affected thereby."

7 C.F.R. § 1001.96 (1968).

order contains an explicit severability clause, clearly indicating that all parties contemplated that judicial invalidation of some provisions would not upset the remainder. Moreover, unlike the provisions involved in *Addison* and *Idaho Power,* the nearby differential is discrete. There is nothing to suggest that elimination of it irretrievably impairs the Secretary's power and purpose to administer the significant regulatory scheme embodied in the remaining provisions of the order. He has simply been told to discontinue illegal payments under the order. Since any discrimination attributable to farm location would appear to be invalid, there is no reason to afford him a chance to disburse them under a different name.[42]

Although we affirm the judgment of the District Court, we must deal with the distant producers' claim of equitable entitlement in respect of the escrow fund.[43] The complaint was filed on December 27, 1966, and the escrowing commenced with the preliminary injunction of January 16, 1967. Final judgment was entered by the District Court on June 15, 1967. In the exercise of our duty, as a court of equity, to "tailor * * * relief

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[42] The injunction is prospective only; the Secretary and the producers can do what they wish with the order hereafter. Unlike the situation in *Idaho Power*, the District Court's injunction did not constitute a command that the Secretary continue the order without the illegal provision. And, since there will be no retroactive recovery in this case, the injunction, as compared with the decision of the circuit court in *Addison*, has no impact on rights arising from events which occurred before the date of the court's judgment.

[43] We do not think the case need be remanded—as all appellants urge—for either the Secretary or the District Court to determine in the first instance the equitable distribution of the escrow fund. Further delay is unnecessary, the facts are not in dispute, and neither possesses a peculiarly informed discretion on this question to which this court should defer.

with a critical and balanced view of the ramifications of [the] decision,"[44] we have decided that the monies escrowed before June 15, 1967 should be disbursed to the nearby farmers and that the distant producers are entitled to amounts thereafter collected.

In support of their claim, the nearby producers point out that the nearby differential was in operation for almost 30 years before it was challenged in court and that the nearby farmers have relied upon it over that period in making economic decisions and investments.[45] In particular, they allege reliance upon the

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[44] 370 F. 2d at 239.

[45] Both the Secretary and the nearby farmers had relied heavily on this line of argument in the 1964 and 1967 decisions and the 1964 hearings. Thus, the principal reason advanced for continuation of the nearby differentials was that they were "deeply embedded" in the New England milk marketing structure; to remove them would be grossly unfair to nearby producers who had relied upon them in voting for the order originally and in negotiating loans and making capital commitments. The nearby differentials had, it was asserted, become capitalized into land values; and if the differentials were to be abandoned or reduced, then it should be accomplished very gradually. Moreover, some witnesses predicted that if the differentials were removed, nearby producers would overproduce to make up for lost revenues, or even worse, they would be forced out of business by high local production costs—an event which must be forestalled in order to preserve an adequate supply of nearby milk and therefore greater economy for the urban consumer. Others hypothesized that nearby producers, deprived of their price advantage under the federal order, would go into business as producer-dealers, thereby removing many Class I sales from the pool and lowering the blended price. Such a development would also force out of business the small dealers who cannot economically import distant milk and who rely on nearby sources, this in turn would contribute to the undesirable trend toward monopolization in the distribution of milk. Finally, the Secretary was warned of the catastrophic inter-market dislocations which would accompany elimination of the nearby differ-

First Circuit's decision in *Green Valley.*[46] Because it was, in language at least, an explicit judicial approval of the farm location differential, they suggest that the payments should not be terminated until the differential has finally been determined invalid by a court of at least equal rank in the federal judiciary.

We recognized in *Blair* that the plaintiffs' long acquiescence in the differential and their years of enjoyment of a blended price and stable marketing conditions in the milkshed were significant factors bearing upon their entitlement to equitable relief. In view of these factors, the nearby farmers could legitimately have expected to receive, and the distant farmers to pay, the differential until it has been held in-

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entials. Such a step would attract vast supplies of milk from the surrounding areas, flooding the New England markets and eventually depressing the price. The Secretary was clearly much impressed with this line of testimony. In his 1967 recommended decision he noted that "the business decisions of nearby producers have been influenced over the years by the higher returns," and that the differential would "promote orderly marketing of milk in the Boston area, and prevent disruption in the normal supplies of milk for the Boston area and thus tend to effectuate the declared purposes and policies of the Act." 32 Fed. Reg. 9902, 9919 (1967).

We are not insensitive to the Secretary's efforts to preserve the public interest in the vastly complex regulation of milk marketing. As we said in *Blair*, however, "this may be a reason for the legislature to enlarge the Secretary's powers, but not for the court to overlook the limited nature of the authority hitherto conferred by Congress." 370 F. 2d at 239.

[46] In his 1967 recommended decision, the Secretary noted that he too had relied on *Green Valley:*

"It was subsequent to, and substantially in reliance upon, this decision that farm location differential provisions were considered to be legal and proper for inclusion in other New England orders."

32 Fed. Reg. 9902, 9920 (1967).

valid, after full opportunity for the presentation of views on both sides, by a court. We think this is a fair view of the equities; and, since a preliminary injunction does not constitute a final judgment on the merits, appellant producers should receive the amounts escrowed between January 16 and June 15, 1967.

We are not persuaded that the endorsement of the nearby differential in *Green Valley* further alters the equities between the parties. The nearby producers' reliance on that opinion is amply recognized by preserving their preference until it has been finally invalidated by a responsible court having jurisdiction to do so. Their expectations cannot seriously be said to encompass a decision to that effect by a Court of Appeals but not by a District Court.

The judgment appealed from is affirmed and the case remanded to the District Court for further proceedings consistent herewith.

It is so ordered.

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1968

No. 21141

Civil 3379–66

FREDERICK T. ZUBER, ET AL., APPELLANTS

v.

RUSSELL ALLEN, ET AL., APPELLEES

No. 21308

ORVILLE FREEMAN, SECRETARY OF AGRICULTURE, APPELLANT

v.

RUSSELL ALLEN, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

Before: BURGER, WRIGHT and MCGOWAN, Circuit Judges

JUDGMENT

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION THEREOF, it is ordered and adjudged by this court that the judgment of the District

Court appealed from in these cases is affirmed, and these cases are hereby remanded to the District Court for further proceedings consistent with the opinion of this court.

Per Curiam.

For the Court:

NATHAN J. PAULSON,
Clerk.

Dated September 23, 1968.

APPENDIX B

District Court Memorandum and Order

[Filed May 24, 1967]

MEMORANDUM

The plaintiff's motion for summary judgment is granted on the authority of *Blair, et al.* v. *Freeman,* U.S. App. D.C. , No. 19801, decided November 18, 1966.

Counsel for plaintiffs will submit an appropriate order.

JOSEPH C. MCGARRAGHY,
Judge.

MAY 24, 1967

[Filed June 15, 1967]

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT FOR DECLARATORY AND INJUNCTIVE RELIEF

This cause came on for hearing on the Motion for Summary Judgment filed herein by the plaintiffs, and the Court having considered the Motion and Opposition thereto, the verified complaint, pleadings, affidavits, points and authorities, exhibits, and other papers filed herein, and having heard argument of counsel for each party and being fully advised in the premises in respect to the entire record, the orders entered herein, the pertinent portions of the administrative

record, the arguments of the amicus curiae and former applicants for intervention, and all other considerations, the Court makes the following

FINDINGS OF FACT

1. The plaintiffs and their class are dairy farmers and milk producers as defined in the Agricultural Marketing Agreement Act of 1937, as amended, and the federal milk order regulating the handling of milk in the Massachusetts-Rhode Island milk marketing area, 7 C.F.R. 1001. They have brought this action for themselves, individually, and for the benefit of all other milk producers similarly situated who produce and sell their milk under the said milk order, which was promulgated by the defendant effective October 1, 1964, and is still in effect at the present time. The plaintiffs seek a judgment that Section 1001.72 of said milk order, the nearby farm location differential provision thereof, is invalid and void. They also request a permanent injunction against the continued enforcement of said milk order provision by the defendant.

2. The Massachusetts-Rhode Island milk order promulgated by defendant contains the aforesaid nearby farm location differential provision, 7 C.F.R. 1001.72, which provides that milk producers whose farms are located in either of two designated areas, as determined by certain enumerated towns, cities, counties and States in each area, are entitled to receive an additional payment for their milk, over and above the uniform blended price received by all milk producers serving the market, of 46 cents or 23 cents per hundredweight, respectively, depending upon in which of the two "nearby" designated areas their farms are located.

3. The nearby farm location differential payments are deducted from the equalization pool proceeds belonging in equity to all milk producers serving the market, and such deduction reduces the uniform blended price which the plaintiffs and their class would otherwise receive for their milk, 29 Fed. Reg. 5590, 29 Fed. Reg. 11213, their farms being so located that they are not in either of the two designated nearby areas which are eligible for the said nearby farm location differential payments.

4. The plaintiffs and their class are required by the operation and provisions of the said milk order nearby differential section, 7 C.F.R. 1001.72, to sustain a reduction in the uniform blended price which they would otherwise receive, in the absence of said differential provision, of approximately $3,000,000.00 per year, the total differential payments under Section 1001.72 amounting to approximately $4,000,000.00 per year.

5. The plaintiffs and their class of ineligible milk producers constitute approximately 6,600 of the 8,800 milk producers serving the market, and there is no way that the said nearby differential payments may be recovered from the "nearby" milk producers by the plaintiffs and their class once such payments are made, in that the 8,800 milk producers are located in many different jurisdictions in various New England and other States and such attempts at recovery would involve a multiplicity of parties and actions.

6. This action has been brought by the plaintiffs as a class action, that is as an action for plaintiffs, individually, and for all other milk producers similarly situated who produce and market their milk under the said milk order. The defendant, through the promulgation of said milk order provision establishing

the eligible and non-eligible class of milk producers for said nearby farm location differential payments, has acted on grounds generally applicable to the class, thereby making appropriate the relief requested with respect to plaintiffs' class of milk producer as a whole. The plaintiffs' class of non-eligible milk producers are so numerous that joinder of all members is impracticable. There are questions of law common to the class, and the claims of the plaintiffs as representative parties are typical of those of the class. The Court has found that the plaintiffs as representative parties will fairly and adequately protect the interest of their class of non-eligible milk producers, and it has entered an order herein authorizing the maintenance of this suit as a class action under Rule 23 (a) and (b)(2), FRCP. The Court has also found and entered an order herein that the defendant is adequately representing any interests of the eligible or "nearby" milk producers that would be adversely affected by the invalidation of the milk order provision, by virtue of the defendant's defense of the nearby farm location differential payments, and it has considered the arguments and defenses of the applicants for intervention as set forth in their pleadings and those of the defendant, including the defendant's motion to hold these proceedings in abeyance. The Court finds that both the plaintiffs and the defendant have adequately represented the interests of the respective classes of ineligible and eligible milk producers, and this judgment includes in its application the said two classes of milk producers, those whose farms are so located as to make them either eligible or ineligible for the nearby farm location differential payments of the milk order.

7. On January 16, 1967, pursuant to the motion of the plaintiffs, this Court entered an order granting

a preliminary injunction during the pendency of this action or until further order of the Court enjoining the defendant from paying over to the eligible class of milk producers the monies representing the contested nearby farm location differential payments of the said milk order and requiring that the defendant collect, place and retain the monthly sums that would otherwise be paid over under said order provision in an escrow account subject to the control of the Court. On March 17, 1967, the said preliminary injunction was modified by a consent order to allow the disbursement from said escrow account of those monies therein attributable to the marketings of milk of the nearby or eligible class of milk producers and for the future payment to them of the said amounts that would otherwise be escrowed except for such modification of the preliminary injunction. The defendant is required by the terms of such order to make monthly reports concerning the escrow deposits and to furnish the same to the Court and to the plaintiffs' attorney, but it has failed to do so since its report pertaining to the said nearby differential payments attributable to the marketing of milk during January, 1967. The monies in the said escrow account presently consist of those withheld from the ineligible or non-nearby milk producers by virtue of the aforesaid reduction in the uniform blended price which they would otherwise receive for their milk except for the said nearby differential provision.

8. On March 21, 1967, this Court denied the motion of Frederick T. Zuber, et al., for leave to intervene herein as defendants, and the applicants' motion for summary reversal of said order of this Court was denied by the United States Court of Appeals for the District of Columbia Circuit on May 5, 1967, "without prejudice to such action as the appellants

may be advised to take following final judgment in the District Court where so far as presently appears there will have been accorded to those appellants by such judgment such recognition of their claims as they may be entitled to receive;". The said Order of the Court of Appeals further stated that the denial of their motion did not constitute a bar to renewing the motion for the purpose of showing in what respect the defendant failed to adequately represent the appellants' interests in the District Court. The proceedings in the Court of Appeals in respect to the appellants' appeal of said Order denying intervention were suspended pending decision of this Court on the plaintiffs' motion for summary judgment, in respect to designation of the record to be printed and the filing of briefs, for a period of twenty days from the date of the ruling of this Court on said motion. Said Order of the Court of Appeals of May 24, 1967, suspending the proceedings in that Court as aforesaid was unopposed by the plaintiffs, who filed a formal consent herein to the filing of a brief amicus curiae by Frederick T. Zuber, et al., for the presentation of any defense or argument that they might desire to place before this Court and who furnished the said applicants with a designation of the page references of the administrative record relating to the nearby farm location differential. The said applicants did not avail themselves of the opportunity to file such a brief in this Court as proposed by the plaintiffs or file any other response thereto, although the same local law firm that represented the applicants Frederick T. Zuber, et al., did file such a brief as local counsel for the Commonwealth of Massachusetts with the consent of plaintiffs on the 15th day of May, 1967, the day prior to the hearing on the plaintiffs' motion for summary judgment.

9. On November 18, 1966, the United States Court of Appeals for the District of Columbia Circuit handed down a decision in the case of *Lorton Blair, et al.* v. *Orville Freeman, Secretary of Agriculture of the United States,* No. 19,801, * * *. U.S. App. D.C. * * *., 370 F. 2d 229, in which it held that the nearby farm location differential provision of the New York-New Jersey federal milk marketing order, 7 C.F.R. 1002.71(b) was unauthorized and void, and it ordered the reversal of the decision of the District Court, C.A. No. 498–65, and the granting of a judgment declaring the invalidity of said milk order provision and the issuance of a permanent injunction against its continued enforcement by the defendant. The time for petitioning the Supreme Court of the United States for the issuance of a writ of certiorari has expired in said case. There is no substantial difference between the operation of the nearby farm location differential provision of the New York-New Jersey milk order declared invalid and void in the case of *Blair* v. *Freeman,* supra, and that of the Massachusetts-Rhode Island milk order contested in this action. Both provide for the nearby differential payments from the equalization pool proceeds through reduction of the uniform blended price, and the said payments to the nearby or eligible milk producers reduce pro tanto the amount which the plaintiffs and their class would otherwise receive for their milk under the respective milk orders.

10. On the authority of *Blair* v. *Freeman,* supra, the Court finds that the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, is invalid and void as being in excess of the statutory power of the defendant Secretary of Agriculture, in that the said differential is not one of the adjustments to the uniform

blended price authorized under the Agricultural Marketing Agreement Act of 1937, as amended, and constitutes a diversion of that portion of the uniform blended price represented by said differential to which the plaintiffs and their class are entitled under the said Act. The said nearby differential provision does not constitute the adjustments authorized under either 608c(5)(b)(ii)(a) or (c) of the Act, nor is it authorized under 608c(7) of the Act as incidental, consistent and necessary in respect to the other terms and conditions of the Act. The said nearby differential payments to the eligible milk producers are determined on the basis of the location of their farms and are not authorized as production or market differentials under the Act. H.R. Rep. No. 1241, 74th Cong., 1st Sess. 10 (1935). Nor does eligibility for such nearby differential payments turn on the location at which delivery of the milk is made, but solely on the location of the farms in the areas designated in Section 1001.72 of the milk order.

As in *Blair*, the differential involves considerations involving the use of milk of the eligible "nearby" milk producers and the payments thereof are also geared to the use of fluid milk, thus violating the prohibitions of the Act concerning payment to all producers of a uniform price for their milk irrespective of use thereof. For these and the other reasons stated in *Blair*, the nearby farm location differential provision of the Massachusetts-Rhode Island milk order is invalid and void. The Court has fully considered the other claims and defenses of the defendant, the amicus curiae, and the applicants for intervention herein, including that claim of Frederick T. Zuber, et al., applicants for intervention, that invalidation of the nearby differential by this Court would deprive nearby milk producers of property without due process of

law and concerning the alleged non-separability of the provisions of the milk order, Section 1001.96, and the Court finds that the same do not constitute a basis for denial of the plaintiffs' motion and the relief requested in their complaint. Further, the Court has found that the plaintiffs and their class are sustaining irreparable injury by virtue of the nearby differential payments and that the issues presented are properly those for judicial determination.

NOW, THEREFORE, the Court makes the following

CONCLUSIONS OF LAW

1. The plaintiffs and their class are entitled to the granting of the motion for summary judgment filed herein by them on the 24th day of February, 1967.

2. The plaintiffs and their class are entitled to the relief requested in their complaint, namely declaration of the invalidity of Section 1001.72 of the Massachusetts-Rhode Island milk order and a permanent injunction against its continued enforcement by the defendant, in order to preclude further irreparable injury to them, and they have no adequate remedy at law.

ORDER

WHEREFORE, it is by the Court this 15th day of June, 1967,

ORDERED, that the motion for summary judgment filed herein by the plaintiffs and their class be and the same hereby is granted, and it is further

ORDERED, ADJUDGED AND DECREED, that the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, be and the same hereby is declared invalid and void, and it is further

ORDERED, ADJUDGED and DECREED, that the defendant Secretary of Agriculture, his Market Administrator for the Massachusetts-Rhode Island milk marketing area, their agents, attorneys, servants and employees, and all persons in active concert or participation with them, be and they hereby are restrained and enjoined from enforcing the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, Section 7 C.F.R. 1001.72, at any time in the future under the same or any other name or designation, either directly or indirectly, and it is further

ORDERED, ADJUDGED and DECREED, that the defendant take all necessary action to effectuate the required termination of the operation of said milk order provision, and it is further

ORDERED, that the defendant, his Market Administrator for the Massachusetts-Rhode Island milk marketing area, their agents, employees, attorneys and servants, comply with the orders of this Court of the 16th day of January, 1967, and the 21st day of March, 1967, requiring that a separate report be filed with the Court and furnished to plaintiffs' counsel, Charles Patrick Ryan, 400 Prudential Building, Washington 5, D.C., concerning the information relating to deposits of the differential payments in the escrow fund established under the control of this Court, for those months for which such a report was not filed or furnished, to and including the report relating to the milk delivered during the month of April, 1967, the said reports to be filed and furnished on or before the 30th day of June, 1967, and it is further

ORDERED, that the defendant and his said Market Administrator retain the monies representing the nearby differential payments deposited in the said

escrow fund pending further order of this Court to be entered concerning distribution of the said fund after compliance with the filing and furnishing of the said monthly reports as aforesaid and after a ruling by the United States Court of Appeals for the District of Columbia Circuit in respect to the appeal of Frederick T. Zuber, et al., No. 20931, of the Order of this Court denying them intervention in this action, dated March 21, 1967, said appeal being presently pending in the Court of Appeals.

JOSEPH C. MCGARRAGHY,
District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1969

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IN THE

Supreme Court of the United States

October Term, 1968

FREDERICK T. ZUBER, Et Al., *Petitioners,*

v.

RUSSELL ALLEN, Et Al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ELLIOT L. RICHARDSON
Attorney General of the Commonwealth of Massachusetts
Amicus Curiae

Of Counsel:

CHARLES M. BURNIM
Assistant Attorney General of the Commonwealth of Massachusetts

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IN THE

Supreme Court of the United States

October Term, 1968

No. 861

FREDERICK T. ZUBER, Et Al., *Petitioners,*

v.

RUSSELL ALLEN, Et Al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Massachusetts, pursuant to Rule 42 of the Rules of this Court, urges that the petition of Frederick T. Zuber, et al., for writ of certiorari be granted. The pertinent facts, the questions presented for review, and the jurisdictional requisites are set forth in the petition itself and are adopted herein. The

opinions below and the relevant statutory and regulatory provisions are printed as an appendix to that petition.

INTEREST OF AMICUS CURIAE

The instant case involves the validity of an integral provision of the 1964 Federal milk marketing order for the Massachusetts-Rhode Island area. That provision for a farm location differential price adjustment has been included in the Secretary's orders for this same general marketing area for over three decades. The Commonwealth lies at the heart of the area regulated by the 1964 order. Its citizens are those principally affected by the decisions below which have already had a severe and adverse impact. Since January 1967, when the district court ordered escrowing of the nearby differential adjustments, approximately 17 percent of Massachusetts dairy farmers have abandoned dairying operations. Of the over $5.5 million in escrow as of November 1968, farmers in the Commonwealth have the major stake—about $3.4 million. In addition, the peremptory elimination of the adjustments by the rulings below threatens, if upheld, in the view of both the Commonwealth and cognizant officials of the United States Department of Agriculture, to "bring about chaotic conditions in the market" and "so misalign the existing [milk] price structure, injure producers, and so seriously disturb long-standing marketing relationships that permanent injury to milk supply for the consumers in the area would result."[1]

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[1] Affidavit of Herbert Forest, Director of the Dairy Division, U. S. Department of Agriculture, filed with the district court on January 9, 1967 and transmitted to this Court as part of the original record.

REASONS FOR GRANTING CERTIORARI

For the reasons stated in the petition itself as well as those stated below, this case is one warranting review by this Court.

1. The decision below raises an important question of Federal law affecting the largest segment of the agricultural economy of Massachusetts. For over thirty years, the dairy industry of Massachusetts has made substantial investment and management decisions predicated upon a Federal milk regulation including a farm location (also called "nearby") differential. The legality of the very differential questioned here, included in the predecessor 1937 Boston order, was fully considered in 1939 by the United States Court of Appeals for the First Circuit in *Green Valley Creamery, Inc.* v. *United States,* 108 F.2d 342. Speaking for a unanimous panel sitting in the heart of the marketing area affected, Judge Magruder explicitly upheld a provision for a nearby differential adjustment identical to that involved in the instant case. Despite this unequivocal ruling, the court below, far removed in distance from the market's locale and acting over three decades later, has now seen fit to override it. The consequences of the lower court's ruling have been and will be severe.

The most important segment of Massachusetts agriculture is dairy farming which represented 31 percent of the total receipts from farming in 1967.[2] As of July 1, 1968, there were 1,564 dairy farms in Massachusetts. All but a handful are located within the nearby and

[2] Source: USDA Bulletin entitled "Farm Marketings", Economic Research Series.

intermediate zones for the Massachusetts-Rhode Island milk order and the vast majority of them market their milk under that order.

For the average Massachusetts dairy farmer, the farm location differential price adjustment constitutes virtually his entire return for his own labor. The net differential, escrowed pursuant to the district court's order commencing in January 1967, averaged $1,393.70 per Massachusetts producer in 1968. The average annual return for the farmers' own dawn-to-dusk labor has been estimated at only $1,517 in 1965, the most recent year for which statistical data is available.[3]

Deprived of the use of the monies escrowed, representing such a large portion of the nearby farmers' annual return, a substantial number of Massachusetts dairy farmers have already been forced to discontinue operations. Since the escrow commenced, 296 dairy farmers have ceased operation, a 17 percent drop in the number of farmers in Massachusetts in a two-year period.

The distant producers marketing under the order have not experienced such attrition. While the number of producers in the nearby zone has substantially decreased since the escrow commenced, the number of district producers under the order was in fact greater in October 1968 than in October 1966 (6,578 as compared to 6,413). While in 1966, both nearby and dis-

[3] Source: USDA Bulletin #230 entitled "Farm Costs and Returns" giving data for the year 1965 for the average dairy farm in the Central Northeast including New England. See affidavit of Reuben Hall, at pages 4-5, filed with the district court on January 9, 1967 and the affidavits of 18 nearby farmers marketing under the Massachusetts-Rhode Island order filed with the district court on January 16, 1967. The affidavits are part of the original record that has been transmitted to this Court.

tant zones suffered an equivalent percentage reduction in numbers over 1965, in 1967 and 1968 after the escrowing of the net differential the nearby zone lost a large number of farms but the distant zone increased their number in 1967 and experienced only a negligible drop in numbers in 1968.[4] The explanation is clear. While the nearby blend dropped 32 cents per cwt. from October 1966 to October 1967, after escrowing of the net farm location differential, the distant farmers enjoyed a 3 cent increase (without regard to any distribution of the escrow). The same relative disparity has continued since October 1967.

If the lower court's judgment becomes final, the impact will be much more severe than the loss of Massachusetts dairy farm operations alone. Dairying contributed nearly $50 million to the Commonwealth's economy in 1967, 31 percent of the total agricultural receipts of $170 million in that year. Other vital elements of the Commonwealth economy will be seriously affected as well. The reduction of dairy farming operations necessarily would reduce requirements for goods and services for the farms, diminish Massachusetts processors' operations, cut employment, reduce consumer buying power, and will thus have an adverse effect upon the entire economy of Massachusetts.

Absent review and reversal by this Court, the direct loss to Massachusetts farmers will not only be the bulk of the $3.4 million of their monies now held in escrow but also the substantial investments in new dairy farm facilities, conservatively estimated to exceed $8 million, made within the last ten years. In recent years,

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[4] Based on the Monthly Statistical Reports (including yearly summaries thereof) of the Market Administrator for the Massachusetts-Rhode Island Milk Marketing Order.

the economics of dairy farming have compelled large new capital investments. Massachusetts farmers have based their managerial decisions to incur these large capital costs predicated upon the three decades of blend prices that included the farm location differential adjustment and upon the unchallenged legal authority of the Secretary, since *Green Valley,* to include the differential in his milk orders.

The general scarcity of farm labor and its high cost, where obtainable, coupled with the volume economies of present day dairying have compelled farm automation and establishment of larger herds. In 1940, over 70 percent of the Massachusetts dairy cows were in herds of 30 or less and even as late as 1955 over 50 percent were in herds of 30 or less cows. In 1960, 60 percent of Massachusetts dairy cows were on farms that had *more* than 30 cows.[5]

The investment required to increase a herd from 30 to 50 cows is approximately $52,900 as follows: Buildings, $35,400; 20 cows, $9,000; milking equipment, $5,000; bulk tank, $4,500; total, $52,900. The new investment required to increase from 30 to 70 cows is $69,100[6] and it is estimated that the capital to increase to 100 cows or more ranges from $50,000 to $150,000 depending upon the previous size of the farm.

As is apparent from the itemization of the capital improvements, if a farmer is forced to cease dairying

[5] Source: Department Series 1 Bulletin, entitled "Large Dairy Farms in Massachusetts", Massachusetts Department of Agriculture.

[6] Source: Based on Bulletin 516, entitled "Income Changes from Reorganization of a Representative New England Dairy Farm", University of Massachusetts.

operations, this investment in building and equipment is almost a complete loss, except for the livestock and limited salvage value, since the facilities are not fully usable in other agricultural enterprises.

In the 9-year period 1955-1964, it is conservatively estimated that capital improvements were made by Massachusetts dairy farmers in excess of $8 million.[7] The decisions to enlarge their herds from the predominate 30 or less cows prior to 1955, to the 50 to 100 cow herds now common, were made by both the farmers and their banks based upon the prevailing pattern of the milk prices under orders that included the farm location differential. The decision below has seriously jeopardized this over $8 million investment in capital improvements.

In the light of the 30-year history of inclusion of the differential by the Secretary, the explicit court sanction in *Green Valley* of the Secretary's authority to include it and Congressional acquiescence in the Secretary's authority with knowledge that nearby differentials were employed and the fact that

—the nearby differential is a very substantial factor in Massachusetts dairy economy;

—its elimination has had, and will have a substantial adverse effect on the agricultural economy and upon Massachusetts' overall economy; and

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[7] Information is available for this 9-year period on farm size and expansion from which estimates of capital investment may be reliably computed. The data source is set forth in footnotes 5 and 6. The escrow of the "nearby" differential that commenced in January 1967 has discouraged capital improvements in Massachusetts dairy farms in 1967 and 1968.

—substantial investments in excess of $8 million have been made based upon the previously declared validity of the differential in the *Green Valley* case,

this Court should grant the petition for certiorari to review the decision of the Court of Appeals having such a grave importance to so many.

2. As a matter of proper administration of justice, this Court should grant certiorari on the question of whether a matter of such complexity and importance requires that the affected farmers and the Secretary of Agriculture be afforded a full hearing so that the Court can be apprised fully as to the intricacies of milk marketing, the legislative history of the Act, and the history of regulation.

The decision of the district court was made on motion for summary judgment. *No hearing* was held in order to explain to the lower court the complexities and intracacies of milk marketing, the historic antecedents and legislative history of the Act, and the over 30 years of consistent administrative action to include a farm location differential in New England milk orders. *The affected nearby farmers were denied* an opportunity to participate as parties in the district court proceedings.

Significantly, in the cases in which courts have had the benefit of a full hearing and briefing, the authority of the Secretary to include a nearby differential has been upheld. *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533; *Green Valley Creamery, Inc.* v. *United States, et al.*, 108 F.2d 342 (C.A. 1); and *Cranston, et al.* v. *Freeman*, 290 F. Supp. 785 (N.D.N.Y. 1968).

A decision of such broad scope and severe economic impact upon so many individual farmers and the economies of several states should not be rendered without affording every interested party his day in court to develop a thorough and complete record for resolution of the difficult legal and economic issues involved.

The courts below, proceeding without aid of a thorough record, have fallen into basic misunderstandings of the milk market, the statutory history and the inherent economic value of nearby milk. For example, the Court of Appeals below discounted whether nearby producers are in fact more even in their production or that evenness benefits the market by reducing the burden of surplus during the flush production period. In fact, in 1967 nearby producers as a group were twice as effective in evening out production as distant producers.[8] Nearby producers' production fluctuated only 13.8 percent during the year while distant varied 32.7 percent. Also, the court below stated "it does not appear" that a farm location differential ever appeared prior to the Boston order of 1937. The *Cranston* court on the basis of a complete evidentiary hearing concluded otherwise.

The Court of Appeals below rested its decision on the language of the Committee Reports, without aid of any elucidation on the legislative history. The *Cranston* court with the benefit of its thorough hearing rested its contrary statutory interpretation on the remarks of principal congressional advocates of the Act in the Congressional Record, the full Committee Reports and the market conditions that prevailed at the time and to which Congress addressed itself.

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[8] Source: Monthly Statistical Reports, Market Administrator, Massachusetts-Rhode Island Milk Order.

With so much at stake and given the labyrinthean complexity of the dairy industry, summary judgment is ill-suited, and the denial of a full hearing and denial of participation of all directly interested parties have incurred the risk that grave injustice may have been done or serious errors committed. The complex economic issues are properly, in the first instance, for the Secretary, but in any event, a full evidentiary hearing before the district court is the only appropriate procedure to assure that there is full judicial comprehension of the complex statutory and economic issues involved.

As Professor Moore has observed:

> "But by its nature summary judgment is apt to be ill-adapted to cases of a complex nature or to those that involve constitutional or other large public issues, which often need the full exploration of trial." *Moore's Federal Practice*, Vol. 6 at p. 2284.

Justice Jackson, in remanding a summary judgment in a comparably complex case, *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-257, said:

> "We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.
>
> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive state-

ment of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide." (Footnote omitted).

CONCLUSION

Therefore, it is respectfully urged that a writ of certiorari be granted for review of the decision below.

Respectfully submitted,

ELLIOT L. RICHARDSON
Attorney General of the
Commonwealth of Massachusetts
Amicus Curiae

Of Counsel:

CHARLES M. BURNIM
Assistant Attorney General of the
Commonwealth of Massachusetts

January 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

FREDERICK T. ZUBER, ET AL., *Petitioners*,

v.

RUSSELL ALLEN, ET AL., *Respondents*.

BRIEF *AMICUS CURIAE* OF ATTORNEY GENERAL OF THE STATE OF CONNECTICUT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF FREDERICK T. ZUBER, ET AL.

ROBERT K. KILLIAN
Attorney General of the
State of Connecticut
30 Trinity Street
Hartford, Connecticut

MICHAEL J. SCANLON
Assistant Attorney General of the
State of Connecticut

Amicus Curiae

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 861

FREDERICK T. ZUBER, ET AL., *Petitioners,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA COURT

BRIEF *AMICUS CURIAE* OF ATTORNEY GENERAL OF THE STATE OF CONNECTICUT IN SUPPORT OF PETITION

The State of Connecticut, pursuant to Rule 42 of the Rules of this Court, urges that the petition of Frederick T. Zuber, et al., for a writ of certiorari be granted. The pertinent facts, the questions presented for review, and the jurisdictional requisites are set forth in the petition itself and are adopted herein. The opinions below and the relevant statutory and regulatory provisions are printed as an appendix to that petition.

INTEREST OF THE *AMICUS CURIAE*

Agriculture constitutes a substantial sector of the Connecticut economy, and dairy farming, in turn, occupies the leading position in that sector. In October, 1968, Connecticut's more than 1,200 dairy farmers[1] delivered virtually all of the milk produced by them for sale in the Federally regulated markets of Southern New England. Total 1968 production from the State's dairy farmers amounted to more than 680 million pounds of milk, with gross receipts from its sale approaching $46,000,000. The decision of the Court of Appeals below outlawing the Secretary's employment of price differentials which are received by Connecticut and other so-called "nearby" producers in milk marketing orders promulgated by him threatens to visit a substantial decline in price on Connecticut's many dairy farmers and thus a serious blow to the State's dairy economy.

One hundred thirty-five[2] Connecticut dairy farmers delivering their milk to handlers serving the Massachusetts-Rhode Island Milk Marketing Area are located in the "nearby" zone described in the Secretary's milk marketing order for that Area[3], and consequently receive the nearby differential at issue in the instant case. Most of the remainder of the State's producers, approximately 1,079 in number, deliver to handlers serving the Connecticut Milk Marketing Area and, under the Secretary's order for the Connecticut

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[1] Dairy farmers are referred to as "producers" or "milk producers" in the Act and the Secretary's regulations under it. The three terms will be used interchangeably in the course of this brief.

[2] The number of producers is for October, 1968. This and other data in this paragraph relating to the Connecticut dairy economy are based on information taken from *Connecticut Dairy Facts*, a monthly publication of the Connecticut Department of Agriculture and Natural Resources.

[3] See 7 C.F.R. § 1001.72(a); App. 11a-13a.

Area, receive a nearby differential analogous to that held illegal by the court below[4]. The Connecticut Order differential has been received by this latter group since the promulgation of the original Connecticut Milk Marketing Order in 1959 and reflects the correspondingly higher prices paid nearby producers for their milk prior to federal regulation of the Connecticut market.[5] The Connecticut differential was recently upheld in a well-considered opinion by the United States District Court for the Northern District of New York (Timbers, J., sitting by designation) in the case of *Cranston* v. *Freeman*, 290 F. Supp. 785 (1968), which is currently on appeal to the United States Court of Appeals for the Second Circuit.[6]

The broader repercussions of the holding of the court below on the agricultural economy of southern New England, and on the interrelationships between that economy and the overall economy of the area, are difficult to gauge with accuracy. Yet it is clear, at a minimum, that removal of the differentials from the New England orders will reduce prices to nearby farmers by significant amounts, and that the further result will undoubtedly be a marked acceleration in the number of producers leaving the market.[7] Because

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[4] See 7 C.F.R. § 1015.72(a). Substantial numbers of New York and Massachusetts producers are also located within the Connecticut order "nearby" zone.

[5] See 24 Fed. Reg. 1049, 1063 (1959), quoted in *Cranston* v. *Freeman*, 290 F. Supp. 785, 795 (N.D.N.Y., 1968), App. 90a-91a.

[6] Appeals in the case were docketed in the Court of Appeals on October 28, 1968, as Nos. 32,793-99.

[7] The decline in numbers of producers throughout the Northeastern portion of the country in recent years has prompted the Secretary to institute substantial Class I price increases in the Northeastern markets. In a recent administrative decision raising the Class I price in six Northeastern markets by $.24 per hundredweight, the Secretary in part explained his action in the following terms:

> "Producers continue to drop out of production in the Northeast Federal order markets at a rapid rate . . . there was a

the differential invalidated in *Zuber* v. *Allen* directly affects a large number of Connecticut dairy farmers, and, more importantly, because, absent review of the *Zuber* decision, the Secretary might terminate the Connecticut differential in the interests of stable and orderly marketing, regardless of the outcome of the *Cranston* case, the State of Connecticut is constrained to set forth in this brief the considerations which prompt it to support the petitioners in the present case.

> loss of about 6% in producer numbers in the last year. . . . This continued trend poses a very serious threat to the adequacy of a milk supply for consumers in the Northeast. . . . The continuing rise in production costs, the tight labor market and the alternative employment opportunities available to dairy farmers in the Northeast pose a serious threat to continuing adequacy of milk supplies in the region." 33 Fed. Reg. 12849, 12850.

Connecticut is no exception to this trend. Its total producer numbers have shrunk from a 1955 total of 3,689 to the current level of less than 1,300. See *Milk Price Handbook for Connecticut* (published September, 1968, by Cooperative Extension Service of the College of Agriculture, University of Connecticut), p. 22. The State's average monthly losses for the year ending October, 1968, numbered between 7 and 8 producers. See *Connecticut Dairy Facts*, November, 1967-November, 1968.

The social and economic tragedies inherent in such losses are suggested in testimony given by Connecticut Commissioner of Agriculture and Natural Resources Joseph N. Gill in 1963 at Federal hearings concerning Class I pricing in the Connecticut market:

> "Think of the bulk tanks for sale, the land lying idle or going into new uses, the people finding new jobs and a new way of life, the changes in tax base for our towns, the cows for sale, the machinery and buildings no longer needed, the effect on suppliers of feed and other inputs, and many other factors [which come into play when producers leave dairy farming]. . . ." (Statement at Hearing on Proposed Amendments to Connecticut and other Northeastern Federal Milk Orders, beginning May 6, 1963, at Market Administrator's Office, 205 East 42nd Street, New York 17, N. Y.)

REASONS FOR GRANTING THE WRIT

In ordering the elimination of the nearby differential provisions of the Massachusetts-Rhode Island Milk Marketing Order and thereby directing that the pooling provisions of the Order instead operate without regard either to economically legitimate customary pricing patterns or to equitable considerations, the court below has significantly misconstrued the Congressional purpose leading to enactment of the legislation in issue. Its treatment of the applicable statutory language contradicts the holdings of other courts, most recently that of the United States District Court for the Northern District of New York in the case of *Cranston* v. *Freeman*. Its reading of the statutory terminology disregards the Secretary's long continued administrative construction of the Act. Because the infirmities of the opinion below are apparent when it is considered against the background of the detailed discussion of legislative purpose, judicial precedent and administrative construction set forth in the *Cranston* opinion, and because the decision below may, if allowed to stand without review by this court, force abandonment of the Connecticut order's nearby differential regardless of the outcome of the *Cranston* case, this court should grant the petition of the affected nearby farmers.

1. *The case raises important questions as to Congressional intent directly and significantly affecting large number of dairy farmers in the southern New England area.*

The price adjustment provision challenged in the present litigation provides for payment, to many hundreds of dairy farmers whose farms are readily accessible to the large population centers of southern New England, of somewhat higher prices than accrue to dairy farmers located at

greater distances from those centers. Consistently with economic data drawn from periods preceding the institution of federal regulation in various parts of southern New England over the past three decades, this pricing provision allocates a portion of the total proceeds paid by handlers for milk received by them from producers in approximate conformity with pricing patterns long customary in the affected supply areas. The provision is desirable from an economic standpoint in that it helps to preserve in the market that core of producers who, for a variety of legitimate economic reasons, including greater accessibility, reliability, evenness of production, and other representative values contributed by them to the market, received greater returns than their distant counterparts prior to the commencement of federal regulation. It is as well cognizant of the equities inherent in the pre-regulation pricing relationships between generally higher cost "nearby" and generally lower cost "distant" producers. As the court below notes, the provision is "designed 'to reflect the fact that under competitive conditions' nearby producers got a higher price . . ."[8] Contrary, however, to the *Zuber* court's conclusions, it is the view of the State of Connecticut that the Secretary's decision to employ farm location differentials is altogether consonant with the Congressional purpose in enacting the statutory language in issue and with judicial and administrative construction of that language.

Circuit Judge Jerome Frank, a former general counsel to the Agricultural Adjustment Administration during the period immediately preceding passage of the legislation in issue in this case, has noted " . . . the plain intention of Congress to give the Secretary wide discretion in devising

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[8] App. 36a.

regional milk plans. . . .'"[9] The relevant Congressional Reports speak to the same effect,[10] and both those reports and the Act further stress the legislative intent that these plans take into account the particular characteristics of the individual markets to be regulated.[11] Even more directly to the point, the act authorizes the Secretary to utilize customary differential adjustments to the uniform prices paid producers,[12] thus granting him a discretionary authority with regard to producer prices which clearly allows reliance by him on market practices operative at the commencement of regulation.

The *Zuber* court has ignored these various indicia of Congressional intent with regard to the milk order legislation in issue. Instead, it has concluded that the Secretary's authority in regulating the fluid milk markets of the Nation is so circumscribed that he must disregard legitimate pricing patterns long common in the milk markets of the Northeastern United States. In the name of uniformity, it has ordered him to institute a pricing system which would create totally unexpected and unjustifiably high prices in areas of northern New England distant from the regu-

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[9] *Queensboro Farms Products* v. *Wickard*, 137 F.2d 969, at 980 (2nd Cir., 1943).

[10] H.R. Rep. No. 1241 74th Cong., 1st Sess. (1935), at 7 and 9, and S. Rep. No. 1011, 74th Cong. 1st Sess. (1935), at 9; and see excerpts quoted in *Cranston* v. *Freeman*, App. 94a-96a.

[11] See Id. and 7 U.S.C. § 608c (11)(C) ("All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas").

[12] See 7 U.S.C. § 608c(5) (B), App. 3a-4a (". . . subject . . . to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order . . .").

lated markets and correspondingly unnatural lower prices in the nearby zones. In doing so, the court has read the statute in a way utterly foreign to the construction which has long had the approval of the Secretary, the courts, and those parties affected by the regulation. This reading should not stand without full review by this court.

Congress, in enacting the statute in issue, was concerned with the well-being of this country's farming population.[13] It was, moreover, concerned with the attainment of orderly and stable milk marketing. It hoped to achieve this result by the use of "methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present section 8(3) of the Agricultural Adjustment Act."[14] "The plans for selling milk . . ." set forth in the statute, the House of Representatives was told in 1935, by a member of that body from Vermont, were those which had ". . . been developed over a period of the last 20 years . . ."[15]

The payment of higher prices to nearby producers in unregulated markets and as a part of cooperative association producer payment plans was at the time of passage

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[13] See 7 U.S.C. § 601, declaring ". . . that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce", and 7 U.S.C. § 602, setting forth the policy of Congress through the Secretary ". . . to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices. . . ."

[14] H.R. Rep. No. 1241, 74th Cong., 1st Sess. (1935), p. 9; S. Rep. No. 1011, 75th Cong., 1st Sess. (1935), p. 9.

[15] 79 Cong. Rec. 9602; June 18, 1935, Remarks of Rep. Plumley.

of the Act a phenomenon of which dairy economists, dairy industry personnel, and farmers were well aware.[16] Given the Congress' express intention that the practices and methods evolved prior to enactment of the statutory language here in question be employed where determined by the Secretary to be appropriate, it is far from surprising that the Secretary has for decades utilized nearby differentials in the Northeastern markets. To have done otherwise would have been to ignore the economics of the market-place and equity as among the farmers in the affected markets. His action hardly calls for judicial censure at this late date, after three decades of widespread use of such differentials in milk marketing orders.

Most certainly it is with many of the foregoing considerations relating to congressional intent in mind that this court in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, at 567 (1939), and the United States Court of Appeals for the First Circuit, in *Green Valley Creamery, Inc.* v. *United States*, 108 F2d 342, at 346

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[16] See, e.g., Cassels, *A Study of Fluid Milk Prices*, (Harvard Economic Studies, Vol. LIV; Harvard University Press; 1937), Figure 33, p. 161. The figure cited is a map showing milk price relationships existing in the Northeastern United States in 1929. The map reveals a significant price difference in favor of producers located in southern, as against those located in northern, New England. On the next page (p. 162) of his prize winning study, Cassels, then an Assistant Professor of Economics at Harvard, notes ". . . it should be observed that because they have evened out their production, and because of their strategic location from a marketing point of view, the nearby producers in the Boston Milkshed had obtained base ratings prior to 1929 which relieved them from bearing any share of the seasonal surplus created by the farmers to the north. Similar factors undoubtedly affect prices around other large metropolitan centers." The same map also appears in Black, *The Dairy Industry and the AAA* (1935), at p. 69. Professor Black's scholarly Brookings Institution study of the early history of the New Deal dairy programs includes a lengthy discussion (at pages 211-219) of the importance of making full allowance for nearby values in the distribution of milk proceeds among farmers in fluid milk markets.

(1st Cir., 1939), unambiguously approved the Secretary's use of nearby differentials in milk orders only a short time after enactment of the statutory language in issue in this case. The long acceptance of the Secretary's interpretation of the statute by the parties affected by his regulation of the New England markets further confirms the correctness of his understanding of the Congressional purposes.

2. *If the decision below is not reviewed by this court, the Secretary may be forced to abandon the Connecticut differential regardless of the outcome of Cranston* v. *Freeman.*

If the decision of the court below is permitted to stand without review by this court, even a holding by the United States Court of Appeals for the Second Circuit favorable to the Secretary in *Cranston* v. *Freeman* may not suffice to preserve the Connecticut differential. Indeed, the Secretary might in such circumstances terminate the Connecticut differential prior to final resolution of the *Cranston* case in the Second Circuit.

Herbert L. Forest, Director, Dairy Division, Consumer and Marketing Service, United States Department of Agriculture, in an affidavit filed at the commencement of the proceedings in this case, stated:

> "Should it eventually be determined that 'nearby' differentials should not be paid, then a completely new approach in an order to achieve orderly marketing in the area must be considered."[17]

Mr. Forest's concern for orderly market reflects the statutory command that the Secretary maintain orderly mar-

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[17] Affidavit of Herbert L. Forest, filed with the District Court on January 9, 1967, and transmitted to this Court as part of the original record.

keting in marketing areas regulated by him.[18] It is clear, therefore, that if *Zuber* is not reviewed by this court, the Secretary will be obliged to speedily determine, through hearings and other appropriate administrative procedures, how best to minimize whatever marketing disorders result from the decision of the Court of Appeals below. Such a review will inevitably entail a consideration of the economic interrelationships between the immediately affected Massachusetts-Rhode Island Order area, and the Connecticut marketing area adjoining it.[19] In the process of reviewing these interrelationships the Secretary will in all probability study the question of whether or not the Connecticut Order nearby differential should continue despite removal of a parallel provision from a contiguous market area order. Even assuming the continued economic viability of the differential when viewed from the standpoint of the Connecticut Order alone, his examination of the problem might lead him nonetheless to conclude that pricing inconsistencies between the two markets demanded elimination of the Connecticut Order differential. In fact, the Secretary would in all likelihood act quickly to end any such inconsistencies if they led to significant symptoms of disorderly or unstable marketing.

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[18] See 7 U.S.C. § 602, quoted *supra*, n. 13; cf. 7 U.S.C. § 608c (18), providing that the Secretary, where he finds such action to be "necessary on account of changed circumstances, . . . shall, after due notice and opportunity for hearing, make adjustments in (milk) . . . prices."

[19] The Massachusetts-Rhode Island Order fixes minimum prices for dairy farmers who deliver their milk to handlers selling milk in fluid form in the states of Massachusetts and Rhode Island. This includes dairy farmers whose farms are located in Massachusetts, Rhode Island, Connecticut, New York, Vermont, New Hampshire and Maine. The Connecticut Order fixes minimum prices for dairy farmers who deliver to handlers selling milk in fluid form in the state of Connecticut. This includes *other* dairy farmers whose farms are located in Connecticut, Massachusetts, New York and, at times, Vermont. In many instances farmers whose milk is priced under one order may in fact be neighbors of farmers whose milk is priced under the other.

In the event that the Secretary did, in the interests of orderly marketing, remove the Connecticut differential from the Connecticut Order in spite of decisions upholding the propriety of that differential by the United States District Court for the Northern District of New York, and possibly even by the United States Court of Appeals for the Second Circuit, the result would be most unfortunate and inequitable for the State's affected nearby producers.[20] The *Cranston* case would be rendered moot, and Connecticut producers, without the differential adjustment, would thereafter lose substantial amounts of money to their distant counterparts despite significant legal authority affirming their right to continue to receive those monies.

3. *The decision of the United States District Court for the Northern District of New York in Cranston* v. *Freeman demonstrates in detail the fundamentally erroneous nature of the construction of the statute reflected in the Zuber* v. *Allen opinion and thus the appropriateness of review by this court of the decision below.*

In numerous important respects, *Zuber* v. *Allen* and *Cranston* v. *Freeman* are directly at odds concerning the construction of the statutory language in issue in this case. In the name of an overly simplistic and historically unsubstantiated concept of price uniformity, the *Zuber* opinion sets forth a reading of the statute contrary of the understanding of a generation of students of the dairy industry. It reads a particularized and limited statutory provision

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[20] It is evident that a decision altogether adverse to the Secretary in *Cranston* would not present the legal and equitable issues raised here. At the same time, it is possible that an intermediate decision to some degree upholding the Secretary's authority, but remanding the case in part, would be rendered irrelevant, however appropriate and desirable such an outcome might be.

describing the mechanics of a market-wide pricing system as a sweeping prohibition of any consideration, by the Secretary in setting producer prices, of one of the basic elements necessarily involved in the economic operation of all milk markets. In the process, the *Zuber* court ignores the reasons of public policy which gave rise to the inclusion of the language in question in the statute and the views of the Department which participated in the original drafting of the statute and has since that time, for some thirty years, regulated milk markets throughout the Nation in accordance with its understanding of the meaning of the words of the statute. In contrast, the opinion of the court in *Cranston* v. *Freeman,* grounded in a full and detailed record, including extensive expert testimony and documentary evidence, persuasively demonstrates the error of each of the numerous and central misconceptions set forth in the *Zuber* opinion. Consequently, review of the decision below by this court and of the adequacy of the summary proceedings upon which it is based would seem most appropriate to *amicus curiae.*

The court below holds that the farm location differential in the Massachusetts-Rhode Island Order is improperly based on the Act's supposed prohibition of "consideration of the use to which the milk of a . . . class of producers is put, historically or potentially . . ."[21] Faced with an almost identical regulatory provision and a similar administrative rationale for it, the *Cranston* court looked to the specific language of the statute. It found that the farm location differential in the Connecticut order did not fall afoul of the statutory direction that producers receive uniform prices "irrespective of the uses made of such milk by the

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[21] *Zuber* v. *Allen,* App. 34a.

individual handler to whom it is delivered."[22] As the court noted, ". . . the differentials are paid on the basis of farm location. The use made of the milk by the handler is totally irrelevant."[23] Concluding that it involved no departure from the specific words of the statute, which nowhere contains reference to general patterns of historical or potential use of the milk of classes of producers, the *Cranston* court adopted the construction of the Act which the Secretary has followed for some three decades, stating:

> ". . . the Court . . . cannot concur in the Court of Appeals' conclusion that the (uniform price) requirement prohibits recognition of the historic fact that farmers located in particular areas near the market were accorded a greater share of that market."[24]

The *Cranston* opinion is not, however, grounded solely in the words of the statute. It looks as well to the purpose behind those words and in doing so relies upon both their historical origins and judicial precedent interpreting them. The court points out that the "irrespective of the uses" language was intended to avoid destructive competition among producers for the fluid milk market, citing this court's decision in the case of *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U. S. 76, at 79 (1962).[25] If producer prices were differentiated on the basis of milk use in each individual case, handlers could then utilize destructive competition to their benefit and the detriment of all producers, precisely as they did prior to the introduction of governmental regulation of the milk markets. Taking into account this historical background the *Cranston*

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[22] 7 U.S.C. § 608c(5)(B), App. 4a; *Cranston* v. *Freeman*, App. 87a-93a.

[23] *Cranston* v. *Freeman*, App. 92a; cf App. 88a.

[24] *Cranston* v. *Freeman*, App. 118a.

[25] *Cranston* v. *Freeman*, App. 88a.

court concludes that farm location differentials "do not in any manner stimulate" the competition which the statute attempts to prevent and thus are not outlawed by its terms.[26]

The opinion below suggests that price uniformity is the overriding purpose of the statute in issue. The *Cranston* court, again drawing on its thorough grounding in the relevant particulars of the historical background of Federal milk regulation, observes:

> "... as agreeable as the concept of price uniformity may be in the abstract, Congress quite obviously did not look upon price uniformity as an absolute rule or even as a goal in itself ..."[27]

Finally, the *Zuber* opinion rests on a reading of the statute which fails altogether to respect the expertise of the Secretary and the understanding of students and participants in the operation of the dairy industry as to the purposes of the legislation. The Court's approach, which appears to assume a willful disregard of the statute by the Secretary and by the vast majority of producers and their counsel over a period of some three decades, stands in stark contrast to the *Cranston* court's informed deference to the long administrative and public construction of the statute:

> "This fundamental continuity in the use of farm location differentials beginning in a period of attempted self-regulation and progressing through various stages of government regulation clearly suggests that Congress recognized the need for such differentials and intended to authorize them."

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[26] *Id.*

[27] *Cranston* v. *Freeman*, App. 87a.

"Certainly those people in the industry and government most intimately involved in drafting the regulatory language and in administering the resulting legislation believed that Congress intended to authorize farm location differentials and they continue to believe so. Their opinions cannot be ignored."[28]

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari of Frederick T. Zuber, et al. be granted.

Respectfully Submitted,

ROBERT K. KILLIAN
Attorney General of the State of Connecticut

MICHAEL J. SCANLON
Assistant Attorney General of the State of Connecticut

Amicus Curiae

January, 1968

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[28] *Cranston* v. *Freeman*, App. 103a-104a.

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FREDERICK T. ZUBER, ET AL., *Petitioners*,

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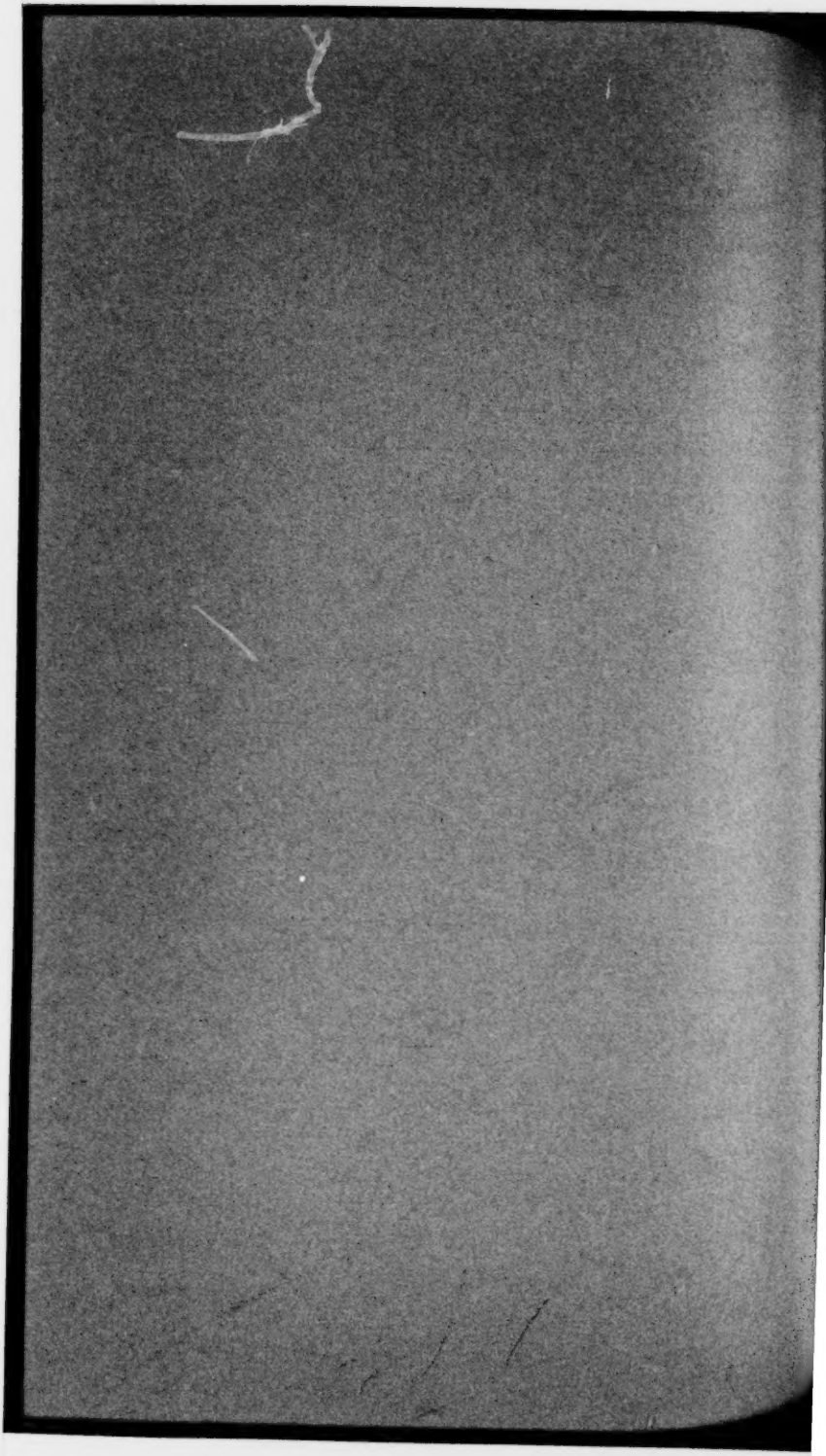
BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

HERBERT F. DESIMONE
Attorney General of the
State of Rhode Island
Amicus Curiae

Of Counsel:

CHARLES G. EDWARDS
Assistant Attorney General of the
State of Rhode Island

Byron S. Adams Printing, Inc., Washington, D. C.



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BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The State of Rhode Island and Providence Plantations, hereinafter referred to as Rhode Island, pursuant to Rule 42 of the Rules of this Court, urges that the petition of Frederick T. Zuber, et al., for a writ of certiorari be granted. The pertinent facts, the questions presented for review, and the jurisdictional requisites are set forth in the petition itself and are adopted herein. The opinions below and the relevant statutory and regulatory provisions are printed as an appendix to that petition.

INTEREST OF THE AMICUS CURIAE

Virtually all dairy farmers whose farms are located within the State of Rhode Island deliver their milk to handlers serving the Massachusetts-Rhode Island Milk Marketing Area, and are therefore eligible for the nearby price adjustment invalidated by the decision below.[1] These farmers, 178 in number, sold some $4,400,000 worth of milk during the year ending November, 1968.

Rhode Island producers have historically realized a price substantially higher in relation to more distant producers than can be accounted for by advantages resulting from the cost of transportation and handling. In his decision to institute regulation in the Southeastern New England markets in 1958,[2] the Secretary recognized the continued economic viability of this long standing price relationship and consequently included a farm location adjustment in his Southeastern New England milk order promulgated in that year. When the Southeastern order was subsequently merged in 1964 with several others into the Massachusetts-Rhode Island Milk Order, the Secretary again determined that inclusion of a nearby differential price adjustment would be appropriate in view of the "... customarily somewhat higher values, above those which normally reflected transportation costs, [which] attached to milk produced near the principal consumption centers as compared to the market value of milk

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[1] See 7 C.F.R. § 1001.72(a), directing payment of the $.46 per hundredweight nearby differential to "all producers located in the State of Rhode Island."

[2] See 23 Fed. Reg. 8225, 8236, October 24, 1958.

produced in the more distant areas of the milkshed."[3]

The continued economic existence of Rhode Island's many producers is directly threatened by the decision below. Ignoring customary pricing practices and equitable considerations, the decision takes vast amounts of money from farmers who have long depended on receipt of the differential and pays them, as a windfall, to producers who have never expected to receive them, and who have long supported orders including the differential. The decision altogether destroys a pricing relationship which has been an accepted fact of life for all sectors of the dairy industry for more than half a century. In the process, by suddenly and drastically reducing the income of Rhode Island's producers, especially at a time of serious inflationary trends in the national economy, the decision threatens to eliminate a substantial portion and seriously harm all of Rhode Island's dairy farming population. The interest of the State is consequently apparent.

REASONS FOR GRANTING THE WRIT

The State of Rhode Island concurs with the reasons stated in the petition itself, as well as those advanced in the amicus curiae briefs filed on behalf of the State of Connecticut and the Commonwealth of Massachusetts. It suggests in addition that the following considerations seem to lie at the heart of the controversy.

Contrary to the holding of the court below in *Blair* v. *Freeman*[4] and *Zuber* v. *Allen*,[5] Congress did not

[3] See App. 14a of Petition, 29 Fed. Reg. 11205, 11213, August 4, 1964.

[4] 370 F.2d 229, at 236-237 (D.C. Cir. 1966).

[5] 402 F.2d 660, at 663 (D.C. Cir. 1968), App. 34a-35a.

intend, in including the phrase "irrespective of the uses made of such milk by the individual handler to whom it is delivered" in § 608c(5)(B)(ii) of the Act,[6] to prohibit the Secretary's consideration of historic or potential fluid utilization patterns in determining adjustments to uniform prices payable to producers. Rather, it intended by this phrase to make clear the Secretary's authority to disregard individual handler utilization levels in determining uniform prices to be received by producers under marketwide pooling plans. Moreover, contrary to the narrow view taken by the court below, the complete history of the milk order portion of the Act demonstrates that the phrase "volume, market and production differentials customarily applied by the handlers subject to the order"[7] was designed to enable the Secretary, in adjusting uniform minimum prices, to employ, in regional milk orders promulgated by him, legitimate business practices existing at the commencement of regulation, and consequently empowers him to employ differentials of the kind at issue in the instant case.

1. The Words "Irrespective of the Uses Made of Such Milk by the Individual Handler to Whom It Is Delivered" Set Forth in the Agricultural Marketing Agreement Act Were Intended by Congress To Enable the Secretary Effectively To Regulate Individual Handlers Under Marketwide Pooling Plans.

The Court of Appeals for the District of Columbia, in the cases of *Blair* v. *Freeman* and *Zuber* v. *Allen*, has held that the clause "irrespective of the uses made of such milk by the individual handler to whom it is

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[6] 7 U.S.C. § 608c(5)(B)(ii), App. 4a.

[7] 7 U.S.C. § 608c(5)(B)(i) and (ii)(a), App. 3a-4a.

delivered" contained in § 608c(5)(B)(ii) of the Act,[8] rigorously "forbids" the Secretary from in any way considering, in promulgating adjustments to uniform prices payable to producers, ". . . the use to which the milk of a particular producer or class of producers is put, historically or potentially. . . ."[9] In fact, however, this clause is designed to enable the Secretary, in determining prices payable to producers under a marketwide pooling plan, to disregard individual handlers' fluid utilization levels. The clause consequently performs a far different task from that assigned it by the court below.

Section 608c(5)(A)[10] of the Act authorizes the Secretary to establish what is called a "classified" pricing plan, under which all milk sold by the handlers serving a given milk marketing area is first classified according to the use in which it is marketed (e.g., fluid (bottled), cream or butter) by them. Each handler is then charged varying class prices, depending on the respective uses in which such handler has sold his milk.

Section 608c(5)(B)[11] deals, on the other hand, with the distribution to producers of the proceeds resulting from the handlers' payments of class prices. Under that Section the Secretary "pools" all monies payable to a group or groups of producers for their milk, arriving at uniform minimum prices payable to all producers in the designated group or groups by a "blend-

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[8] 7 U.S.C. § 608c(5)(B)(ii), App. 4a.

[9] *Blair* v. *Freeman*, 370 F.2d 229, at 237; *Zuber* v. *Allen*, 402 F.2d 660, at 663.

[10] 7 U.S.C. § 608c(5)(A), App. 3a.

[11] 7 U.S.C. § 608c(5)(B), App. 3a-5a.

ing" or averaging of the various use class prices paid. These prices are then subject to a number of specified adjustments based on economic and equitable considerations.

Two kinds of "pooling" are authorized by the Act. In an individual handler pool, each group of producers serving an individual handler in the market receives uniform prices reflecting the average or "blend" of the various use prices charged to that individual handler for milk sold by him in the various uses. In contrast, under a marketwide pooling plan, all handlers are in effect treated as one and all producers serving handlers who are in the regulated market receive uniform prices reflecting the average or "blend" of the various use prices charged to all the handlers covered by the regulation. Thus, as this Court stated in *Lehigh Valley Coop.* v. *United States*, § 608c(5)(B) authorizes:

> ". . . the establishment of either marketwide pools or individual handler pools. . . . [T]he latter require only that each handler pay uniform prices to all the producers from which he buys, but does not impose a uniformity requirement among the various handlers [such as is imposed by the former] . . . ." [12]

The term "irrespective of the uses made of such milk by the individual handler to whom it is delivered" in subsection 608c(5)(B)(ii) serves to emphasize the contrast between the individual handler pooling authority granted under subsection 608c(5)(B)(i) and the marketwide pooling authority granted under subsec-

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[12] *Lehigh Valley Coop.* v. *United States*, 370 U.S. 76 (1962), at 82 (Footnote 8).

tion 608c(5)(B)(ii). This descriptive role becomes apparent when we consider that while, on the one hand, individual handler pooling operates to provide each group of producers supplying each individual handler with uniform minimum prices different from other groups of producers supplying other handlers because of the differing shares of the fluid use market obtained by the various handlers in the market, marketwide pooling, on the other hand, operates to provide uniform minimum prices to all producers "irrespective" of the use classes in which the individual handlers' milk is sold. It further explains why the phrase appears in the subsection authorizing marketwide pooling and does not appear in the subsection authorizing individual handler pooling.

Moreover, and more importantly, in addition to clarifying the difference between individual handler and marketwide pooling, the phrase in issue explicitly lodges positive authority in the Secretary, in instituting marketwide pooling in regulated markets, to ignore those individual handler fluid utilization levels which in regulated individual handler pools and as well generally in unregulated markets are largely determinative of prices paid producers. When considered in the light of the concepts of the limits of governmental regulatory power of the day, it can be seen that the positive authority so granted was of an extremely controversial nature. It empowered the Secretary to provide, in marketwide pooling plans promulgated by him, for the transfer of the proceeds obtained in the marketplace from one handler's sale of milk to the benefit of producers who had never supplied that handler, whose milk may have been sold at an entirely different place and to different customers and who had supplied

another handler. In doing so, it enabled the Secretary to deprive high fluid use handlers[13] of a significant competitive advantage they possessed over their lower fluid use competitors in obtaining milk supplies.

This power was termed "equalization" by the affected handlers and attacked by them as violative of constiutional guarantees in the leading cases of *United States* v. *Rock Royal Co-op., Inc.*[14] and *H. P. Hood &*

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[13] At the time of the enactment of the legislation there were, and still are, different types of handlers. One example is the small proprietary handler whose business consists principally, if not entirely, of a local milk route in a given community. Almost 100% of the sales by this kind of handler are fluid use sales. Another type is the large handler serving fluid route sales in a number of communities, both wholesale and retail, and engaged in the manufacture of ice cream, butter and other dairy products throughout the entire area. These large handlers traditionally have had a substantial amount of fluid use sales, but also use a substantial portion of surplus milk for non-fluid sales. A third type is the handler whose business consists principally of the manufacture and sale of milk products, such as cheese, butter, ice cream and the like. This third type of handler at the time of the Act had, and even today has, almost no fluid milk sales. Since the institution of milk orders most, if not all, manufactured milk handlers in the Northeast have made a minimum amount of fluid sales for a minimum portion of the year sufficient only to qualify themselves for regulation under federal orders so that their producers will be entitled to share in blend prices. A much larger proportion of the milk produced in distant areas under the Massachusetts-Rhode Island Order goes to this latter type of handler than is the case with milk produced in nearby areas. (It should be noted, parenthetically, that, since characteristics such as evenness of production, accessibility and reliability are only important to the handler primarily selling milk in fluid use, distant producers selling to these manufactured milk handlers are not required through the year to provide as important value contributions as their nearby counterparts, who primarily serve fluid milk handlers.)

[14] 307 U.S. 533 (1939).

Sons, Inc. v. *United States*[15]. In both of those cases, this Court recognized the Congressional purpose in including the "irrespective of the uses . . ." phrase in the statute to be a central aspect of the primary legislative intent to authorize *regulation of handlers through marketwide pooling.* The Court found that the provision did not contravene the Constitution, and, in *Rock Royal,* held also that it did not preclude the Secretary's employment of differential provisions of the sort challenged in the present case, further suggesting in its discussion of the constitutionality of the equalization pool that it was precisely the fact that the Secretary was permitted to make adjustments to the uniform price reflecting "usual market variations" which disproved the handlers' claim that the marketwide pooling process violated due process.[16]

It is most anomalous that, at this late date in history, a provision intended to authorize the Secretary to limit the potentially disruptive effects of varying handler utilization levels in milk markets should be read now to have precluded a differential adjustment which is not now and never was disruptive in its effects, which does not depend on the individual handler's use of the milk delivered to him, which is economically legitimate and equitable as among producers serving the market, and which preserves one of those market variations whose preservation the *Rock Royal* Court felt was central to the constitutionality of the Act. Review by this Court of the decision below would therefore seem particularly appropriate to *amicus curiae.*

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[15] 307 U.S. 588 (1939).

[16] See 307 U.S. 533, at 567, 571-573. See discussion in *Cranston* v. *Freeman,* 290 F. Supp. 785, 805-06, App. 111a-114a.

2. The Price Adjustment in Issue Is a Market Differential Customarily Applied.

While the price adjustment at issue here is not proscribed by the phrase "irrespective of the uses made of such milk by the individual handler to whom it is delivered," the adjustment is as well within the Secretary's authority to promulgate "market . . . differentials customarily applied by the handlers subject to such order . . . ." [17] The considerations dictating such a conclusion are set forth in detail in the opinion of the United States District Court for the Northern District of New York in the case of *Cranston* v. *Freeman*,[18] and provide a significant contrast to the exclusive reliance of the court below on language contained in a single paragraph of the relevant Committee Reports.[19]

While it is true that pricing patterns favoring nearby producers were commonly in effect in milk markets at the time of enactment of the statutory language and that Congress in numerous ways gave indication of its intent that pricing arrangements evolved by cooperative associations and utilized in the Secretary's licensing programs in the period 1933-35 be continued under the 1935 amendments,[20] the colloquy cited by the *Cranston* court between Senators Murphy and Copeland[21] would seem perhaps most persuasive of Congress' intent to permit the Secretary to utilize

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[17] 7 U.S.C. § 608c(5)(B)(ii)(a), App. 4a.

[18] 290 F. Supp. 785 (N.D.N.Y. 1968), App. 73a.

[19] See *Zuber* v. *Allen*, 402 F.2d 660, 673, App. 54a-55a.

[20] See *Cranston* v. *Freeman*, 290 F. Supp. 785, 796-803, App. 94a-108a.

[21] *Cranston* v. *Freeman*, 290 F. Supp. 785, 799, App. 98a-100a. The colloquy appears at 79 Cong. Rec. 11139-11140, August 15, 1935.

nearby differential adjustments to the uniform price to producers.

As is clear from a reading of the discussion on the Senate floor, Senator Copeland was attempting to receive assurances from the bill's floor manager, Senator Murphy, that producers nearby a regulated market could receive a higher price, beyond transportation costs, despite marketwide pooling. Senator Murphy answered him affirmatively by pointing out the language of the bill permitting differentials customarily paid and stating that the language adopted "the present practice of business."[22] A fair reading of Senator Murphy's remarks would be that, if a nearby adjustment accurately reflected a normal practice of business in existence at the time of institution of regulation, the Secretary could employ it under the ". . . differential . . . customarily applied . . ." language of the statute. Since the nearby differential at issue here accurately reflects a normal practice of business prevalent in the New England markets over at least the past five decades, it would appear to fall comfortably within the Secretary's statutory authority as described by Senator Murphy.

On the House floor, a Vermont Representative presented the 1935 milk regulation amendments to the AAA to his fellow members. He stressed that the "plans" permitted by the legislation were the same devices which had been used by cooperative associations over many years prior to 1935.[23] Moreover, he con-

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[22] 79 Cong. Rec. 11140.

[23] See 79 Cong. Rec. 9602; June 18, 1935, remarks of Rep. Plumley.

cluded his remarks with an extensive discussion of the chaos then prevailing in the Boston milk market, as a result of a court decision holding the Boston milk license invalid. His statements include no suggestion that the nearby differential arrangements under the license were illegal, or otherwise undesirable, nor was there any indication given by him that the 1933 and 1934 licenses' provisions for higher prices to nearby farmers could not be retained under the new regulatory terminology. On the contrary, Representative Plumley's comments indicate quite simply that the new amendments were intended to permit restoration of the licensing arrangements, albeit under the new "order" terminology.[24]

That the differential challenged here has been customarily applied in the New England markets is incontrovertibly a matter of record. That it falls within the provision for "volume, market and production differentials customarily applied by the handlers subject to the order," intended by Congress to encompass "the present practice of business", is equally clear when the full history of the statute and the conditions surrounding its enactment are taken into account. Therefore, this Court should grant the petition of the affected nearby farmers and reverse the decision below.

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[24] See 79 Cong. Rec. 9603-9604.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari of Frederick T. Zuber, et al., be granted.

Respectfully submitted,

HERBERT F. DESIMONE
Attorney General of the
State of Rhode Island
Amicus Curiae

Of Counsel:

CHARLES G. EDWARDS
Assistant Attorney General of the
State of Rhode Island

February 1969

COPY

No. 25

IN THE

Supreme Court of the United States

October Term, 1968

Office-Supreme Court, U.S.
FILED
MAR 26 1969
JOHN F. DAVIS, CLERK

FREDERICK T. ZUBER, ET AL.,
Petitioners,

v.

RUSSELL ALLEN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF VERMONT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES M. JEFFORDS
State Supreme Court Building
Montpelier, Vermont

Attorney General of the State of Vermont
Amicus Curiae.

IN THE

Supreme Court of the United States

October Term, 1968

No. 861

FREDERICK T. ZUBER, ET AL.,

Petitioners,

v.

RUSSELL ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF VERMONT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The State of Vermont, pursuant to Rule 42 of the Rules of this Court, respectfully submits that the petition of Frederick T. Zuber, *et al.*, for a writ of certiorari, and that of the Secretary of Agriculture in No. 1076, should be denied. The *amicus curiae* is of the respectful opinion that the petition of Russell Allen, *et. al.*,

for a petition for a writ of certiorari in No. 874 should be granted, and the *amicus curiae* hereby adopts the questions presented for review as set forth in the latter petition and in the briefs in opposition to the petitions in Nos. 861 and 1076, respectively. The jursidictional prerequisites and relevant facts are set forth in the aforesaid petition in No. 874 and in the opposing briefs in Nos. 861 and 1076.

INTEREST OF THE AMICUS CURIAE

The importance of the dairy industry to the people of the State of Vermont cannot be exaggerated. Approximately 60 percent of the people of this State live in rural areas. *34th Biennial Report of the Commissioner Of Agriculture of the State of Vermont,* 1967-68, p.9. As noted in said Report, "The economic climate for our agricultural community should be of concern to all Vermonters and also non-Vermonters." *Ibid.* The sale of all agricultural commodities by Vermont farmers amounted to approximately $131,527,000 in 1967, and of this total, income from the sale of fluid milk and surplus dairy livestock was reported to be $109,664,000.[1] It is readily apparent that the facts warrant the statement in the Commissioner's Report that, "The dairy industry still dominates our agricultural scene, producing approximately 83.6 percent of the receipts." As noted by the Commissioner of Agriculture; "No other state is specialized to this degree in one type of agriculture." (*Statement of Robert Brannon,* Milk Hearings, Washington, D.C., Nov. 1966).

Not only is the Vermont agricultural economy specialized; the dairy industry itself is highly dependent upon non-nearby milk, eighty percent of Vermont's dairy production going to the Massachusetts-Rhode Island market.

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[1] *Massachusetts-Rhode Island Monthly Milk Market Statistics,* Jan.-Dec., 1968, prepared by Market Administrator, Order No. 1.

In 1968, on a twelve-month average, there were 4,136 Vermont producers supplying that market. This compares to only 1,603 in Massachusetts, a much larger State.[2] In 1968, Vermont producers supplied 1,649,300,000 pounds of milk to this market as compared to 496,692,000 pounds supplied by Massachusetts, the third largest producer.[3] Vermont therefore supplied 47.9 percent of the total milk supplied in the Massachusetts-Rhode Island market in 1968. Of the number of producers in this market, 47.8 percent were Vermonters.[4]

Serious difficulties beset the modern Vermont dairy industry. A recent research report lists among its significant findings the fact that dairy herds in Vermont have dropped greatly and that cow numbers have also dropped in the thirteen years covered by this report.[5] That report contains an alarming introduction:

> "Until recent years the annual change in total number of cows on farms in Vermont was slight. In 1900 there were approximately 270,000 cows on farms. At the end of World War II there were approximately 273,000 cows.
>
> In the ten year period between 1953 and 1963 cow numbers dropped to a new low of 247,000. Since 1963 cow numbers have steadily declined. From 1963 to 1964 the decrease was 9,000 cows; from 1964 to 1965 another 8,000 cows. But the greatest drop—24,000 cows—occurred between 1965 and 1966. With just under 206,000 cows on Vermont farms April 1, 1966, the lowest point in cow numbers for any period in the Twentieth Century was reached.

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[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

[5] *Research Report of the Vermont Agric. Exper. Stat.*, Univ. of Vt., (July, 1967); and see Report dated August, 1968.

> * * * In the decade between 1953 and 1963, three thousand six hundred farms ceased to house dairy herds. Between 1963 and 1964 approximately five hundred farms went out of the dairy business; and between 1964 and 1965 another five hundred. The rate of loss increased substantially between 1965 and 1966 when the number of dairy farms discontinued in the one year rose to approximately eight hundred."

Such a situation in a state where dairy farming has the importance that it has in Vermont is indeed alarming. A comparison of ring test activity between 1965 and 1966 confirms the severity of the decline in dairy herds. In March of 1965, there were 6,030 herds on the ring test; on June 1, 1966, there were 5,059, approximately a sixteen per cent decline. In June, 1967, there were 4,681 herds, and the number had decreased to 4,666 herds in July, 1968. As of January, 1969, the figure had been lowered to 4,484 herds. Furthermore, this decline was not limited to the small so-called inefficient operator. During this period many medium and large size dairies discontinued operation. *Biennial Report of the Commissioner of Agriculture of the State of Vermont* (1965-68).

This critical decline in the number of herds and the total number of cows has begun to affect production. *The Biennial Report of the Vermont Commissioner of Agriculture* recognizes "one of the most significant trends in the dairy industry", during the period 1965 to 1966, to be "the reduction in production which began in the early fall of 1965. The decline in the number of dairy farms which in general reflects the economic forces at work in our economy–namely, the technological revolution and price-cost squeeze, finally resulted in a sufficient number of farmers discontinuing dairying to result in a decline of total output. Up to this point, although we have had a continuing decline in the number of dairy

farms, production had continued to increase". (*33rd Biennial Report of the Commissioner of Agriculture of the State of Vermont* (1965-1966) page 5.). In view of the importance of Vermont producers to the Massachusetts-Rhode Island milk market, this decline in production cannot help but alarm consumers in the entire milkshed. Statistics reveal a declining number of Vermont producers supplying that milk market. In January, 1965, there were 5,437 such Vermont producers. In December, 1965, this number had decreased to 4,677, representing a decrease of 760 Vermont producers. *Massachusetts-Rhode Island Milk Market Statistics* (August 1966). The decline continued in 1966. In January of 1966, there were 4,588 Vermont producers in that milkshed. In December of 1966, this number had declined to 4,255 representing a total decline in the year 1966 of 333 Vermont producers. In December, 1967, the number of Vermont producers declined to 4,183, and this number was lowered to 4,021 as of December, 1968. *Massachusetts-Rhode Island Milk Market Statistics.*

The present Commissioner of Agriculture has noted that "The Vermont dairy industry in in serious difficulty at the present time". (*Statement of Robert J. Branon, Milk Hearings,* Washington, D.C., Nov., 1966). These difficulties are of great concern to the people of the State of Vermont. In view of the importance of the Vermont dairy industry to all of New England, they are also matters of great concern to the entire New England area.

All but 57 Vermont dairymen who serve the Federal order are required by the operations and provisions of the milk order nearby differential section, 7 C.F.R. 1001.72, to sustain a reduction in the uniform blended price which they would otherwise receive in the absence of the provision. *Blair v. Freeman,* 370 F.2d 299 (D.C. Cir. 1966). In 1966, there were 1,594,780,000 pounds

of Vermont milk in the Massachusetts-Rhode Island milk market produced by approximately 4,400 Vermont farmers. The cost of the farm location differential to so-called distant producers is at least twelve cents per hundredweight. (See the *Market Administrator's Review, Volume 19, No. 1,* page 1 (Jan. 1967). Therefore, the total cost of the differential to the Vermont dairy industry in 1966 was $1,913,736.00. The average cost to each Vermont farm in the Massachusetts-Rhode Island market was $435.00. In 1967, the total cost to Vermont producers was $1,809,017.00 or approximately $416 per producer. A similar amount was paid under the differential in 1968, amounting to at least $427 per Vermont producer.

This discrimination is unwarranted, both in fact and by law. If the farm location differential had any validity when instituted many years ago, the reason has long since disappeared with the advent of the bulk tank, uniform dairy standards and modern transportation.

ARGUMENT

THERE IS NO CONFLICT IN CIRCUITS OR IMPORTANT UNSETTLED FEDERAL QUESTION.

The core of the congressional program contained in the Agricultural Marketing Agreement Act was a uniform minimum price for producers that did not turn on or vary with the nature of use for which the producer was able to dispose of his milk. 7 U.S.C.A. 608c (a)(B)(i). As the Court below has recognized, the rationale of the Secretary of Agriculture for the farm location differential is the use for which the nearby producer was historically able to dispose of his milk. This approach is not only without authorization in the statute, but "on the contrary was exactly the approach that Congress had intended to prohibit". *Blair v. Freeman,* 370 F.2d 299, 338 (D.C. Cir. 1966).

A close reading of the language in the opinion handed down in *Green Valley Creamery, Inc. v. United States,* 108 F.2d 342 (1st Cir. 1939), reveals that the alleged approval of farm location differentials was at best nothing more than dictum. Furthermore, the Court in *Green Valley* "presumed" that nearby producers would deliver to handlers near the market; that presumption was dubious in 1939[6] and is completely unwarranted today because of the bulk tank and greatly improved transportation.

This Court's decision in *United States v. Rock Royal,* 307 U.S. 533 (1939), is not in conflict with the decision below, and the lower court was obviously correct in stating that only *handlers* and a different section of the Act was involved in the *Rock Royal* case. The nearby differential mentioned in *Rock Royal* was also based on *delivery* to a *plant* in the marketing area of the old New York milk order, and the Secretary has provided for such a differential in the zone differential of the Mass.-Rhode Island milk order. The court below was clearly correct in holding that the differential could not be based on the location of the farm, and such a criterion would bar other producers from ever acquiring a differential of that nature. This Court also noted in *Rock Royal* that any difference in price based upon use of milk would be in direct violation of the Act, and the *amicus curiae* respectfully submits that the holding of the court below is in agreement with the decision of this Court.

The *Cranston* case cited by the petioners is a district court decision which will be reversed on appeal, and the operation of that order's nearby differential clearly shows the discriminatory operation of such a provision. It causes severe economic injury to non-nearby producers without any countervailing benefit in returns under the differential to Connecticut producers. The *Cranston*

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[6] See Joint Appendix, p. 75, filed herein, containing testimony from Dec. 10-12, 1935 Hearing for 1936 Greater Boston milk order.

decision appears to be in conflict with its own Circuit on principle, and the decision there rests on an interpretative approach that is clearly unnecessary and unsound.

The Secretary failed to petition this Court for certiorari in the *Blair* case, and he admitted in that case that the nearby differential was identical to the nearby differential involved in this case and based on very similar findings. Dairy farmers have relied on that refusal to seek review in this Court, and it is respectfully suggested that the forced relitigation of this issue is against the public interest under such circumstances.

The farm location differentials are discriminatory on their face. They are not authorized by the Agricultural Marketing Agreement Act and, in fact, tend to frustrate the principal purpose of that act: the assurance of a uniform minimum price for milk without regard to the use to which the milk sold is ultimately put. They are detrimental to the dairy industry, to the economy of the State of Vermont and to the milk consumers of the New England States:

> "Dairy farms are being liquidated at a rate which threatens the future of our dairy industry. Vermont is a principal dairy area of New England, supplying a major portion of the high quality, fresh fluid milk in the Massachusetts-Rhode Island area for the past thirty years. Continuation of the current situation is a serious threat to the people living in metropolitan areas which we supply."[7]

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[7] Statement of Robert J. Branon, Commissioner of the Vermont State Department of Agriculture, Milk Hearings, Washington, D.C., April 14, 1967.

CONCLUSION

The petitions in Nos. 861 and 1076 for a writ of certiorari should be denied. The petition of Russell Allen, *et al.*, in No. 874 for a writ of certiorari should be granted.

Respectfully submitted,

JAMES M. JEFFORDS
Attorney General of the
State of Vermont
Amicus Curiae.

March, 1969

No. 842

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

SUPREME COURT, U.S.
FILED
MAR 26 1969
JOHN F. DAVIS, CLERK

FREDERICK T. ZUBER, ET AL.,

Petitioners,

v.

RUSSELL ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
for the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS RUSSELL ALLEN, ET AL., IN OPPOSITION TO PETITION OF FREDERICK T. ZUBER, ET AL., FOR A WRIT OF CERTIORARI

CHARLES P. RYAN
EDWARD J. RYAN
JOHN J. SIMARD

Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 861

FREDERICK T. ZUBER, ET AL.,

Petitioners,

v.

RUSSELL ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS RUSSELL ALLEN, ET AL., IN OPPOSITION TO PETITION OF FREDERICK T. ZUBER, ET AL., FOR A WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the Court of Appeals is reported at 402 F.2d 660 and is also set forth in the petition filed in No. 874, together with the opinion of the lower court in the related case of *Blair v. Freeman,* 370 F.2d 229 (1966).

JURISDICTION

The jurisdictional prerequisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether, under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), the Secretary of Agriculture was authorized to include in the Massachusetts-Rhode Island milk order of October 1, 1964, a nearby farm location differential provision 7 C.F.R. 1001.72, under which producers whose farms are located in either of two designated "nearby" areas are entitled to receive a differential payment which varies the uniform price required under Sec. 8c(5)(B)(ii) in recognition of (1) the use made of nearby producers' milk or (2) the allegedly higher prices received by nearby producers prior to Federal regulation, the aforesaid section providing that all producers are to receive a uniform price for all of their milk irrespective of the use thereof.

2. Whether the nearby differential provision promulgated on October 1, 1964, is an authorized adjustment to the uniform price, either under Sec. 8c(5)(B)(ii)(c) concerning "the locations at which delivery of such milk is made", or under (a) relating to "market * * * differentials customarily applied by the *handlers*", when such payments are made by "non-nearby" dairy farmers regularly supplying the fluid milk market to other producers whose farms are located in certain designated "nearby" areas, and when the "nearby" producers are already compensated for any location value of their milk under the zone differential of the milk order, 7 C.F.R. 1001.62, which includes an additional payment over the uniform price and includes (1) the authorized market differential for direct delivery of milk to a city plant or market; (2) the transportation differential paid for milk delivered progressively closer to the primary market; and (3) the higher transportation rates paid within the "nearby" zone as contrasted with the rates for each 10-mile zone in the balance of the milkshed.

3. Whether the Secretary's findings were deficient, inconsistent and unsupported by valid and substantial evidence, and his conclusions and decisions irrational, inconsistent and arbitrary.

4. Whether the operation of the nearby differential is illegally discriminatory and violative of constitutional rights to due process and equal protection of law.

STATEMENT

The respondents' statement is set forth in their brief in opposition to the petition of the Secretary in No. 1076 in respect to the facts relating to the issues in the case, and their petition and reply brief in No. 874 sets forth the proceedings in the courts below. The respondents have prosecuted this action as a class action for all dairy farmers similarly situated in Vermont, Maine and New Hampshire, an Order to such effect having been entered by the district court after a full hearing on such question. The respondents there offered to increase the number of individual plaintiffs to 500 or 1,000 if the district court so desired, and additional names recently filed in the district court would bring to over 500 the number of individual plaintiffs herein.

The respondents do not propose to burden this Court with briefs *amicus curiae* by other interested organizations, although offers have been made to support respondents' position in this Court, and they note that the Secretary received more written exceptions from interested persons, organizations, government officials, etc., when he proposed the continuation of the nearby differential than on any other proposal in recent years. A number of such exceptions were filed below, including the following from the National Grange:

> "The National Grange has received communications from Granges affected by the proposed Massachusetts–Rhode Island milk marketing orders as stated

in Vol. 32 – Number 129 of the Federal Register, dated July 6, 1967. They have particularly objected to the decision to maintain farm location differentials in the Mass.–Rhode Island market, an objection in which we would join. The recent court decisions indicate that this can be thrown out in the courts, that it is unfair in the present situation, and that, in our judgment, this section should be deleted from the proposed order." (Letter of 8/25/67 from Harry L. Graham, Legislative Representative, National Grange, Washington, D.C., to Hearing Clerk, USDA).

SUMMARY OF ARGUMENT

The petition herein and in No. 1076 is a belated application for review of the unanimous decision of the court below in *Blair v. Freeman*, 370 F.2d 229 (1966), wherein the identical question was posed to that court: "1. Whether, under the agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 et seq.), the Secretary of Agriculture is authorized to provide in milk marketing orders for the payment of a differential to nearby producers." No petition for a writ of certiorari was filed in that case, and the Secretary terminated the nearby differential of the New York–New Jersey milk order because said provision did not effectuate the purpose of the Act. Producers in that large market and throughout the country have relied on said decision as an accepted fact that the nearby differential was illegal, particularly when such a differential exists only in the Connecticut order out of about 75 federal milk orders. Additionally, the Secretary admitted in *Blair* that the Boston differential involved herein was "identical in purpose and effect" and issued on "very similar findings". He further acknowledged that the Congressional definition of the "market differential" authorized by the Act was correct,

and that he had always promulgated the nearby differentials as a "location differential" under Section 8c(5)(b)(ii)(c) of the Act, a fact that acknowledges the error of the dictum in *Green Valley Creamery v. United States,* 108 F.2d 332, and the district court decision in *Cranston v. Freeman,* 290 F. Supp. 785. The repeated relitigation of the same issue and belated application for certiorari should not be approved by this Court when thousands of dairy farmers have relied on the *Blair* decision and the failure to seek certiorari in that case.

The petitioners' contentions that certain "nearby" producers may be paid a non-uniform price on the basis of the past use of their milk conflicts with the decisions of this Court and lower courts, and such interpretation of the plain language of the statute would render it a nullity. The legal validation of such a discriminatory preference would open the floodgates for the issuance of similar devices based on political and group pressures for such favored treatment. It would complicate mounting problems of rural and urban areas by forcing more small farms to abandon production with resultant loss of income to the dairy farmer, small businesses and the community, for the non-nearby farmer is unable to sell his land for housing developments or commercial development like the nearby producer.

The termination of the differential would not injure nearby producers, in that the Act and milk order provide only for *minimum* prices, and he may receive any premium over and above the minimum price from handlers if the nearby milk actually does have any extra value whatsoever. The fact that the Connecticut differential returns but 2-cents per cwt. to nearby producers at a cost of 44-cents per cwt. to "non-nearby" producers is indicative of the fact that nearby milk has no additional value, for nearby producers would be able to obtain the 2-cents differential if such milk did have any extra value.

The petitioners have failed to indicate any value of nearby milk that is not already compensated for under the zone differential of the order for transportation charges and direct-delivery, and the factor of seasonality or evenness of production is compensated for under the seasonal incentive plan of the order. Moreover, the Secretary has specifically found that the other items mentioned by petitioners are not grounds for the issuance of the nearby differential, and no proper purpose could be served by remand to the agency. The nearby differential is in conflict with the principles enunciated by this Court, and the district court decision in *Cranston* is in conflict with its own circuit and patently erroneous.

ARGUMENT

I. THERE IS NO IMPORTANT UNSETTLED QUESTION

This matter has been treated to some degree in the respondents' brief in opposition to the petition of the Secretary in No. 1076, and the respondents emphasize the following in this brief:

1. The Secretary admitted in his brief in *Blair v. Freeman,* 370 F.2d 229 (1966), that he had always promulgated the nearby differential as a location differential under Section 8c (5)(B)(ii)(c) of the Act in the few orders that contained such a provision. He quoted approvingly from the Congressional definition of the market differential set forth in the reports of the House and Senate to evidence that the nearby differential could not be promulgated under subsection (a) of the Act as a market differential. The Secretary thus admitted that there was no ambiguity as far as he was concerned, and he stated in his *Blair* brief, filed as an exhibit below, that the Greater Boston nearby farm location differential of 1937 was "identical in purpose and effect" to the

New York–New Jersey nearby differential considered and invalidated in *Blair*, further stating that they were issued on "very similar findings".

The Secretary refused to seek certiorari in respect to the unanimous *Blair* decision, and he thereafter terminated the differential provision for failure to effectuate the purpose of the Act. Although the Secretary and *amicus curiae* in *Blair* argued that the nearby differential had been in existence since 1938 under the predecessor New York order, they made no claim in law or equity to the escrowed monies of the non-nearby producers in that case. If the Secretary acknowledged in *Blair* that he had always promulgated the nearby differential as a location differential under subsection (c) and that no ambiguity existed in respect to his purported source of authority, it is respectfully submitted that the questions set forth by both petitioners have already been answered in the negative by both the Secretary and the court of appeals in *Blair*. Petitioners may not seek a belated review of that case more than two years later and when there admittedly is nothing for the Court to review because of said admissions. The fact that there is a large escrow fund of the respondents' monies involved in this case does not justify a disavowal of past admissions in order to seek the respondents' monies through remand to the Secretary when such course was not pursued in the *Blair* case.

2. The facts in this case serve only to emphasize that the writ should not be granted, for it was only through political pressures that the Secretary sought a stay of judgment in the district court and subsequently prosecuted an appeal from the judgment.[1] After denial of said stay the Secretary indicated that he probably would

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[1]The following acknowledgment in the Connecticut Milk Producers' Association Bulletin of Nov., 1967, also admits that the CMPA is maintaining *this* case in the name of the 7 petitioners;

not appeal the case, and various news media advised to such effect and that the nearby differential was a dead issue. Indeed, the 7 petitioners were only allowed to intervene after judgment in order to afford them the protection of appellate review, since it did not appear that the Secretary was going to appeal. Although such an appeal was taken by the Secretary, it is the opinion of respondents that this was done in order to give some substance of governmental approval to petitioners' appeal. After the unanimous decision below, the Secretary requested the full 90 days to determine whether to petition for certiorari. Thereafter, the Secretary petitioned this Court for an extension of time of sixty days in order to study the question as to whether a petition should even be filed herein. After all the foregoing indecision and obvious lack of confidence in petitioners' position, the Secretary's petition and other briefs filed herein reflect only the same unsubstantial arguments, a number of which are clearly inaccurate and at variance with his own prior findings. Indeed, he now joins with the 7 "nearby" petitioners to suggest as a basis for

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"CREDIT–WHERE CREDIT IS DUE. In all of our discussion of the nearby differential litigation *we* would be very remiss not to acknowledge publicly our appreciation for the support of our Congressional delegation, particularly Senator * * * and Congressman * * *. At one point the Attorney General appeared to be vacillating on his support of *our* "motion for a stay in *Allen v. Freeman.* This was a very critical issue, for failure to seek a stay of the District Court's order terminating the nearby differential would have undercut the Government's arguments on the merits, since failure to seek a stay would have implied a lack of confidence that its arguments would prevail. Furthermore, without a stay the escrowed funds would have been paid out and it would have been impossible to recover those payments, when (not if) *we* win. So the intervention of Senator * * * on *our* behalf was invaluable."

attempted remand a number of proposals that has heretofore denied because disorderly marketing would result therefrom and which admittedly could only injure producers and consumers alike or be without his statutory power. In view of these circumstances and the failure to ever cite a valid reason for the nearby differential after years and years of exhaustive consideration of such issue in numerous administrative hearings, the respondents are reluctantly forced to conclude that the same political pressures that gave rise to the differential in 1937 are again insistent that a final attempt be made to disburse respondents' monies to preferred nearby associations and attorneys, such procedure being also calculated to discourage any future challenges to the administrative authority by grass-roots dairy farmers. Significantly, attempts to accomplish this very objective on a number of occasions in the last Congress met with failure, the attempt being made to require such remand to the agency under the guise that respondents were being accorded an "administrative remedy". It is obvious that individual farmers could not afford the legal and expert assistance necessary over a period of years in administrative proceedings, and that the real intent was to deprive farmers of the right to challenge unauthorized regulations in a court of law. No proper basis for remand to the Secretary is even suggested by petitioners.

3. The 7 petitioners are already compensated under the order for any location value of their milk by virtue of the zone differential of the order, the same providing for payment over and above the uniform price for transportation and direct-delivery factors. 7 C.F.R. 1001.62. They are compensated for seasonality or evenness of production by reason of the seasonal incentive plan of the order, 7 C.F.R. 1001.65(c), whereby monies are deducted in certain months from the pool and placed in a fund for payment over in other months in order to reward producers for this factor. (See. App. E, p. 11e

and pp. 4-10e). The nearby producers would be obtaining a double payment for such factors by virtue of the nearby differential payments, and the petitioners have cited no element of value or service for which they are not already compensated or which admittedly should not be paid by the handlers subject to the order. They have already exacted millions of dollars from the respondents' pockets through an illegal discrimination, and the respondents respectfully submit that further irreparable delay is not justified under such circumstances, particularly when a speedy disbursement of respondents' monies through the district court would enable many marginal producers to stay in business.

The grave problems engendered by such dislocations, for the cities as well as the rural areas, are currently receiving widespread attention by private and governmental agencies. Small businesses and communities are thus deprived of needed income or tax revenues, and the migration of the children and hired help of such ex-farmers to the cities results in added financial burdens for the cities when such individuals are ill-equipped for urban absorption. No economic opportunity exists for such individuals in either area, for there are no alternative economic opportunities available in most rural areas when a farm is forced out of business, and the farm worker's opportunities are similarly limited in the cities because of his lack of a skill needed to survive independently in the urban area. The rural farmer is unable to sell his farm for a housing development or commercial development at huge profits, and he is unable to hold his land at low tax rates with this objective in mind. The Court may note that this problem has been receiving substantial attention in the State of Maryland and other states where the population is increasing at rapid rates. The State is deprived of needed revenue as some of these farms are operated at a minimal level or by "tax farmers" who are not interested in running an

efficient business. Petitioners respectfully suggest that they should not be forced to subsidize such "nearby" farms, and that the nearby differential precipitates and perpetuates the very problems for rural and urban areas that a number of governmental and private bodies are seeking to solve.

4. The Act provides only for the payment of a *minimum* price, as this Court and many lower courts have noted on many occasions, and there is nothing in the Act or order that precludes the handler from paying an identical differential to the nearby producers if their milk actually does have any extra value. Consequently, petitioners would suffer no financial injury if their claims are sound. Any contrary contention or insistence that smaller dairy farmers pay the differential is an admission of the lack of merit in their claim of extra value for their milk, and the grounding of such differential on historical use prices is also an admission that no current justification exists for the nearby differential payments. Handlers will pay for a real but not an illusory value, and it is manifestly unfair to exact such penalty payments from smaller dairymen who already sustain a reduction in their uniform price because of the deductions for transportation and handling charges. The handler should be the one to pay for any value or service that he receives from nearby milk, and the discrimination in price for an identical product is further compounded by forcing the smaller farmer to pay the discriminatory difference from out of his own milk price. This Court has consistently held such action to be violative of the Constitution, and there is no unsettled question in this respect.

5. A number of decisions of this Court set forth the basic requirement of the Act that all producers are entitled to a uniform price for their milk irrespective of the manner in which it is used by the handler, and

the Secretary's brief filed in *Blair* (p. 19) states as follows in this regard:

> "As noted above, one of the fundamental objectives of the provisions of the Agricultural Adjustment Act relating to the marketing of milk is to insure that the producers will receive uniform minimum prices for their milk regardless of the use made by the handlers of their particular production."

The petitioners now appear to argue that the Secretary may consider the use of their milk in forcing respondents to pay part of their milk price in the form of the nearby differential, and that the proscription in the Act merely means that the Secretary shall not consider the use of the milk by the individual handlers in regulating the handlers through marketwide pooling. The utter lack of merit in such a contention is readily apparent, for the purpose of the "irrespective of use" command is to insure producers of a uniform price for their milk, and this is the very reason for such regulation and the existence of marketwide equalization pool or producer settlement fund. The petitioners make a statement which actually says nothing when they say that "irrespective of use" refers only to the difference between individual–handler pooling and marketwide pooling and the regulation of handlers under such pooling. It is elementary that the words have a purpose and are directly concerned with assuring the payment of a uniform price to all producers for all of their milk irrespective of the use made thereof. Moreover, all producers serving the same handler under individual–handler pooling receive a uniform price for their milk based on the average use made of the milk of the producers supplying such individual handler, i.e., irrespective of the use of *their particular milk* by said handler. Clearly, the petitioners have demonstrated a fundamental unawareness of the plain purpose and language of the Act, and the illogical contentions are extended to such

a degree in the brief *amicus curiae* of the State of Rhode Island that they actually stress the fallacy and delusive reasoning of the petitioners. Merely to state such argument is to reject it, and the petitioners' further argument that there is no violation when payment of the differential is based on past use of the nearby producers' milk rather than on the current use thereof by the individual handler is even more illustrative of the utter lack of merit in such reasoning. Such contentions ultimately led the *Cranston* court to confuse the identity of the recipient of the nearby differential with the basis for its issuance by the Secretary.

The respondents respectfully submit that this Court and many lower courts have recognized on a number of occasions that the Act and marketwide equalization could not function under the inconsistent interpretation urged by petitioners, an interpretation that conflicts with the very purpose of the Act, the prior contentions of both petitioners, and the former assertions of the Secretary that acknowledged the lack of any ambiguity in this regard.

6. The findings of the Secretary openly acknowledge that the nearby differential is an exception to the Act and authorized marketwide pooling of milk, this Court also having consistently held that an administrator has no power to amend the statute under which he functions. The specific enumeration of the allowable adjustments to the uniform price and other prerequisites to issuance of an order and the terms and conditions therein circumscribe the power of the Secretary, although the respondents readily admit his discretion to apply the enumerated terms and conditions under appropriate circumstances in the exercise of his expertise. However, the nearby differential devours the entire Act, and the rule of uniformity is emasculated by the exception thereto. The respondents know of no decision by

this Court which would authorize an admitted deviation from the statute for the benefit of a group of preferred participants in a government-sponsored program, and this Court has recognized that this Act was passed to relieve the financial plight of all dairymen and the threat to the consumer and public interest resulting from a disorderly market.

7. The principles enunciated by this Court in *Baldwin v. Seelig,* 294 U.S. 511, *Hood & Sons v. DuMond,* 336 U.S. 525, *Lehigh Valley Farmers Co-op. v. United States,* 370 U.S. 76, and *Polar Co. v. Andrews,* 375 U.S. 361 are also dispositive of the questions presented by the petitioners. Neither State officials or nearby producers may legally claim a vested right in a particular milk market under the Act, and their contentions that the Secretary may set up economic barriers to the free flow of milk under the guise of fixing prices is in conflict with the decisions of this Court and the Act's provisions for equal sharing of the benefits and burdens of the market:

> "The power which we deny to Florida is reserved to Congress under the Commerce clause, * * *. This provision, as the Court explained in *Lehigh Valley Farmers Co-op., Inc. v. United States,* 370 U.S. 76, was intended to prevent the Secretary of Agriculture from setting up trade barriers to the importation of milk from other production areas in the United States. We seriously doubt that Congress, *in denying the power to the Secretary,* thereby granted it to the States."
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> * * *
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> "The principles of *Baldwin* are as sound today as they were when announced. They justify, indeed require, invalidation as a burden on interstate commerce of that part of the Florida regulatory scheme

which reserves to its local producers a substantial share of the Florida milk market."

In view of the fact that the Secretary himself noted the unfairness and ineffectiveness of State programs designed to reserve preferential prices and fluid markets to local producers to the exclusion of "outside" producers, or a greater share thereof in deficit markets, it is indefensible to perpetuate such illegal preferences under a federal program at the insistence of a few influential producers. One deviation leads to others, and this is what occurred in the secondary markets adjacent to the Boston area, all without any justification and to the injury of many non-nearby producers who had regularly supplied such secondary markets on an equal basis, exclusive of transportation costs and in some instances handling charges. It is obvious that such nearby differential could not have existed prior to federal regulation and that it was never paid by handlers, a fact which is evident from the handlers' refusal to comply with the Act for an extensive period of time and by the lack of a marketwide equalization pool or producer settlement fund to effectuate such payments among hundreds of handlers and thousands of producers. Moreover, handlers would not pay premiums for a non-existent value and were hardly desirous of excluding less expensive milk from the market, a fact which this Court has also set forth in a number of cases.

II. THERE IS NO CONFLICT IN CIRCUITS OR WITH THE DECISIONS OF THIS COURT.

Respondents respectfully submit that the petitioners fail to comprehend the actual holding of this Court in the *Rock Royal* and *Hood* cases,[2] in that their primary

[2] *United States v. Rock Royal,* 307 U.S. 533; *H. P. Hood & Sons v. United States,* 307 U.S. 588.

contention concerning exemption from the uniform price and equalization pooling provisions of the Act was rejected by the Court in those cases. In effect, the petitioners attack the statute and its constitutionality when they seek to nullify its very purpose by maintaining that they are entitled to payment based on the past use of their milk and retention of allegedly higher "historical prices" that admittedly have no current justification.

This Court held in those cases that the Congress could require handlers to pay the excess of their fluid sales over the marketwide uniform price into the marketwide equalization pool or producer settlement fund for transfer over to other handlers who would thus be able to pay their producers the marketwide uniform price, the latter handlers having disposed of their milk at an average price below the uniform price because of the lack of a high fluid utilization for their milk. The handlers with primarily fluid milk sales claimed that such an arrangement was unconstitutional; that they were being discriminated against by such provisions of the Act; that they were entitled to pay such excess over the uniform price to their own producers for a variety of reasons, and that such an arrangement would unjustly reward handlers with whom they were in competition.

The Court rejected all of their arguments in upholding the constitutionality of the Act and noted that handlers were only required to pay the *minimum* prices for the milk according to the nature of their sales. The Court held that the handlers were required to account to the marketwide equalization pool or producer settlement fund on the basis of their average sales at such minimum prices, and it is obvious that the handlers had no standing to even raise a question as to the operation of the pool or fund and the disbursements to producers therefrom. The Court's opinion necessarily held that the

public interest predominates over any narrow interest of a few handlers or producers, and that the very disorder of the markets necessitated the enactment of such program for the general benefit of producers and consumers alike. Moreover, the record below is replete with admissions that the Act and order program benefited nearby producers as much, if not more, than other dairy farmers, the findings of the Secretary actually stating that nearby producers receive an established price which may be higher than in the absence of regulation and are assured that they will not lose their markets to other producers. It is evident that any other holding by this Court would have effectively nullified the statute and entire program enacted by the Congress as its solution to the national emergency then confronting the dairy farmers and milk consuming public. Moreover, the fact that the Act requires the payment of only minimum prices is of especial significance, since any producer is thus able to receive any premium over the uniform price that his handler might find warranted because of any extra value or service connected with his milk.

The petitioners, however, pursue the same arguments that were rejected by this Court and contend that the handler need not account to the pool or fund on the basis of his sales at the minimum use prices. They contend that the marketwide uniform price need not be computed and paid on such basis, but that their handler may retain a portion of his average sales at such minimum prices for payment over to nearby producers on the basis of the higher utilization of their milk for fluid purposes prior to the Act. Respondents respectfully suggest that petitioners are merely repeating the arguments that were rejected by this Court thirty years ago, for it is elementary that the petitioners and such handlers with a high fluid utilization seek the same objectives – to avoid equalization or price uniformity in order to retain the higher prices associated with a

fluid milk outlet. If the decision of this Court rejected the handlers' arguments that they should be able to pay the excess of their fluid sales over the uniform price to their own producers, rather than into the pool or fund for transfer to other handlers and the latters' producers through a uniform price, then it is submitted that the petitioners' contentions are simply untenable and in conflict with the rulings of this Court from *Rock Royal* and *Hood* to the present time. Indeed, the quotation set forth by petitioners from this Court's opinion in *Rock Royal* clearly states that each producer is to receive a uniform or weighted average price for his milk irrespective of the manner of its use. The inconsistency of petitioners' contentions could not be more apparent.

Respondents make the further observation that the briefs of the Secretary and the handlers in *Rock Royal* do not constitute a part of the opinion of this Court in that case. Nor do such briefs of opposing interests bind the respondents, particularly when no producers were before the Court and when petitioners fail to understand the nature of the arguments made by the parties therein for their own particular interests. The court below recognized the lack of merit in the petitioners' contentions, for the *Rock Royal* case was fully considered in both this case and *Blair.*

Petitioners are aware that the differential referred to in *Rock Royal* was included in the New York Metropolitan milk order promulgated by the Secretary on August 9, 1938 (3 Fed. Reg. 1945), and that it provided for the payment of a differential of 25-cents per cwt. on all milk *delivered to plants* located in certain counties in the marketing area. Article IV of said order, entitled "Minimum Prices", specifically stated that, "Payment of the minimum prices for milk received *direct* from producers shall be in accordance with Article VII", and that article provided for payment of

the differential "in the case of *plants* located in the counties listed in paragraph 8 of section 1 of Article VI, the latter provision providing for the payment of the differential "for all net pooled milk received from producers *at plants* in the counties or portions of counties listed below in this section".

In order to "overcome" the plain language of the order provision for payment of said differential to any producer for the direct-delivery of milk to the plants located in the marketing area, the petitioners cite selective excerpts from the briefs of opposing interests to change not only the opinion of the Court but the plain language of the order which specifically refers to the location of city plants rather than to producers' farms. The Act authorizes a market or direct-delivery differential for the savings effected in handling costs when milk is delivered directly to the city market or distribution plan instead of initially to the country plant where double handling costs would be involved. Moreover, the Secretary has included such a differential in the New York-New Jersey and Connecticut orders, as well as in the Massachusetts-Rhode Island order involved herein,[3] and the very existence of such market or direct-delivery differential in such orders evidences the correctness of the Congressional definition and the impossibility of substituting the present nearby differential based on farm location for such authorized market differential.

Petitioners acknowledge the infirmity of their own contentions when they actually resort to argument which obviously admits and simultaneously attempts to avoid the plain language of the order provision involved

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[3]The authorized market differential is actually termed a "direct-delivery" differential under the N.Y.–N.J. order, and it is combined with the transportation differential under the Mass.–R.I. and Conn. orders where it is referred to as a "zone differential" or "plant zone differential". See 29 Fed. Reg. 11211 and 32 Fed. Reg. 9917.

in *Rock Royal* concerning payment of the differential for direct-delivery of milk at city plants. Their illogical contention that "a range of mountains made delivery to the plants feasible only for farmers residing in the 18 counties" is clearly an attempt to change the language of the New York order to that excerpted from the Secretary's brief in *Rock Royal,* a party adverse to the respondents in this action.[4] Such a contention attributes an inconsistent action to the Secretary in respect to not only the New York order provision but the early Greater Boston provisions which specifically gave a direct-delivery differential payment of 21-cents per cwt. to producers whose farms were located more than 40 miles from the market center. Such action by the Secretary necessarily admits that non-nearby producers were delivering part of their milk directly to the market in the early 1930's.

The petitioners' contention that only nearby producers could deliver their milk to the marketing area because of "a range of mountains" is an obvious horse and buggy argument. It bears great analogy to their contention that bulk tank trucking did not originate until about 1958 and that the lower court was in error in contending otherwise. The lower court correctly noted that the factor of delivery was subordinated to the location of the farm in order to forever preclude the respondents from acquiring the challenged differential. Additionally, the improvements in transportation, roads, refrigeration, packaging, etc., lowered the premium paid for direct-delivery of milk and precipitated the nearby producers'

[4]Petitioners also attempt to change the decision of this Court in that case concerning the status of said association as a handler with resultant inability to question disbursements from the pool. They also fail to note that such associations were refusing to comply with the Act.

demand for a differential limited to farm location which would be both exclusive and permanent for nearby producers. These facts are self-evident and a matter of record, the petitioners' assertion that the lower court's observation reflects "a lack of judicial comprehension" being simply another instance in which petitioners demonstrate an unfamiliarity with the facts and this particular subject. It is clear that they confuse bulk tank trucking with the more modern practice of installing bulk tanks on the dairy farm and other technological improvements in bulk tank hauling of milk. Indeed, the very document referred to in their brief in alleged support of their other assertions (H.R. Doc. 501 (1936), states as follows in respect to tank truck shipments prior to 1936, the below-listed table of tank truck shipments for the period 1920-31 for the Philadelphia milkshed being taken from the publication of The National Milk Producers' Federation, *History Series No. 3,* Oct. 1, 1932, p. 31.

> "When country receiving stations were first introduced, milk was shipped to city processing plants in milk cans. The mechanical or physical loss, caused by milk adhering to the inside of the can and by spillage, was considerable but unavoidable. By far the major part of the shipments went via railroad refrigerator cars.
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> The development of *milk tanks* for railroad cars *and later for motor trucks, as good roads became more common,* decreased the mechanical loss in shipping milk, as less surface was exposed to the milk. In addition, the cost of washing the tanks was much less than washing the number of milk cans necessary to hold corresponding quantities of milk.
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> Milk shipped via railroad is unloaded at city railroad terminals and hauled by truck to the city processing plants. Milk shipped from the country

station by motor truck, however, is unloaded directly at the city processing plants, and terminal costs, of course, are eliminated.

The introduction of milk tanks and the improvement of roads have made it possible for those Philadelphia distributors using them to decrease their costs of hauling milk from country receiving stations to city processing plants. The increase in use of motor trucks for hauling milk into Philadelphia and the decrease in use of railroads for this purpose since 1920 are clearly shown by the following tabulation:

Trend of milk shipments into Philadelphia,[1] 1920–31

Year	Percentage by trucks	Percentage by railroad	Year	Percentage by trucks	Percentage by railroad
1920	2.1	97.9	1926	29.7	70.3
1921	9.6	90.4	1927	38.6	61.4
1922	14.1	85.9	1928	50.7	49.3
1923	20.1	79.9	1929	51.4	48.6
1924	23.2	76.7	1930	51.7	48.3
1925	26.6	73.4	1931	55.3	44.7

The respondents respectfully submit that petitioners are totally in error in attempting to rewrite the differential contained in the old New York order and in claiming that all "non-nearby" dairy farmers were unable to deliver their milk directly to the market in the 1930's. Respondents agree that the Act authorizes the payment of such a market or direct-delivery differential to all producers by the handler under Section 8c(5)(A) of the Act relating to handlers. They respectfully disagree, however, that the non-nearby producers may be forced to make the same payments authorized to be made by handlers under the Act, and the very difference in their status illustrates that the terms "handler" and "producer"

are not used interchangeably in the Act. Such a contention is totally lacking in merit, as is the petitioners' attempt to saddle respondents with the actions or lack of action by the parties in *Rock Royal.* The Court was concerned only with handlers in that case and their strained claims involving alleged discrimination because of the operation of the transportation differential to the advantage of their competitors. But the Court did note that the district court had found the differential payments to producers from out of the pool, rather than totally from handlers, to be discriminatory *as among producers,* a claim that the handlers had no standing to interpose in the case. This Court further noted that it would view as a serious matter any discrimination based on the use of milk, stating at page 580 that "If the cooperative members were freed of the burden of carrying their proportion of milk going to manufacturing use, the discrimination in their favor would be the most strongly marked." The petitioners thus claim a conflict between *Rock Royal* and the lower court when those two cases are in agreement and petitioners' contentions in conflict therewith.

The respondents have no quarrel with the market differential or any of the other adjustments to the uniform price authorized, enumerated and defined in the Act or Congressional Reports. The respondents agree that the uniform price is subject to the enumerated adjustments for quality, location and other usual market variations, as contended by petitioners quotation from the *Rock Royal* case. This identical statement is also found in the *Blair* decision that held the nearby differential of the N.Y.–N.J. order to be unauthorized and void: "However, the Act provides that this uniform minimum price is subject to adjustments for differentials authorized by the Act for quality, location, or other market variations". (125 U.S. App. D.C. 207 at 211, 370 F.2d 229). But this language obviously does

not indicate approval for the wholesale inclusion of any type of differential into a milk order as a "market differential", and the reliance of petitioners upon such an insubstantial contention illustrates the dearth of support for their arguments. If petitioners' reference to such language was sound, it is clear that the Act would have simply provided for "all market differentials" instead of the specific enumeration of the *only* authorized adjustments and the definition thereof in the Congressional Reports.

The *Blair* case itself recognizes the utter lack of merit in such a contention when it states, "Although Section 8c(5)(B)(a) does permit 'market * * * differentials customarily applied by the handlers' concerned, it is plain that this type of allowance turns not on the location of the producers' farms but on the nature of the market to which they deliver their milk. The 'market differential' rationale is plainly not a tenable basis for the nearby differential." The *Blair* case also noted that the Secretary did not even attempt to justify the nearby differential on such ground, either in the findings of the Secretary or in his brief filed in *Blair*, a copy of which has been filed in this case as an exhibit. His brief actually cited the definition of the market differential contained in the Congressional reports to evidence that it was a specific differential and that the nearby differential could not be promulgated on such basis under Section 8c(5)(B)(a) of the Act. The Secretary there contended that such fact supported his issuance of the nearby differential as a location differential, and he also admitted that he had always promulgated the nearby differential, including that of the Greater Boston milk order referred to in *Green Valley*,[5] as a location differential under

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[5] See App. C, pp. 14-160c, of Appendix to respondents' brief in opposition to brief *amicus curiae* of State of Connecticut.

subsection (c) of the Act. The Secretary thus admitted the error of the dictum in *Green Valley* in respect to such nearby differential being a market differential, and his "long-standing contemporaneous administrative construction of the Section" makes this crystal clear:

> "Thus, dating almost to the very enactment of 7 U.S.C. 608c(5)(B)(c) the Secretary has construed *that* provision as permitting the very type of nearby differential which the appellants would have this Court declare unauthorized. It is, of course, axiomatic that such a long-standing contemporaneous administrative construction of the Section by the official charged with its administration is entitled to great weight."

Although the foregoing admissions conclusively reflect that the nearby differential was never promulgated or regarded as a market differential and that the Secretary acknowledged the correctness of the Congressional definitions for 35 years, the petitioners attempt to avoid such fact by referring to language used by this Court in *Brannan v. Stark,* 342 U.S. 451, wherein the Court noted that *Green Valley* had upheld a differential between cooperative and non-cooperative milk as a market differential under Sec. 8c(5)(A)(1), the latter section pertaining to payments by handlers as in the *Rock Royal* case. A proper understanding of the authorized market differential indicates that there is no conflict with the *Stark* case and the decision below. As previously stated, the market or direct delivery differential, whether issued as a separate differential or combined with the transportation allowance as a zone differential, is based on the nature of the market or plant to which a producer delivers his milk and cannot be equated with the nearby differential that is based on the location of a producer's farm. The market differential is paid for the savings effected when milk is delivered directly to a city market

or plant rather than to a country plant where double handling costs are involved, the milk being tested, weighed, cooled, etc., at such country stations prior to shipment to the city market or distribution plant. The amount of the market or direct-delivery differential is usually the difference between the handling costs at the city and country plants. The market differential in *Green Valley* between the prices received by cooperative associations and producers who were not members thereof was based on the marketing services performed by the cooperative association, such as the aforesaid testing, weighing, cooling, etc., of the milk, and the defined market differential was not violated thereby. The market differential, as previously indicated, represented the difference in the cost of receiving the milk at a country plant and a city market or plant. If the cooperative association performed the marketing services for the producer, it would be entitled to part of the difference in costs incurred by it under the "market differential" definition. The Act specifically authorizes payment to all producers and "associations of producers", and Section 8(c)(5)(E) authorizes appropriate deductions for the verification of weights, sampling and testing of milk, even when such marketing services are not performed by associations. All that need be noted here is that associations perform certain marketing functions in handling their members' milk, services that were performed in some instances at country receiving plants or which otherwise must be performed upon receipt of the milk at the city plant. Consequently, it is entirely proper to refer to the added payment to the association as a market differential, for this differential is concerned with handling costs as previously explained. This in no way provides a basis for extending the market differential beyond its normal meaning in order to accommodate it as a nearby differential based upon the location of farms. The "nearby" producer may deliver his milk to a country plant and still receive the nearby differential, and

the non-nearby producer may deliver his milk directly to the city plant or market without receiving the nearby differential, this fact evidencing that the nearby differential is not the authorized market differential which already exists in the milk orders as a separate differential. The case of *Brannan v. Stark* is thus authority for the respondents and presents no conflict with the decision of the court below.

The only other case cited is the *Cranston* district court decision which may not form the basis for the writ and which is patently erroneous. Initially, it should be noted that the trial in *Cranston* commenced on October 18, 1967, subsequent to the hearing of September 5, 1967, in this case concerning the Secretary's attempt to issue new "findings" after the district court's decision of June 15, 1967, invalidating the nearby differential of the Mass.–R.I. milk order. The recommended decision of the Secretary contained "findings" which purported to replace those made in 1937 and to rectify the lack of other findings in the early milk orders. It indicated that the Secretary had relied on the *Green Valley* case, and it adopted various contentions as findings which had theretofore been specifically rejected by the Secretary when no legal action was pending. The district court aptly termed the recommended decision "a brief", and there was no basis for such findings in the hearing record to which it related, many of the statements in the recommended decision being inaccurate or inaccurately portrayed. After inability to change the record during the course of the litigation, the same objective of replacing the pertinent administrative records upon which the Secretary had acted became the focal point of the *Cranston* "trial". The main witness therein was Attorney Reuben Hall, associate counsel of petitioners' attorneys in this case. The attorney for the intervenors in *Cranston* was Frederick Conard, Esq., who was also associated in this case and the *Blair* case with

Attorney Hall and petitioners' counsel. The district court's decision rests largely on the testimony of Attorney Hall and that of one other witness (Kane) who not only replaced the administrative records with their testimony but also presumed to replace the Congressional intent and reports.

No real corroborating evidence of a documentary nature was offered to support the testimony of the witness Kane that the defined and well-known market differential was actually an all-inclusive differential, one embracing any type of differential in markets across the country. The witnesses Kane and Hall had testified to such effect and to their involvement with the National Cooperative Milk Producers Federation in proposing revisions to the Congressional committees that would reflect that the Act and Reports were their handiwork rather than that of the Congress. They failed to produce any of the drafts or other material to which they referred in their testimony, and it is elementary that the submission of a draft or proposed revision of a statute to the Congress does not transfer the legislative intent from the Congress to such individuals. Hundreds of such proposals were received by the Congress in respect to this very Act, but most of such material has little relationship to the final product of the Congress and may not replace either the work or intent of the Congress. Further, an examination of the N.C.M.P.F. draft discloses that it proposed the elimination of the section authorizing individual handler pools, but the Congress retained the same in the Act. This would seem to cast a little doubt on the contentions of such witnesses that they "drafted" the legislation and proposed revisions thereto that disclose the real intent of the Congress. Other examples abound in the draft.

Additionally, the very fact that the particular subsection of the Act enumerates three different differentials

is indicative that the term "market differential" may not include the other two specifically enumerated and defined differentials. Otherwise, the Act would have simply referred to "all market differentials" if this term was meant to be illustrative and all-embracing in nature, rather than being limited to the definite and well-known differential for the direct delivery of milk to a city plant or market. In fact, the N.C.M.P.F. draft, dated June 5, 1935, stated "volume, market or production differentials *or other differentials* customarily used in the market covered by such order." (See App. C, pp. 12-21c). Significantly, this draft distinguishes the market differential as a separate and distinct differential even more than does the Act, if that is possible, and the Congress actually refused to authorize the "other differentials" in limiting adjustments to the uniform price to *only* the enumerated and defined differentials. The introductory phrase of Section 8(c)(5) also states that a milk order shall contain "one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) *no others.*"

It is also noted that the testimony of the witness Kane confuses the nearby differential with the very description of the direct-delivery or market differential defined by both the Senate and the House in their respective Reports. (See App. C, p. 16c). The witness Alpin also appears to confuse these two distinct differentials, both of which exist in this Order (App. C, p. 21c). The testimony of witness Hall, attorney for nearby producers in both *Blair* and *Allen,* is clearly calculated to replace the testimony in the administrative records, including that of economists for his own clients (NEMPA, CMPA) in hearings in which he appeared, that there was no hearing differential as such prior to the Act and Federal regulation. (App. C, pp. 24-30c). Such testimony was necessary to "show" that the nearby differential existed and was "customarily applied" by handlers prior to the Act, as required by the statute.

The district court's opinion in *Cranston* states that "the Connecticut Milk Marketing Order contains three principal adjustments to the uniform price payable to dairy farmers." This statement is fatally inaccurate, as will be hereinafter demonstrated.

The *Cranston* court correctly notes that a butterfat differential is provided for in Section 1015.71 of the milk order under the authority of subsection (b) of the Act relating to "the grade or quality of the milk delivered."

The opinion also states that "Section 1015.62 of the Order . . ., providing for 'plant zone differentials', is also unchallenged . . . Essentially, the purpose of the differential is to reflect in the price received by the farmer the added cost to the handler of moving the milk from the more distant receiving plants into the marketing area for distribution. Such a differential is clearly authorized as an adjustment according to 'the locations at which delivery of such milk is made'." The district court's failure to acknowledge that the plant zone differential embraces the market differential as well as the transportation differential constitutes error that goes to the very basis of its decision.

The district court's opinion then refers to the contested nearby farm location differential as the third differential in the Connecticut milk order, 7 C.F.R. 1015.72, and it purports to uphold this differential under subsection (a) of the Act as the "market" differential "customarily applied by the handlers subject to such order." In order to make this conclusion, however, it was necessary for the district court to cast aside or ignore the plain language of the pertinent Congressional reports defining the market differential, the testimony and evidence in the administrative records going back thirty years, the decisions of the Secretary dealing with this very subject, and the specific wording

of the Act itself. More importantly, the court actually ignored the fact that *the market differential is already in the Connecticut milk order,* and it rested its decision on the incredible testimony of interested witnesses who allegedly "knew of no differentials which would in any way fit the definition of market differentials contained in the reports."

The Congressional reports specifically state that, "The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant." (App. C, pp. 14-16c).

The district court's opinion makes no mention of the fact that such fourth adjustment, the true market or direct delivery differential, is included with the transportation differential as a part of the plant zone location differential:

> "3. *Zone differentials and zoning.* The Massachusetts–Rhode Island and Connecticut orders should provide that the Class I and blended prices applicable at nearby (city) plants be 47 cents per hundredweight above comparable prices for the 21st (201-210 mile) zone. * * * The present nearby plant Class I zone differential of 54 cents is based on two principal factors: (1) *Freight* charges for hauling milk from plants located in the 21st zone to city plants, and (2) *the difference between costs incurred in the assembly of producer milk at country plants for transfer to city plants and costs incurred in receiving milk at city plants directly from producers.* The total *freight* charge allowed in the present differential is 41 cents per hundredweight, which includes a Federal transportation tax no longer in effect. In earlier computations of the difference between country and city

> receiving costs, total *country* plant *handling* costs were considered to be 23 cents per hundredweight. Of the latter amount, 20 cents represented the cost of operating the country plant and the remaining three cents was to cover the cost to the handler in furnishing cans for the shipment of milk from the country plant to the city plant. Handling costs for receiving, weighing, and testing milk received from farms at the city plant were considered to be 10 cents per hundredweight, with the difference between this amount and the country plant handling costs thus being 13 cents. * * *
>
> "It is therefore concluded that the allowance for *transportation* to be reflected in the city plant zone differential should be 37 cents. Further, the *handling* allowance to be reflected in this differential should continue to be 10 cents. Accordingly, the Class I price applicable at nearby (city) plants under the Connecticut order and the proposed Massachusetts–Rhode Island order would be 47 cents greater than the Class I price at plants located in the 21st zone." (29 F.R. 11211).[7]

The foregoing is sufficient to illustrate the basic error of the *Cranston* opinion, and it would be impossible for the district court to rest on a rejection of the Congressional definition if it was aware of the existence of the

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[7] A change of 7-cents in the zone differentials and revision of the mileage zones was recently made in the orders. All "nearby" farm location differential areas were formerly included in the nearby plant zone of the Mass.–R.I. order, but such revision after the *Allen* decision excluded the already limited "nearby" farm areas of Vt., Maine, and N.H. from the nearby plant zone. 32 F.R. 9917, July 6, 1967.

defined market or direct delivery differential as the fourth adjustment in the Connecticut milk order. The testimony of the witnesses is also subject to a built-in inconsistency in attempting to contradict the Congress in this regard, and this is clearly evidenced by the fact that the authorized market differential is included in the plant zone differential of the order.

Such interested witnesses also attempted to attack the Congressional definition in the pertinent reports by referring to the statement in the reports that the market differential "vary with the markets and cannot be qualified as a 'location' differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets."

It has previously been demonstrated that the location or transportation differential is usually determined on the distance from a primary market or principal consumption center and the point at which delivery of the milk is made to the handler. This differential clearly reflected the location value of the milk. The direct delivery of the milk to a city plant or market, however, relates to an element of service that is not limited to the primary market or principal consumption center. There were numerous secondary city markets or plants within every milkshed, and the payment of the market or direct delivery differential, as well as the amount thereof, was necessarily related to the availability of alternative supplies to the handler. This subject was fully covered in the *Blair* case and by the Secretary in his Decision of June 14, 1957, 22 Fed. Reg. 4215, involving the New York–New Jersey milk order. He there discussed the factors involved in payment of such market differential in secondary city markets and in the metropolitan New York City area, and the *Blair* plaintiffs demonstrated that such differentials were paid in varying amounts all over the milkshed prior to promulgation of the New York–New Jersey order in 1957.

In fact, the plaintiffs in *Blair* cited administrative decisions of the Secretary wherein he allowed direct-delivery or market differentials to producers in the Capital District (Albany, Troy, Schenectady) in recognition of the fact that these producers had obtained such premiums and higher prices prior to 1957 when the New York milk order was expanded to include Upstate New York producers as well as those in the State of New Jersey. (See 22 Fed. Reg. 4215).

These Upstate producers are located in the very area as the plaintiffs in the Cranston case, and the Secretary has acknowledged that many of them received market or direct-delivery differentials both prior and subsequent to federal regulation. (See App. C, pp. 22-24c).

Said direct-delivery differentials, the authorized market differential in the Act, were paid in secondary markets in New England as well as in New York State prior to federal regulation. These market or direct delivery differentials are now relegated to the primary market under federal regulation because of the factors of administrative convenience, ability of the handler to pay such differential over the uniform minimum price as a premium without providing for the same in the regulations, enforcement problems resulting from varying alternative supplies in different secondary markets and refusal of handlers to pay the differential under such conditions.

Such market or direct delivery differential adopted the present "practice of business" when the Congressional reports were written in 1935.

The contentions made by the interested witnesses and upon which the district court predicated its decision are thus completely erroneous.

Moreover, the Secretary and nearby producers in *Cranston,* represented by Attorney Conard, associate of petitioners' counsel herein, stressed the differences between the Connecticut order and this order when respondents attempted to hold *Cranston* in abeyance pending a decision on the *Allen* appeals.

The Secretary's opposition stated as follows in successfully arguing distinguishability:

"(2) The Connecticut Order and the Massachusetts-Rhode Island Orders are two separate Orders, promulgated at different times, involving different marketing areas, and necessitated by different market conditions. Indeed, in 1962, a proposal was made to consolidate the Connecticut Order with the Massachusetts-Rhode Island Order, but this proposal was rejected due to the Secretary's finding that:

'Because the major problems pertaining to intermarket relations in New England do not involve the Connecticut Market, the consolidation of the Connecticut Order with any of the other New England Orders is not presently warranted.' (29 Fed. Reg. 11205-06)."

Additionally, the *Cranston* court stressed the same differences when respondents attempted to show that *Cranston* was being used by the attorneys herein to relitigate this case and affect its disposition and escrowed monies:

"THE COURT: Well, I know this isn't probably an appropriate place for argument I don't intend to belabor it, but it surely does seem to me to be so elemental that we should all be able to agree * * * that the facts of this case, the *Cranston* case, are different from the facts of the *Blair* case. Specifically, this is an entirely different administrative order before this Court than there was before the Court in *Blair,* and you have – in my view, from what I have seen of it – a distinctly different milk marketing order. You have quite a different order before the Court here, the so-called Connecticut order, than there was before the *Blair* court or before the *Allen* court * * *. * * * but we do have here, as I understand it, three distinctly different marketing orders, so that I have a little trouble following you * * * I don't think the same decision necessarily flows or

should necessarily flow in this case as in the *Blair* case or *Allen* case, being given the same legislative material. They are being applied with a different set of facts."

The other points raised by the petitioners do not merit any reply or the same have been answered in the other briefs filed herein. The cases cited by petitioners in respect to remand obviously do not support their contentions here. The lower courts gave detailed and exhaustive consideration to every relevant factor, and the record is extremely extensive, embracing every administrative hearing record and milk order from 1936 to that containing the challenged differential. The respondents are of the respectful view that unfactual assertions do not constitute a basis for the granting of the writ, and the statements of the petitioners that the ruling below or the failure of this Court to grant certiorari could invalidate other differentials is devoid of factual content, the example furnished in footnote 20 on page 15 of petitioners' brief being evidential of the lack of logic and merit in such *in terrorem* contentions. The petitioners have totally failed to demonstrate any reason for the granting of the writ, and the respondents will be further injured by any undue delay in the disbursement of their escrowed monies under the supervision of the district court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Charles P. Ryan
Edward J. Ryan
John J. Simard
Counsel for Respondents.

March, 1969

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No. [redacted]

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FILED
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IN THE

Supreme Court of the United States

October Term, 1968

Clifford M. Hardin, Secretary of Agriculture,
Petitioner,

v.

Russell Allen, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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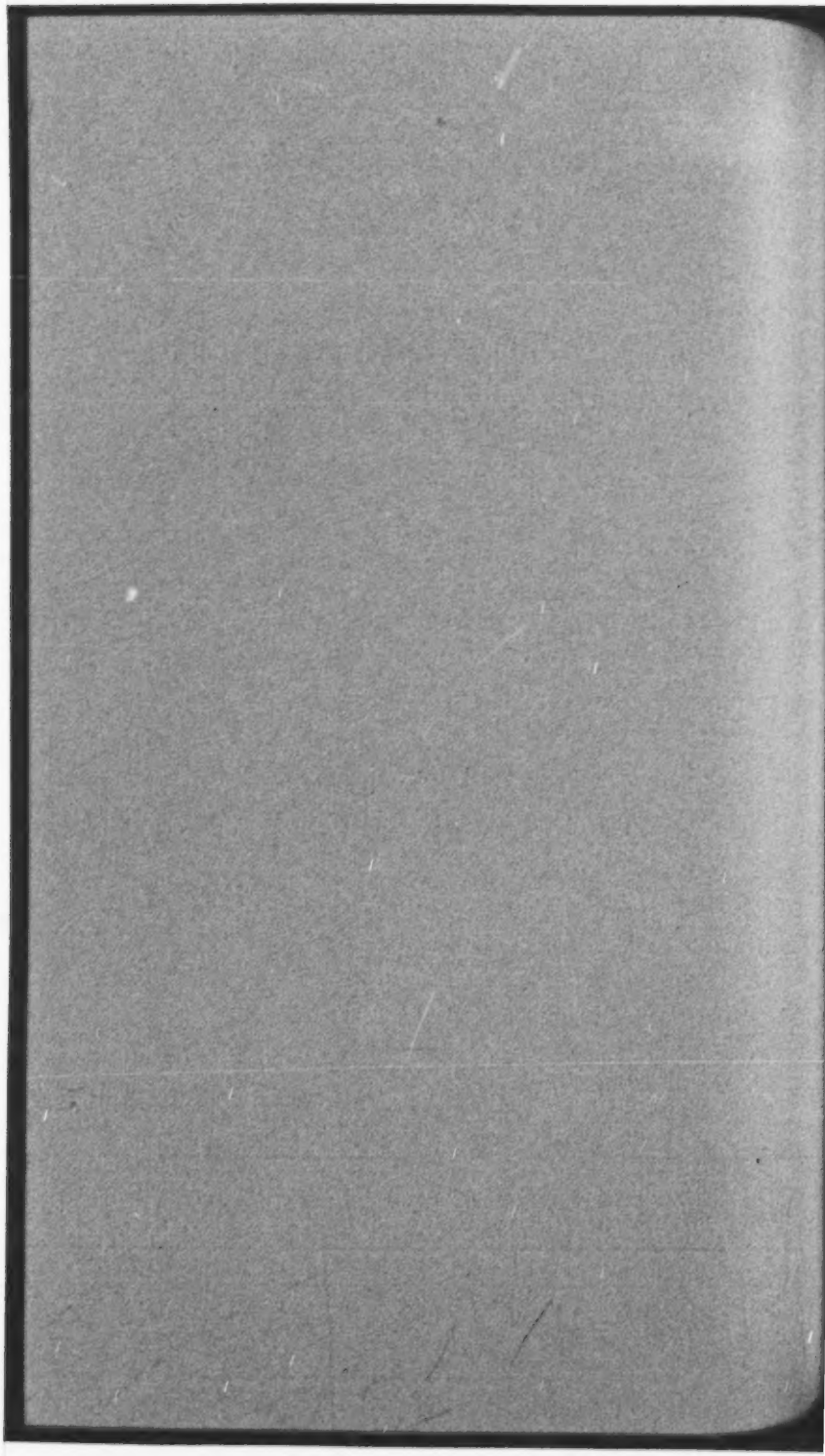
BRIEF OF RESPONDENTS RUSSELL ALLEN, *ET AL.*, IN OPPOSITION

CHARLES P. RYAN
EDWARD J. RYAN
JOHN J. SIMARD
400 Prudential Building
Washington, D.C. 20005
Counsel for Respondents.



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IN THE

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October Term, 1968

No. 1076

Clifford M. Hardin, Secretary of Agriculture,
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v.

Russell Allen, et al.,
Respondents.

On Petition For A Writ Of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS RUSSELL ALLEN, ET AL., IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 402 F.2d 660 and is set forth at pages 1-29a of the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether, under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), the Secretary of Agriculture was authorized to include in the Massachusetts-Rhode Island milk order of October 1, 1964, a nearby farm location differential provision, 7 C.F.R. 1001.72, under which producers whose farms are located in either of two designated "nearby" areas are entitled to receive a differential payment which varies the uniform price required

under Sec. 8c(5)(B)(ii) in recognition of (1) the use made of nearby producers' milk or (2) the allegedly higher prices received by nearby producers prior to Federal regulation, the aforesaid section providing that all producers are to receive a uniform price for all of their milk irrespective of the use thereof.

2. Whether the nearby differential provision promulgated on October 1, 1964, is an authorized adjustment to the uniform price, either under Sec. 8c(5)(B)(ii)(c) concerning "the locations at which delivery of such milk is made", or under (a) relating to "market * * * differentials customarily applied by the *handlers*", when such payments are made by "non-nearby" dairy farmers regularly supplying the fluid milk market to other producers whose farms are located in certain designated "nearby" areas, and when the "nearby" producers are already compensated for any location value of their milk under the zone differential of the milk order, 7 C.F.R. 1001.62, which includes an additional payment over the uniform price and includes (1) the authorized market differential for direct delivery of milk to a city plant or market; (2) the transportation differential paid for milk delivered progressively closer to the primary market; and (3) the higher transportation rates paid within the "nearby" zone as contrasted with the rates for each 10-mile zone in the balance of the milkshed.

3. Whether the Secretary's findings were deficient, inconsistent and unsupported by valid and substantial evidence, and his conclusions and decisions irrational, inconsistent and arbitrary.

4. Whether the operation of the nearby differential is illegally discriminatory and violative of constitutional rights to due process and equal protection of law.

STATUTE INVOLVED

The statute involved, the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, is set forth in detail in the Appendix to the respondents'

brief in opposition to the brief *amicus curiae* of the State of Connecticut in No. 861.

STATEMENT

The respondents are 168 Vermont dairy farmers who have brought this action against the Secretary of Agriculture for themselves, individually, and for the benefit of all other dairy farmers similarly situated in the States of Vermont, Maine and New Hampshire, and whose farms are so located as to render them ineligible for the "nearby farm location differential" payments of the Massachusetts-Rhode Island federal milk order. Their complaint requested a judgment declaring the invalidity of the differential provision of the Order, 7 C.F.R. 1001.72, as well as an injunction against the future enforcement of such differential provision by the Secretary. The District Court granted their motion for summary judgment, and it subsequently entered an order which awarded the requested relief.

The judgment of the District Court was appealed by 7 "nearby" producers who were allowed to intervene in the case after judgment when it appeared that the Secretary was not going to take an appeal. The Secretary thereafter appealed, however, and both cases were heard by the court of appeals on a consolidated basis, the judgment of the District Court being unanimously affirmed on September 23, 1968. The petitioners in No. 861, the 7 nearby producers, filed their petition herein on December 20, 1968, but the Secretary of Agriculture was granted an extension of time of sixty days to determine whether a petition should be filed on his behalf. Such a petition was filed on February 20, 1969.

The Massachusetts-Rhode Island milk order is one of approximately 75 federal milk orders which regulate the handling or marketing of milk in the various regional marketing areas throughout the United States. It was promulgated by the Secretary effective October 1, 1964 under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, and is presently in effect. The present Order consolidated the former federal orders regulating the

handling of milk in the Greater Boston, Worcester, Springfield and Southeastern New England marketing areas, the latter order having encompassed the entire State of Rhode Island and a substantial part of southeastern Massachusetts. The Secretary's Decision in respect to the issuance of the consolidated Order is found at 29 Federal Register 11205, and the pertinent parts thereof are set forth in Appendix B, together with pertinent excerpts from the Decisions promulgating the four former milk orders which were consolidated into the present one.[1]

The differential provision of the order, Sec. 1001.72, provides that producers whose farms are located within Rhode Island and part of Connecticut and in certain enumerated towns, cities and counties in specified New England states, primarily Massachusetts, shall be paid a differential of 46 cents per hundredweight for their milk, over and above the uniform price, "unless the addition of 46 cents gives a result greater than the Class I price" at the plant at which the milk is received, in which event "there shall be added a rate which will produce that price." Subsection (b) provides for a differential of 23 cents cwt. or such lesser sum as will equal the Class I price to producers whose farms are located in another similarly enumerated preferential area, both the "nearby" and "intermediate" producers being referred to as "nearby" producers herein.

The monies to pay the differential to nearby producers are deducted from the marketwide equalization pool prior to computation and announcement of the monthly uniform price by the Market Administrator. Such deductions necessarily reduce in corresponding amount the uniform price which respondents would otherwise receive for their milk except for such nearby differential provision. (29 Fed. Reg. 11213) The nearby differential exists in only one other order (Connecticut) out of about 75 federal orders in the United States.

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[1] The Appendix referred to herein is appended to the respondents' brief in opposition to the brief *amicus curiae* filed in No. 861 for the State of Connecticut.

Initially it should be noted that there are certain problems inherent in the marketing of milk which necessitated the passage of State and Federal legislation for the regulation of the dairy industry. Milk is a highly perishable product which does not lend itself to leisurely bargaining on an offer and acceptance basis. It is a fertile field for bacteria, and considerable investment is required by all dairy farmers for the purchase of equipment and the maintenance of sanitary health standards. Cows give more milk from April through August than they do in the remaining months of the year, but the size of the herd must be maintained the entire year in order that sufficient milk is available in the period of shorter supply, the variance in production thus creating a surplus of milk in the flush season of the year. The consumer demand for milk is rather constant the entire year, but a reserve supply of milk to meet daily fluctuations and unexpected contingencies in demand for fluid or drinking milk is also necessary.[2]

The surplus milk which cannot be used for fluid purposes is manufactured into such dairy products as butter, cheese, ice cream, powdered milk and other less perishable milk products. These milk products, referred to as surplus or manufactured milk, must compete in the market with other like products from distant areas of the country, due to the very fact of their non-perishability, and they consequently return a lower margin of profit than the higher-priced fluid milk.

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2 "Although there is a pronounced seasonal variation in the production of milk, milk consumption is about the same in all months subject, however, to daily fluctuation which requires the industry to carry an operating reserve of approximately 20 percent." (USDA, Marketing Division, 1954 *Yearbook of Agriculture*, 477; see also, Brooks, *The Pricing of Milk Under Federal Marketing Orders*, 26 Geo. Wash. L.R. 180 (1958). The maintenance of such reserve during the short season results in a much greater surplus during the flush production season.

The competition for fluid milk outlets became so intense in the early 1930's that milk wars, violence, and depressed milk prices were the inevitable result. The situation was seen by most handlers or dealers as a golden opportunity to exploit the helpless dairy farmer, their tendencies in this regard being related in many of the early cases. Kickbacks and rebates by the dairy farmers to the handler with a high fluid milk outlet or utilization were often a prerequisite to the retention of such fluid milk outlet, and excessive hauling charges by such handlers constituted a common practice.

In the five-year period ending December 31, 1933, prices to dairy farmers fell more than fifty percent, although the handlers were still able to make a net profit on their investment of more than twenty-five percent.[3] The problem of surplus milk and the resultant cut-throat competition for fluid milk sales could not be solved by the cooperative associations to any appreciable degree and their efforts ultimately collapsed completely.

The enactment of regulatory legislation concerning the handling of milk by the State of New York was upheld by the Supreme Court in *Nebbia v. New York,* 291 U.S. 502 (1934), but almost immediately thereafter the Court held in the case of *Baldwin v. Seelig,* 294 U.S. 511 (1935) that the State had no power to regulate and control the sale of milk produced without its borders. This decision rendered largely ineffective the State regulation of the handling and marketing of milk, and it prompted the Congress to meet the disastrous national problem by the enactment of the Agricultural Adjustment Act, which was re-enacted in and and amended as the Agricultural Marketing Agreement Act of 1937, hereinafter referred to as the "Act." The Congressional answer was a program that provided for the sharing of the benefits (fluid or Class I use) and the burdens (surplus or Class II use) of the market by all dairy farmers through

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[3] House of Rep. Concurrent Resolution No. 32, 73rd Cong., 2nd Sess., May 14, 1934, directing the FTC to investigate the milk industry.

the medium of a uniform price, irrespective of the use made of the milk of a particular dairy farmer or a group of milk producers.

The Congress was necessarily aware that a few producers, through circumstances or good fortune, might have a preferential price position with a handler who disposed of most of his milk for fluid or Class I use. But it was also totally aware of the entire chaotic conditions in all markets and of the necessity for such few producers to give up any transitory price preference that they might have in order that a sound foundation might be formulated for a program that would stabilize marketing conditions, raise the income of all dairy farmers, improve the national economy and credit structure, and inure in other respects to the common good of consumers and producers alike.

The Act confers certain enumerated powers upon the Secretary of Agriculture, and its purpose is to raise farmer income and to establish and maintain such orderly marketing conditions as will provide, in the interests of producers and consumers, an orderly flow of the supply to market. *Sec.* 601, 602.

In general, Section 608c(5) of the Act authorizes the Secretary to issue regional orders regulating the handling of milk in the various marketing areas throughout the United States. Only specifically enumerated terms and conditions *and no others* are authorized to be placed into the milk orders by the Secretary. The Secretary is empowered to set up a system of price-fixing whereby milk is classified according to the form or the purpose for which it is used, and each such use classification of milk is assigned a price that is computed from certain formulas determined by the Secretary:

> "608c (5) Milk and its products; terms and conditions of orders.
>
> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) *no others*:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers and associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers."

Milk used or disposed of by the handler for fluid purposes is classified as Class I and is assigned the highest price because it returns a greater price and profit to the handler. Surplus or manufactured milk is classified as Class II and is assigned a lower price, not because the milk is any different from that used for fluid use, but only because it brings a lower return to the handler when disposed of in such form or for such purpose.[4]

All handlers regulated under the Order are required to pay the same *minimum* prices fixed for each use classification of milk, and they are also required to make monthly reports to the Market Administrator for the particular marketing region concerning their respective sales of milk in each use classification at the minimum prices set by the Secretary for each use of milk. In order to avoid the self-defeating competition for fluid milk outlets, the total sales in each use category at the respective minimum prices are computed by the Market

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[4] This system of classified pricing was initiated by cooperative associations but the prices to dairy farmers varied all over the milkshed because of the different plans in effect, one farmer often being unaware of the price received by other neighboring producers.

Administrator for each handler[5] and then for all handlers, the total being divided by the amount of all milk sold during the month to arrive at a marketwide uniform "blended" price. The Act requires that all producers be paid such uniform "blended" price for their milk irrespective of how it was used by the handler to whom it was delivered:

> "(ii) for the payment to *all* producers and associations of producers delivering milk to *all* handlers of uniform prices for *all* milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;"

Since some handlers dispose of most of their milk for fluid or Class I use, and therefore at an overall monthly return in excess of the market's uniform price, they are required to pay such excess into a Producers Settlement Fund maintained by the Secretary's Market Administrator. Those handlers who dispose of their milk for primarily surplus or manufactured use are entitled to withdraw those monies from the Fund *in order that they may be able to pay their producers the uniform price,* the Class II price necessarily being lower than the marketwide uniform "blend" price. In this way, all handlers pay for milk according to the value of the same to them, and all producers are thereby enabled

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[5] The Act also authorizes individual-handler pools, whereby all producers delivering to the same handler receive a uniform price contingent upon the average use made of their milk by the handler. Individual-handler pools are only appropriate in markets where milk is in short supply and where it is disposed of primarily in fluid form. Such type pooling must also be approved by at least three-fourths of the producers serving the market, and this must be done in a separate referendum on this issue alone. (608c(5)(B)(i), set forth in Pet., pp. 2-3). Although individual-handler pooling is inconsistent with marketwide pooling, the Congressional objective of uniformity is evident by the aforesaid restrictions on the institution of such type of pooling, and the Secretary specifically found that individual-handler pooling would create disorderly marking in New England and injure both producers and consumers. Additionally, the same adjustments to the uniform price are authorized under both types of pooling.

to be paid the required uniform price for their milk, irrespective of how it was used by the particular handler to whom it has been delivered.

The Act clearly provides for such an arrangement in subsection 8c(5)(C):

> "(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection."

It is as if all of the regulated milk produced in the milkshed was placed in a giant pool from which the handlers procured their supplies, paying for the same according to the purpose for which they sold the milk, the payments then being divided up in such a manner that each producer received the same uniform price for his milk in the pool, none of which can be distinguished from the milk of any other producer. This is the true concept of marketwide pooling, and the Producers Settlement Fund, with its system of debits and credits for the individual account of each regulated handler, is the device for effectuating such marketwide pooling or equalization of payments.

A very clear description of the purpose and manner of operation of a marketwide equalization pool, which also illustrates the abuses it is designed to correct, is set forth in the Government's Economic Brief, Paper No. 12, pp. 82-84, filed in the administrative record of the 1937 Greater Boston milk order (App. C, pp. 1-5c), and several cases also describe its basic purpose and mechanics of operation. *Blair v. Freeman,* 370 F.2d 229 (1966); *Grant v. Benson,* 97 App. D.C. 191, 229 F.2d 765, *cert. denied,* 350 U.S. 1015; *Lehigh Valley Farmers Co-op., Inc. v. United States,* 370 U.S. 76, the latter case stating as follows:

> "The net effect is that each handler pays for his milk at the price he would have paid had it been earmarked at the outset for the use to which it was ultimately put. *But the farmer who produces the milk is protected from the effects of competition for premium outlets since he is automatically allotted a proportional share of each of the different 'use' markets.*"

Again, in *Stark v. Wickard*, 321 U.S. 288 (1944), the Supreme Court stated as follows:

> "It is apparent that serious inequities as among producers might arise if the prices each received depended upon the use the handler happened to make of his milk; accordingly, Sec. 8c(5)(B) authorizes provision to be made for the payment of a uniform price to producers for the milk delivered irrespective of the use to which the milk is put by the individual handler."

The heart of the Act is its requirement that all producers be paid a uniform price for their milk irrespective of how it is used by the handler to whom it is delivered, and this primary objective of the Act and marketwide pooling of milk has been repeatedly noted by this Court and the lower courts.

The Act's command of a uniform price to each dairy farmer irrespective of the use made of his milk is subject to one exception, in that subsection 8c(5)(D) requires that a new producer be paid during the first two months of regular delivery "at the price for the lowest use classification specified in such order." After the two months period, he must be paid the uniform price for his milk irrespective of the use thereof, and this exception to payment of the uniform price is an obviously necessary provision that protects the regular suppliers of the market from those producers who would market their milk only at opportune times in order to avoid the burden of sharing the surplus of the market. The Congressional reports specifically state that, "This is the only limitation upon the entry of new producers – wherever located – into a market, and it can remain effective only for the specified three month period." Moreover, the AAA

acknowledged that this time limitation, changed from three to two months in the conference of the House and the Senate, was the only exception to the payment of a uniform price without consideration of use of the producer's milk. (App. C, pp. 8-11c). The uniform price is subject to certain enumerated adjustments under subsection 8c(5)(B) of the Act, but these adjustments emphasize the requirement of uniformity for producers and handlers alike. Producers may deliver their milk to a plant nearer to the market center and receive the higher price paid for the milk at such location under the zone differential that involves transportation and handling charges. They may improve the grade or quality of their milk to receive the butterfat differential of the milk order. However, the nearby differential does not embrace such uniformity, in that the more distant producer may deliver his milk to the identical spot as the nearby producer and yet only the nearby producer receives the "nearby" differential. The nearby producer need do nothing to receive such payment, and the more distant producer can do nothing to receive it, other than to move the location of his farm.[6]

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[6] Subsection (D) also provides that payment at the lowest use classification or surplus price for said two months shall be "subject to the adjustments specified in paragraph (B) of this subsection." If the nearby differential is an authorized adjustment to the uniform price under (B), the new "nearby" producers would be required to receive a surplus price under (D) and also the nearby differential payments based on the fluid use of their "nearby" milk. It would be an absurdity to attribute such inconsistent and illogical reasoning to the Congress, particularly when petitioner attempts to equate the payment of Class I prices to nearby producers prior to the 1937 nearby differential as "similar differentials" and magnifies such inconsistency in so doing.

ARGUMENT

I. There Is No Important Unsettled Federal Question Or Conflict In Circuits, And The Decision Below Is Correct

The respondents respectfully submit that petitioner acknowledges the illegality of the nearby farm location differential when he equates the same with the 1936 Greater Boston milk order provision which provided for the payment of the Class I or fluid milk price of $3.30 per hundredweight for the base milk of "nearby" producers and the payment of a composite or blend price to other producers who were forced to bear the surplus of the market in such manner. Article IV of said Order, entitled "Minimum Prices", provided that the Class I minimum price was $3.30 per cwt. for milk delivered within 40 miles of Boston, and the respondents maintain that the Act clearly forbids the payment of the Class I or fluid milk price to a preferred group of producers for any reason, and particularly on the ground that such producers had received higher prices prior to the Act because of the fluid use of their milk. The referral to such an obvious violation of the Act as "similar differentials" reflects a failure or refusal to perceive the clear command of the Congress "for the payment to *all* producers . . . delivering milk to *all* handlers of uniform prices for *all* milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;". If the Congress intended to exempt the "nearby" producers from uniformity of price when it referred to "all producers", "all handlers", and "all milk", it would certainly have said so in the same plain language. The contention of petitioners that nearby producers are the sole beneficiaries of the governmental program through an apportionment of the fluid market to such preferred producers is simply untenable, whether effectuated through the nearby differential or the illegal Class I payments for "nearby" milk under the licenses and 1936 Greater Boston milk order. Moreover, such illegality is pointed up by the 1965 amendments to the Act, which provide that *all* producers are to be paid the Class I price for their "base" milk under the Class I base-rating plan authorized

under subsection 8c(5)(B)(ii)(d) of the Act.[7] The provisions of the Act relating to base-rating never authorized a scheme to apportion the fluid use market to one group of producers in a particular part of the milkshed and the burden of surplus to another group in a different area.

Petitioners note, however, that the 1936 Greater Boston order provision at least required the *delivery* of the milk of the nearby producer to a plant within the 40 mile radius of Boston. Under the present nearby differential provision, the "nearby" producer may deliver his milk 200 miles from the market center and still receive the full 46-cents "nearby" differential, but the "non-nearby" dairy farmer in the 200-mile zone may deliver his milk to the handler's doorstep in Boston without being eligible for said differential. Instead he must dig down in his pocket, in effect, and pay a part of his uniform price to an illegally preferred producer who performs no service and gives no value for the same.[8] The respondents respectfully submit that petitioners' characterization of Class I or fluid milk payments to the "nearby" producers as "premiums" or "preservation of similar differentials" when equated with the nearby differential is an admission of illegality and a fundamental violation of the very

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[7] Such a "differential" in the 1936 milk order – payment of a fluid milk price to nearby producers – could not have been ratified by the Congress without nullifying the Act at the same time. Moreover, the 1936 provision was not done *under* the Act, and it was not the same as the 1937 nearby differential which first appeared in the Boston milk order on August 1, 1937, the re-enactment of the Act having occurred theretofore on June 3, 1937. Additionally, this contention was rejected by this Court in *Brannan v. Stark*, 342 U.S. at 465-66, where the Court also made the equally applicable observation: "Nor have provisions bearing substantial similarity to those before us since been included in other milk orders so frequently as to amount to a consistent administrative interpretation of import in construing the Act."

[8] Respondents' brief in opposition to the brief *amicus curiae* of the State of Connecticut treats this subject in detail.

purpose of the Act. The entire rule and command of uniformity is devoured by the exception thereto.

The petitioner's attempt to justify the Secretary's finding in 1936 that nearby producers were entitled to Class I prices because of "the greater availability of their milk for Class I use" is totally lacking in merit. Even if this finding could be divorced from the illegal criterion of payment based on use of nearby milk, it is clear that respondents' uniform milk price could not be reduced by virtue of the availability of nearby milk. The Secretary himself found that "the inherent value of nearby milk to the market because of its *availability* and the high quality of such milk" are factors which, "to the extent that they are valid, are related to the extra value of such milk to the handler who buys it rather than to the producer generally and are, therefore, appropriate for consideration with direct-delivery differentials *payable by handlers rather than out of the pool.*" (22 Fed. Reg. 4213; App. E, p. 3e) The direct-delivery or authorized "market" differential already exists in the milk order as a part of the zone differential, and an additional differential limited to nearby producers could not be issued on the same basis. Moreover, the respondents supply the bulk of the fluid milk for the market, and an excellent article by the Assistant General Counsel, USDA, entitled, "The Pricing of Milk Under Federal Marketing Orders", 26 GW L.R. 180 (1958), illustrates the lack of merit in such "availability" argument:

> "The entire supply of milk which is approved by the health authorities for fluid use in a particular marketing area is fungible and homogenous. There is no discernable basis for selecting out of the approved supply one producer's milk rather than that of another for sale on the fluid market, and also a particular producer's milk cannot be distinguished in a milk plant from that of another. *All of the milk approved by the health authorities for the fluid use in a particular marketing area is available for disposition on the fluid milk market. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared*

> *equally by all producers and distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor.*" (See also, *Nebbia v. New York*, 291 U.S. 502 (1934)

The increased frequency of voluntary sales of nearby farms for housing subdivisions or commercial development hardly denotes reliability or availability of supply. Petitioner's reference to the accessibility of nearby milk to small handlers is also lacking in merit, in that such dealers were able to procure any required supply from more distant areas at the time of passage of the Act. This Court has also noted that it was usually the small dealer who undercut the producers' milk price and failed to bear his proper share of the burden of surplus in the market. *Nebbia v. New York*, 291 U.S. 502 (1934). (See also App. E, p. 30). It cannot be seriously contended that respondents must subsidize such "small dealers" as well as the larger nearby producers, particularly when they both refuse to bear their share of the burden of surplus of the market.

Although the respondents readily acknowledge that the uniform price is subject to certain enumerated adjustments, they respectfully maintain that the petitioner's reference to production costs as a possible basis for a "nearby" differential is inappropriate and admittedly inaccurate. The utilization of this contention after it was specifically abandoned by petitioner's same counsel during oral argument in the court of appeals reflects adversely on the purpose of the desired remand, and the petitioner did not oppose the issuance of the preliminary injunction or the escrowing of the differential monies on any such basis in the district court. Moreover, the Secretary found as follows in 1957 concerning cost of production as a justification for the nearby differential:

> "Cost of production is a criterion for establishing prices under an order only to the extent that it affects the supply of milk for the market. Orders do not guarantee a price equal to or exceeding the cost of production,

and therefore, producers generally should not be required to pay a minority an increased return because of high production costs. Accordingly, it is concluded that factor (1) above does not provide a legitimate basis for nearby location differentials." (22 Fed. Reg. 4213).

The Secretary took this same position shortly after the passage of the Act and correctly concluded that production costs were appropriate for consideration under the general pricing provisions of the regional order pursuant to subsection 8c(18) of the Act but were not appropriate for differentials among producers affecting the minimum prices.[9] In

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[9] The petitioner also fails to note that milk and its products are exempt from the requirement of Sec. 8c(11) of the Act that limits orders to the smallest regional area, and that such matters as production costs are considered in determining the regional marketing or production area. Moreover, the colloquoy involving Sen. Copeland revolved primarily around the size of such regional area and the latter's view that his district should not be included in an arbitrary region. He was assured by Sen. Murphy that the Secretary would not do this, but he was also informed that all producers within the same region would be subject to the same terms. (App. C, pp. 5-7c). Sen. Murphy also cited the differentials that were authorized under the Act and which reflected the present practice of business, such as the location differential that provided for an adjustment for the place of delivery of the milk, in that the cost of transporting the milk to the primary market entered into the pricing of the milk. He mentioned the market differential which was paid for the direct delivery of the milk to the city plant or market and which provides a service or saving to the handler by the elimination of handling costs involved when milk was first delivered to a country plant. He mentioned the differential for grade or quality of the milk delivered and which compensates producers for a milk of a certain butterfat content. All of these items reflected the then present practice of business and to some extent relate to production costs generally, and Sen. Murphy assured Sen. Copeland that the Act provided for the same. Nearby producers are still compensated for such location value of their milk under the order, but handlers never paid an extra payment to "nearby" producers simply because of the location of their farms and there was no "nearby" differential until it was placed in the 1937 Boston order. (See App. C, pp. 24-27c)

N.Y. State Guernsey Breeders Co-op v. Wickard, (CAA 2 1944) 141 F.2d 805, *certiorari denied,* 323 U.S. 725, the Guernsey producers maintained that they were entitled to an additional differential over the butterfat differential awarded to all producers under the adjustment to the uniform price authorized for grade and quality of milk. They based their claim on the ground that said differential did not adequately compensate Guernsey producers for the greater marketability of their milk for fluid use or for the added production costs involved in producing Golden Guernsey milk. Although they were able to show that they had been "able to secure a higher-than-average Class I (fluid milk) utilization for the milk of its members" in support of their claim of greater marketability, the Second Circuit did not agree that they were entitled to payment on such basis or on the basis of such historically higher prices:[10]

> "This finally is the ultimate issue in the case – one, of course, of outstanding importance in milk regulation. It seems to us that the Secretary has correctly construed the law, and that production costs or marketability are not in themselves factors to influence minimum milk prices. For such prices it hardly seems pertinent that special allowances should be made for milk more expensively produced, or more extensively and successfully advertised, but not better in grade or quality. In a purely competitive industry factors of this kind may well affect the market price, *but when regulation by way of minimum price is substituted by reason of the very disorder of the market and its effect in impairing farmer purchasing power* (Sec. 1, 7 U.S.C.A. 601), *it is not surprising to discover no allowance for them in the governing authority.*"

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[10] Golden Guernsey producers had been awarded preferential bases under the early milk licenses for the Greater Boston milk marketing area. (See App. E, p. 1e)

Moreover, the Second Circuit noted that the "higher-than-average Class I (fluid milk) utilization" of such producers might have been due to extensive advertising, superior selling practices, *or proximity to fluid markets,* the specific inclusion of the latter factor with the other enumerated reasons indicating that the Court did not view proximity to fluid markets, or a previous higher-than-average Class I or fluid utilization as a result of such location of certain producers, as a valid reason for special treatment of such "local" or "nearby" producers.

If production costs, marketability, and public demand for certain milk, *as evidenced by a high Class I utilization prior to the Act,* cannot be the basis for compensation over the butterfat differential for grade and quality of milk because the uniform minimum price would be illegally varied thereby, a serious contention can hardly be made that the uniform minimum price can be varied by reason of the location of a producer's farm, particularly when the nearby producers are already compensated for the location value of their milk through the zone differential of the milk order.

In view of the foregoing decision by a unanimous panel of the Second Circuit and the Secretary's own findings, it is submitted that the *Cranston* district court decision is in conflict with its own circuit and is thus doubly inappropriate as a basis for requesting a writ of certiorari. Although petitioners allege that an appeal is pending in the Second Circuit in said suit, it should be noted that the *Cranston* decision was issued on August 2, 1968, and that the briefs will not be filed therein until June, 1969, thus presumably assuring that such "conflict" will be in existence when a determination is made by this Court on the petitions for the writ of certiorari. Moreover, it is clear that the *Cranston* district court decision is patently erroneous and that it actually confuses the identity of the recipient of the nearby differential with the basis for its issuance by the Secretary. That decision states that "the differentials are paid on the basis of farm location. The use made of the milk by the handler is totally irrelevant". However, the Secretary stated as follows in his 1959 Decision

promulgating the Connecticut order and nearby differential, 24 Fed. Reg. 1049 at 1063:

> "The Federal order markets in the New England and the New York-New Jersey market provide for similar differentials * * * . *The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes.* Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. * * * The differentials adopted will reflect more representative values with respect to the milk of both nearby and distant producers since the nearby producer will share in the higher-priced Class I market *to an extent somewhat greater than would be the case under marketwide pooling.*"

Again, in 1960 at 25 Fed. Reg. 7833, the Secretary found as follows in respect to the Connecticut nearby differential:

> "As stated in the Secretary's decision of February 9, 1959 (24 F.R. 1049), the present provisions were established in recognition of the higher Class I utilization, and higher returns that nearby producers had customarily received over more distant producers."

The Secretary made the same findings in respect to the issuance of the nearby differential to producers in Massachusetts and Rhode Island, and a comparison of his findings for the different milk orders is set forth at pp. 17-18e of Appendix E. These findings openly admit that the nearby differential is a device to apportion the fluid milk price to nearby producers and that it is violative of the uniformity required under marketwide pooling and the Act. If a "differential" may be employed to obtain a larger share of the fluid milk market for nearby producers, then it is evident that such a differential predominates over the whole Act. When the issuance is grounded on the past use of a producer's milk, *then it is also evident that the illegal result has been obtained on an impermissible basis.*

Additionally, the findings as to higher returns admittedly do not refer to the period immediately preceding the passage of the Act, for the Secretary has found that prices to all producers were at depressed levels prior to the Act. Such findings as to higher prices relate solely to the use of nearby milk for fluid purposes before the advent of motor trucks, improved highways, refrigeration, etc., and the Secretary's findings in promulgating the Southeastern order and differential in 1958 clearly contradicts the petitioners' contentions that the lower court "did not fully understand the reasons for the higher prices received by nearby farmers":

> "Historically, dairy farmers in the States of Massachusetts, Rhode Island and Connecticut, because of their location with reference to the large population concentrations of New England, have disposed of a substantially larger portion of their production for fluid uses than have dairy farmers in the upcountry area. *Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market.* Under the marketwide pooling herein proposed and *without some adjustment mechanism,* the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk in the milkshed *rather than according to the utilization of his milk.* * * * " (23 Fed. Reg. 8238).[11]

Moreover, the petitioner's brief, in the *Blair* case, 370 F.2d 229 (1966), admitted that, "Nearby differentials were considered justified principally because nearby producers historically enjoyed a greater percentage of the marketwide Class I sales (*hence they received more for their milk than did producers located more distant to the center of consumption*);"

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[11] The Secretary also found that the nearby producer obtains the benefit of an established Class I price under regulation which may be higher than in the absence of regulation, and has assurance that he will not lose his market to more distant milk.

The subject of the nearby differential was exhaustively treated at the 1963 administrative hearings for the Massachusetts-Rhode Island milk order, and every witness testifying in favor of such differential grounded the same on the past use of nearby milk for fluid purposes, an illegal criterion that also acknowledges the lack of any current justification for its existence.

The correctness of the lower court's decision and that in *Blair* concerning the Secretary's inability to amend the Act by giving consideration to "historical" price relationships or preservation of the "status quo" in favor of certain producers is illustrated by the case of *H. P. Hood & Sons v. United States*, 26 F. Supp. 672, *affirmed*, 307 U.S. 588, 59 S. Ct. 1019. The district court in the *Hood* case allowed a producer to intervene for his class on the side of the handler, Hood & Sons, and a second producer was allowed to intervene on the side of the Whiting Milk Co., a handler that was also sued by the United States to enforce the milk order, 21 F. Supp. 321 (D.C. Mass. 1937). The producers' contentions concerning entitlement to the "historical" higher prices were fully considered and rejected by the district court.

The intervening producers continued in the case when it was presented to the Supreme Court, 59 S. Ct. 791, 306 U.S. 629, 83 L. Ed. 1032. Their arguments were summarily rejected by the Supreme Court with the comment in 59 S. Ct. at page 1027:

> "Other contentions are made which have been considered but they do not seem to require any statement. Affirmed."

Of especial significance is the fact that the interveners in *Hood* were non-nearby producers, the main intervener being from the State of Vermont, and this clearly indicates that many non-nearby producers also possessed preferential fluid milk outlets and higher prices prior to the Act. However, the Secretary acknowledges that the Congress did not write the legislation to retain the "status quo" and preferential price position of these producers, and it is equally clear that

the Congress did not engraft any exception of this nature in favor of a particular group of "nearby" producers.

The Supreme Court also rejected the analogous arguments of the handlers that the payment of the excess of their fluid sales over and above the uniform blended price into the producer settlement fund or marketwide equalization pool for transfer to other handlers *and the latters' producers* violated the constitutional rights of the handlers *who disposed of their milk for fluid or Class I use.* The Supreme Court noted the obvious fact that such handlers were required to pay only a minimum price according to the nature of their sales, and that they had no interest in the fund or pool to question disbursements therefrom or the uniform blended price required to be paid to all producers.

If handlers with a high fluid utilization could not pay their own producers on the basis of the excess of their fluid sales over the marketwide average price, then it is clear that producers with such "historical" fluid milk outlets[12] may not demand payment on such basis through a differential deduction from the equalization pool prior to computation of the uniform price. Either method of avoiding the Act's command of a uniform price irrespective of use would nullify the Act.

It is important to note that the arguments of handlers and those producers who received higher prices *prior to the Act* were in opposition to the equalization and uniformity required by the Act, whereas the arguments of the ineligible or non-nearby producers concerning violation of their statutory and constitutional rights are grounded *upon the Act.*

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[12] Respondents note that the "historical" boundary under the Connecticut differential is the New York Thruway, the tank truck crossing said highway numerous times to pick up milk from farms on both sides of the highway, although farmers on only one side of this relatively new thruway are eligible for the nearby differential. Such illogical bureaucratic determinations create discontent and unrest among farmers.

The latter acknowledge the constitutionality of the Act and its fundamental purpose to secure to all producers "the right to be paid a minimum price". *Stark v. Wickard,* 321 U.S. 288 (1944).

The Act provides for uniform minimum prices, not for varying non-uniform "historical" prices, and any contention concerning preservation of the "status quo" would nullify the uniform price requirement of the Act even if consideration of the use of a producer's milk did not formulate the basis for the nearby differential. Moreover, adoption of such a contention on a factual basis would result in the nearby producers receiving a surplus or Class II price for their milk, in that the Secretary found in each of his decisions promulgating a nearby differential that the nearby producers were losing their markets to distant producers and that local milk was often disposed of as surplus or manufactured milk.[13]

The respondents also respectfully submit that there is no conflict between the court below and the First Circuit when the petitioners' contentions are founded on the *dictum* in *Green Valley v. United States,* 108 F.2d 342 (1st Cir. 1939) which offered some gratuitous comments concerning the "location differential" of the aforesaid Greater Boston milk order of August 1, 1937. This case was thoroughly considered in both *Blair* and this action, and it should be noted that the action was one by the United States against handlers for enforcement of the milk order

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[13] When the transportation allowances to handlers under the order exceeded actual transportation costs by only 7 cents in the distant zones, the handlers sought to purchase their supplies from distant producers, a fact which indicates that handlers would not pay even a 7-cents premium for nearby milk. Moreover, the Secretary acknowledged that "city plant operators often have preferred to purchase milk from country sources rather than from local producers. The situation is, in fact, one of the major marketing problems dealt with in this decision because recently much of the locally produced milk has had to be disposed of in manufacturing channels." 29 FR 11208.

provisions. *No producers were involved in that case,* and the Court itself belatedly acknowledged that the handler had no standing to question disbursements from the marketwide pool or producer settlement fund. Nevertheless, the Court did make the gratuitous comment that the nearby differential was authorized under the Act as a location and market differential and stated as follows:

> "*Whatever the explanation,* this group of producers in fact commanded somewhat more favorable prices for their *fluid* milk as against producers more remotely located. The differentials now objected to were inserted in the Order *so as not to disturb the status quo in this respect.*

Initially, the plaintiffs make the point that the validity of the nearby differential was not before the Court, and the Secretary can hardly contend otherwise when the Court itself accepted the Secretary's argument to this effect.

The total error of the *Green Valley dictum* and the court's evident unawareness of the full extent of the *Hood* decision in respect to "retention of higher prices" or "preservation of the status quo" is abundantly clear, and this error is compounded by numerous other statements that reflect a cursory treatment of the question.

The Court stated that the differentials were "largely undefined" but this is obviously incorrect, for the entire Act and Congressional reports reflect the care and caution used in drafting the legislation because of the then recent cases of *Schechter Poultry Corp. v. United States,* 295 U.S. 495, and *Panama Refining Co. v. Ryan,* 293 U.S. 388. As stated by this Court in *Brannan v. Stark,* 342 U.S. at page 465:

> "With these cases specifically in mind, Congress set forth with deliberate particularity and completeness the terms which the Secretary might include in marketing

orders. H.R. Rep. No. 1241, 74th Cong., 1st Sess. 8; S. Rep. No. 1011, 74th Cong., 1st Sess. 8."[14]

The *Green Valley* court noted that nearby milk was "presumably" delivered to Boston, but the record discloses that most of it was disposed of in secondary markets. It failed to note that many "non-nearby" producers delivered to Boston, a fact which is evidenced even by the order provision which gave them the market or direct-delivery differential. It failed to realize that all producers were receiving depressed prices at the time of passage of the Act and that *non-nearby* producers with fluid milk outlets had petitioned the Supreme Court in the *Hood* case for retention of the higher prices that they had formerly received for their milk. In all fairness to *Green Valley*, however, it must be acknowledged that many of the respondents' arguments were not presented to that court. In all fairness to respondents, it can hardly be argued that they may be denied their day in court and that they can be bound by arguments advanced by the parties in those cases who have an interest adverse to the respondents. By the same token, the *dictum* of *Green Valley* may not be urged as a conflict in circuits under such circumstances.

The Supreme Court handed down the *Hood* case decision on the same day as the decision in *United States v. Rock Royal*, 26 F. Supp. 534, 307 U.S. 533 (1939), *this case also involving only handlers*, and the Court repeating in this case that handlers had no standing to question disbursements from out of the producer settlement fund. The Court referred in the case to a differential under the old New York order and stated that Sec. 8c(5)(A) of the Act pertaining to *handlers* authorized an arrangement for differential payments *by them* on milk *delivered* to plants in certain counties near the metropolitan area. The Court stated with reference to

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[14] Details of administration of the orders and Congressional program are left to the Secretary, but the extent of his statutory power is prescribed by the Act and determined by the judiciary under Art. III of the Constitution. *Stark v. Wickard*, 321 U.S. 288, 310.

the handler's contention that the preferential payments were discriminatory that, "This was found discriminatory *as between producers* by the District Court but there was no finding or conclusion of law as to any discrimination against *defendants*." The defendants in *Rock Royal* were handlers, and the issue herein was thus not before the Court in that case, but it could not be cited as authority by defendant Secretary in any event. Indeed, although the differential involved there was entirely distinct from that in the current Order or the former nearby differential in the New York-New Jersey order, it is clear that the court would have viewed as an even more serious matter any discrimination between producers *based on use of milk*, the court stating at page 580: "If the cooperative members were freed of the burden of carrying their proportion of milk going to manufacturing use, the discrimination in their favor would be the most strongly marked."

The *Rock Royal* case is thus not authority for the nearby differential payments exacted from the respondents, and the petitioner has acknowledged that the market or direct-delivery differential should be paid by handlers rather than by producers through deductions from the marketwide pool. Moreover, respondents agree that *handlers* may pay the differential because of the service and savings effected when milk is delivered directly to the market center, and they respectfully submit that the *Rock Royal* case is in no way in conflict with the decision below. No other cases are cited by the petitioner in respect to any conflict with the decisions of this Court or other circuits, and it is clear that the petitioner could have sought certiorari after the *Blair* decision if he actually thought that the aforesaid cases supported his position. Instead he terminated the nearby differential of the large New York-New Jersey order but inconsistently refused to terminate the nearby differential in this order. This is particularly inconsistent when it is considered that his brief in *Blair*, filed as an exhibit in this case, specifically cited the Boston nearby differential as being "identical in purpose and effect" to the N.Y.-N.J. nearby differential and

"predicated on very similar findings." Such brief argues with detailed specificity the identity between the nearby differentials of the two milk orders, and his brief quoted approvingly from the definition of the "market" differential in the Congressional Reports to show that the nearby differential was a "location" differential rather than the "market" differential authorized by subsection 8c(5)(B)(ii)(a) of the Act. In fact, petitioner admitted that he had always justified the nearby differential as a location differential under subsection 8c(5)(B)(ii)(c) of the Act:

> "*Thus, dating almost to the very enactment* of 7 U.S.C. 608c(5)(B)(c) the Secretary has construed *that* provision as permitting the very type of nearby differential which the appellants would have this Court declare unauthorized. It is, of course, axiomatic that such a *long-standing contemporaneous administrative construction of the Section* by the official charged with its administration is entitled to great weight."

It thus appears that the petitioner himself has rejected the *dictum* of *Green Valley* concerning justification of the nearby differential as the authorized market differential relating to the direct-delivery of milk to a city plant or market instead of initially to a country plant where double handling costs are involved. In view of this fact, the respondents respectfully submit that the citation of said case and the district court decision in *Cranston* as a basis for certiorari is clearly lacking in merit. Moreover, the latter decision completely fails to comprehend that the authorized market differential is already in the Connecticut order, just as it is in the Massachusetts Rhode Island order, as a part of the zone differential relating to transportation charges and handling costs of country and city markets or plants. The *Cranston* decision actually refuses to acknowledge the present existence of the authorized market differential in the Connecticut order when it enumerates the differentials contained therein, and it then proceeds to hold that no such market differential ever existed as defined in the Congressional Reports. Such a differential also existed in the very secondary

market in which that court sat and in which those plaintiffs are located, the schedule of such "customary market differentials" being set forth at pages 22-23c of App. C with related material at pages 12-22c that illustrates the total inaccuracy of the testimony of the interested witnesses upon which the *Cranston* district court relied.

The respondents respectfully submit that the *Cranston* district court decision is also in conflict with its own circuit in respect to the principle enunciated in *Kass v. Brannan,* 196 F.2d 791, and *Knudsen Bros. Dairy v. Freeman,* 303 F.2d 886 (a Connecticut case), and by this Court in *Lehigh Valley Farmers Cooperative v. United States,* 370 U.S. 76, involving a similar differential payment.

In the *Lehigh Valley* case, the Supreme Court declared illegal the "compensatory payments" provision of a milk order which required a handler to make such payments into the Producers Settlement Fund when he brought "outside" milk into the region for sale as Class I or fluid use, the Court stating:

> "As has been noted, the sale for fluid use of nonpool milk in the marketing area displaces pool milk that might otherwise be used for the premium outlet. * * * A close examination of the workings of the present compensatory payment provision reveals that its effect is to preserve for the benefit of the area's producers the blend price which they would receive if all outside milk were physically excluded and they alone would supply the fluid milk needs of the area. For every cwt. of pool milk that is forced into 'surplus' use by the entry of nonpool milk, the handler introducing the outside milk is required to pay for the benefit of the area's producers the difference between the value of pool milk would have had if the nonpool milk had never entered and the value it has once the nonpool milk is sold for fluid use. *In effect, therefore, the nonpool milk is forced to subsidize the pool milk and insulate the pool milk from the competitive impact caused by the entry of outside milk.* This was recognized by the

> Court of Appeals which held that such a compensatory payment was '*designed to compensate the pool for the loss of the Class I fluid milk utilization.*' * * * Along with enumerating the powers granted to the Secretary of Agriculture so as to avoid the 'delegation' problems brought to light by the then recent case of *Schechter v. United States,* 295 U.S. 495, the Congress sought in 1935 to limit the Secretary's powers so as to prevent him from establishing 'trade barriers.' * * * that history likewise makes it clear that as regards milk the word 'prohibit' refers not merely to absolute or quota physical restrictions, *but also encompasses economic trade barriers of the kind effected by the subsidies called for by this 'compensatory payment' provision.*" (Emphasis supplied)

The payments in *Lehigh* were made by *handlers* for the laudable purpose of protecting *all* producers whose milk was regulated under the regional order, and the payments were required only in those months in which surplus milk exceeded 15 percent of the total pool milk. The nearby differential payments, however, benefit only a minority of producers and constitute an injury to the majority of *regular* suppliers of the market who must bear the burden of surplus through such device. The non-nearby milk is being used to subsidize nearby milk, and the nearby producer is insulated from competition for the fluid milk market by virtue of the nearby differential payments. They constitute a burden on interstate commerce, interfere with the free flow of commerce between States, and amount to an illegal duty or tax on every hundredweight of milk produced and sold by non-nearby dairymen, the economic market barrier erected thereby being equal in degree to such tax or subsidy.[15]

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[15] The decisions of this Court in *Baldwin v. Seelig,* 294 U.S. 511, *Dean Milk Co. v. Madison,* 340 U.S. 349, *Hood & Sons v. DuMond,* 336 U.S. 525, and *Polar Co. v. Andrews,* 375 U.S. 361, emphasize the inability of the Secretary to promulgate such discriminatory differentials.

The respondents respectfully submit that there is no conflict that would warrant issuance of the writ, and that the petitioner's attempt to create an ambiguity in respect to the plain language of the Act concerning uniformity of price irrespective of use is completely devoid of merit. The contention that nearby producers may receive payment based on the past use of nearby milk is clearly untenable, and to contend that the current payments on such basis are not prohibited because the present use of nearby milk is not considered in making such differential payments is totally unsound and illogical. Although petitioner states that there is no necessity for extensive discussion of the merits, it is obvious that this is because of the lack of merit in such contentions, and respondents note that his petition contains all prior arguments to the courts below.

The disbursement of the respondents' escrowed funds by the district court without further delay is imperative if additional irreparable injury is not to be sustained by the respondents. The petition must be denied for this reason and because of the complete lack of merit in petitioners' contentions, his own arguments virtually assuring the chaotic and disorderly marketing that would occur in every regional order if the nearby differential is judicially validated. It would open the floodgates for the issuance of similar discriminatory price preferences based upon political expediency and group pressures, thereby reviving all of the cutthroat competition that gave rise to the passage of the Act and effectively nullifying its very purpose and policy.

Moreover, the petitioner refused to apply for certiorari after the *Blair* case, and 35,000 dairymen in that market and thousands of others throughout the country have likewise accepted the fact that such differentials are illegally discriminatory and unauthorized under the Act. The present petition amounts to a belated application for review of that decision, and only confusion and uncertainty among dairy farmers would result from the granting of the writ. Lack of confidence in the administrative process would also ensue if

the case was now remanded for any reason, for this differential was exhaustively considered from its very beginning during the 1963 promulgation hearings and the Secretary's own committees have recommended its abolishment without success. No valid reason was ever established for the nearby differential after exhaustive consideration by the Secretary, and remand would actually constitute a denial of legal counsel under the contemplated procedure and preclude any future challenge to petitioner's authority by grass-roots farmers. The Court below astutely noted that remand to the agency was desired for no proper purpose, and the district court should oversee the prompt disbursement of the escrowed monies directly to respondents in conformity with the records maintained for such purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. RYAN
CHARLES P. RYAN
JOHN J. SIMARD

Counsel for Respondents

March, 1969

No. 868

IN THE

Supreme Court of the United States

October Term, 1968

Office-Supreme Court, U.
FILED
MAR 26 1969
JOHN F. DAVIS, CLERK

FREDERICK T. ZUBER, ET AL.,

Petitioners,

v.

RUSSELL ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR RESPONDENTS RUSSELL ALLEN, ET AL., IN OPPOSITION TO BRIEF AMICUS CURIAE OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CHARLES P. RYAN
EDWARD J. RYAN
JOHN J. SIMARD

400 Prudential Building
Washington, D. C. 20005

Counsel for Respondents

IN THE

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October Term, 1968

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The brief *amicus curiae* of the Commonwealth of Massachusetts presents little more than a recitation of the alleged injury that would result to Massachusetts "nearby" producers by virtue of the denial of the petition for a writ of certiorari. In respect to the statistical data set forth by the *amicus curiae*, the respondents note that most of it is selective in nature and misleading by virtue of significant omissions of relevant facts or by reason of utilization of different terms on an interchangeable basis.

The brief states that there are 1,564 dairy *farms* in Massachusetts as of July 1, 1968, and that "all but a handful" are located within the nearby and intermediate zones of the Massachusetts–Rhode Island milk order. However, the official reports of the Market Administrator for said milk order for July 1, 1968, reflects that there are only 1,233 Massachusetts *producers* serving the Massachusetts–Rhode Island market, and the number of dairy *farms* would presumably be less by reason of the fact that some dairy farms are run by more than one individual producer. It is evident that those Massachusetts producers who do not market under the federal order are not affected by the escrowing of the respondents' monies, and the figure cited by the *amicus curiae* obviously includes farms that are not embraced under the order. The cited figure is off by at least 231 dairy farms, and their location within the nearby differential zone is of no significance if they are not covered under the federal order.

The *amicus curiae* then states that "since the escrow commenced, 296 *dairy* farmers have ceased operation, a 17 percent drop in the number of *farmers* in Massachusetts in the two-year period." No official source is cited for the data set forth, and the brief fails to state whether the 296 dairy farmers marketed under the federal order. There is no indication as to whether the 17 percent drop in "the number of farmers in Massachusetts" refers to dairy farmers or all farmers in Massachusetts. In any event, the reference of the *amicus curiae* to the 231 dairy farms as "a handful" would appear to be equally applicable to the 296 dairy farmers who have ceased operation in the two years that the respondents' monies have been escrowed.

The preliminary injunction and escrow order was entered on January 16, 1967, and the official figures from the Market Administrator's annual statistical reports discloses that there were 1,411 Massachusetts producers who

marketed under the order as of January 1, 1967. The same reports reflect that there were 1,664 Massachusetts producers under the order on January 1, 1965, and this would indicate a loss of 253 Massachusetts producers during the prior two-year period. As of January 1, 1969, there were 1,180 Massachusetts producers under the order, a drop of only 231 producers during the two-year period of the escrow account. The official reports thus show that fewer Massachusetts producers who marketed under the order left dairy farming during the two-year period of escrowing than in the prior two year period of 1965-1967, and the respondents respectfully submit that such fact evidences the lack of necessity for continued subsidization of nearby producers by the respondents. It also evidences that the contentions of the nearby producers must be closely scrutinized in order that a fair and accurate evaluation may be made thereof.

The brief *amicus curiae* next treats the nearby vs. non-nearby attrition rate in recent years, but it is noted that no supporting figures are provided for the general allegations made in the brief. The official reports are cited for the statement that, "in 1967 and 1968 after the escrowing of the net differential the nearby zone lost a large number of farms but the distant zone increased their number in 1967 and experienced only a negligible drop in 1968." However, an examination of the Market Administrator's reports cited by the *amicus curiae* discloses that there were 2,620 nearby producers under the milk order on January 1, 1965 and 2,198 such producers as of January 1, 1967, a drop of 422 nearby producers in the two-vear period prior to commencement of the escrowing of a part of respondents' minimum milk price. There were 1,985 nearby producers under the order on January 1, 1969, a drop of 213 in the two-year period of the escrow order. Again the official figures are at variance with the contentions of the *amicus curiae* and clearly demonstrate that nearby producers need not exact

the penalty payments from the respondents to stay in business.

Nor do the statements of the *amicus curiae* hold up when measured against the official reports in respect to the claim that there were more distant producers in 1968 than in 1966, the brief limiting its reference to the month of October in said years. When analyzed on a consistent basis, it is noted that there were 6,706 distant producers under the order on January 1, 1966 and only 6,451 on January 1, 1969, or at the end of 1968. Moreover, the distant producers decreased by 165 in 1968 in spite of an increase in their numbers that was attributable to an expansion of the order's coverage in December, 1967. The respondents respectfully submit that the contention of the *amicus curiae* that "the distant zone increased their number in 1967" is unfair by virtue of its failure to explain that this was not solely due to new dairy farms being started in the non-nearby area but also occurred as a result of the expansion of the order in 1967 to cover existing farms in areas that were not previously embraced by the federal order.[1]

The respondents further note that the brief *amicus curiae* omits the year 1966 entirely when setting forth the foregoing inaccurate and selective statistics. The same official reports of the market administrator discloses that there were 7,696 non-nearby dairy farmers under the order on January 1, 1965 and only 6,706 on January 1, 1966, a loss of almost one thousand distant producers in the first year following consolidation of the Greater

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[1] The expansion of the order in 1967 included additional nearby producers who had never received the nearby differential payments, but they would receive the respondents' escrowed monies under the petitioners' arguments that nearby producers have "relied" on such exactions from the respondents and by virtue of the "historical pricing patterns".

Boston order with the secondary market orders of Worcester, Springfield and Southeastern New England.[2] The nearby producers under the order decreased by but 299 during the same period, and they sustained a reduction of only 223 nearby producers in 1966 as compared to a loss of 485 non-nearby producers in that year. The omissions of the brief *amicus curiae* are thus not mere happenstance, and virtually every statement and statistic cited in the brief is at variance with the facts or misleading in nature by virtue of such omissions or interchange of apparently identical but completely different identifying terminology. The same tactic has prevailed throughout this litigation in the lower courts, the respondents being forced to spend an inordinate amount of time in rectifying such misleading material.

The brief *amicus curiae* also refers to average income figures for either dairy farmers or all farmers in the Northeast United States, the exact reference not being fully identified in the brief. The reference would include non-nearby dairy farmers in any event, and their smaller incomes would necessarily reduce the overall average figure and render it inapplicable to the larger nearby producer. Significantly, the brief acknowledges the larger size of the average nearby producer's operation when it cites

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[2] On January 1, 1964, prior to consolidation of the milk orders on Oct. 1, 1964, there were 692 nearby producers and 7,317 non-nearby producers under the Greater Boston order, and only 67.9% of the nearby milk was assigned to Class I use. The percentages were higher for all zones out to the middle of the milk shed, varying from 79.1% in zones 9-15, 84.1% in zones 16-17, 70.7% in zone 18, and 90.5% in zones 19-20 of the milkshed or 200 miles from Boston. In January, 1965, after consolidation of the orders, the non-nearby producers numbered 7,696, but the nearby producers jumped to 2,620 and increased the nearby differential payments over four-fold. Many non-nearby producers were forced out of business the following year.

the increase in the size of their herds in the last ten years. This clearly indicates that nearby producers are able to sell their herds to other nearby producers when they decide to sell their land at huge profits for housing developments or other commercial purposes.[3] This citation would also indicate that there is little overall impact on the Massachusetts dairy business when nearby producers do sell their farms and their cows. Under these circumstances, the statistical data cited by the *amicus curiae* as to attrition in the number of nearby producers or farms has little real meaning or significance.

Moreover, the respondents respectfully submit that the income data quoted by the *amicus curiae* is obviously unrealistic, and that the inclusion of the affidavit of Reuben Hall and the eighteen dairy farmers in the same reference serves only to emphasize such fact. In fact, the proffer of the latter affidavits, some of which were not notarized,

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[3] "I, Herman L. Sparrow, have for fourteen years owned and operated a dairy farm in the town of Northboro, Worcester County, Massachusetts, which has been in my family since 1900 and on which I produced 1,118,967 pounds of milk during 1966 which was sold to a handler regulated under the Massachusetts–Rhode Island federal milk order. My income from the farm operation for this year was about $74,000 and my expenses for the year amounted to about $72,100 without allowing for any return on approximately $27,000 of new capital invested in the business. Net return for my labor and management above expenses was therefore $1,900 and allowance for five percent return on capital invested would reduce this figure to $550. Without the $.46 per hundredweight differential payment I now receive, my gross income would have been $5,147.40 less in 1966, and I would have begun to seriously consider disposing of my property for a housing development. * * * ." Respondents submit that such affidavits are unrealistic, counsel proffering the same not assuming responsibility therefor even though he had notarized some of the same, and they further maintain that they should not have to subsidize such producers who could obtain a better return from a bank for their monies.

was without compliance with the rules as to service on opposing counsel at the appropriate time, the petitioners consistently refusing to serve such papers and motions until immediately before a hearing in order to prejudice the respondents' opportunity to question or defend against such matters. The record below also evidences the inaccuracy of many of the contentions made in the affidavit of Attorney Hall, and the respondents note that many of the statistics and citations set forth in the brief of the *amicus curiae* are identical to those set forth in the papers submitted by Attorney Hall below.[4]

The reference of the *amicus curiae* to the alleged reliance of nearby producers on continued receipt of such illegal exactions from respondents is an obviously unsound and inequitable argument. One could argue with equal force that the increased costs of necessary supplies should be borne only by non-nearby producers because the nearby producers had not anticipated such increased costs. The nearby Rhode Island producers might argue that they need such nearby differential payments because of anticipated institution of a state income tax in Rhode Island. Even an individual who had been embezzling monies from his employer over a long period of time could argue that he should continue to receive such monies because of reliance thereon and investments made upon such basis. But it must be remembered that non-nearby producers go out of business and simply bear the loss of their vocation and investments. The fact that one's expected profit or return

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[4] The brief *amicus curiae* even refers to the respondents' escrowed monies as the "net differentials", the same terminology being used below to divert attention from the fact that such escrowed monies emanate solely from the respondents' milk price and are attributable to the marketings of their milk during the escrow period. Records are being kept of such marketings by the Market Administrator, and the nearby producers currently receive the full uniform price for their milk without escrowing, the sums attributable to their marketings which were in escrow having previously been returned to them at the suggestion of respondents.

is decreased, however, would not entitle one group of individuals in a particular field of endeavor to claim that the unexpected lower profit or return should be covered by a forced payment from their fellow workers or investors. Nor should this reasoning apply to require an extra profit or return to certain preferred producers, particularly from out of the pockets of the smaller dairy farmers. This is neither good Government nor sound economics. It creates illegal discrimination among dairymen and leads to disorderly marketing.

Moreover, the total lack of merit in the fallacious "reliance" argument is illustrated by the testimony of nearby producers in the *Cranston* trial, and said testimony evidences that such arguments do not usually originate with dairy farmers. One nearby producer testified in that case that he had relied on such differential payments in making an investment of $107,000 and another stated that he had relied on such payments of 46-cents per hundredweight (or almost $5,000 annually) in incurring indebtedness that required payments of about $1,000 per month. These nearby producers stated that they were receiving nearby differential payments of 46-cents per cwt. under the Connecticut milk order, but the differential in that order returns them only but about 2-cents per cwt. or an average of $12.50 per month over the uniform price in the absence of such differential. They testified that the CMPA economist had instructed them concerning the nearby differential payments, and the lack of merit in the argument concerning "reliance" on the nearby differential payments in making investments, etc., becomes painfully evident when it is realized that this same argument was even made in respect to the 2-cents nearby differential of the Connecticut order. Additionally, other "nearby" producers all across the United States are able to exist without such subsidies in making their investments. Nevertheless, the *Cranston* trial devotes page after page to such inaccurate testimony that only serves

to illustrate that most nearby producers did not even know they were receiving such a differential payment. Most nearby dairymen would not be in favor of exacting such payments from their smaller fellow dairymen, and some nearby Massachusetts producers actually signed a petition stating that they favored elimination of the differential.[5]

The other contentions of the *amicus curiae* reflects an unfamiliarity with the record below and issues in the case. The district court held many hearings over a period of six months, and it gave exhaustive consideration to the arguments presented by the Secretary and the nearby

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5 "We, the undersigned producers, do not want the Allen-Freeman case appealed to the Supreme Court for the following reasons: 1. Appealing this case will result in many more months of litigation and escrowing of differential funds. 2. An appeal could prevent the immediate disbursement of the escrow fund. 3. Appealing this case will result in a cross-appeal of that part of the court's decision that awarded a portion of the escrow fund to nearby producers, therefore it is possible that we might lose this share. 4. Even though we stand to lose financially by losing this case, we feel that nearby differentials should be ruled invalid. In our opinion, all producers should be working in harmony for a higher uniform price. If nearby milk is more valuable than distant milk, the handler or dealer should pay the premium, not the distant milk producer. 5. The eight producer intervenors have no right to appeal or request a stay in this case without consulting all nearby producers. They are jeopardizing our share of the escrow fund and would appear subject to legal action. 6. We feel that many more nearby producers would join our cause if they were informed that the case is going to be appealed." (Respondents previously advised that they would not seek certiorari of the lower court's award of part of their monies to the nearby producers if no further proceedings were had, in that the present need of non-nearby producers for such monies outweighed the future receipt of all of their monies through a time-consuming petition for a writ of certiorari. They petitioned this Court only after the nearby producers did so, and they now seek full relief because of the additional injury occasioned by delay in disbursement of their monies).

producers who applied for intervention. The courts below simply rejected the illogical contentions concerning Attorney Hall constituting the Congress of the United States in respect to legislative intent, and it also rejected the equally illogical contention that an isolated and ambiguous colloquy between two Congressmen should be interpreted by the court in such manner as to prevail over the language of the Act, the specific language in the Senate and House reports, the testimony in the administrative records, and other relevant material. Moreover, the testimony presented in *Cranston* was nothing more than a third relitigation of the same contentions that nearby producers' counsel have been making since 1965, and it led to a decision that is patently erroneous, the district court in that case failing to note that the "market differential" defined in the Congressional reports exists in the Connecticut milk order and had existed in the very area in which the district court was located. (See App. C, pp. 21-23c). The *Cranston* district court also accepted the testimony of Attorney Hall that varied from the testimony in the administrative record (App. C, pp. 24-30c), and it accepted the testimony of another witness as controlling when his testimony is contradicted by the very document that his testimony was based upon, said document not being produced at the trial because of such fact. (App. C, pp. 12-21c). Other than the minimal testimony of 4 non-nearby producers and 3 nearby producers, the only witnesses were the two aforesaid individuals, 2 CMPA officials who had previously testified in administrative proceedings, and USDA personnel who had full opportunity to present their testimony in this case.[6] Instead, they even refused to furnish certain administrative records

---

[6] A Connecticut bank official initially testified concerning loans made to nearby farmers on the basis of the differential, but he admitted that he would have made such loans in any event when he realized that the Connecticut nearby differential did not return 46-cents but only 2 or 3 cents.

to the district court below after respondents furnished the court with detailed summaries thereof that reflected testimony adverse to the petitioners' arguments.

The 7 nearby producers were given repeated opportunities to present any argument for the district court's consideration, and respondents even furnished them with administrative record references when petitioners intentionally sought delay on that ground. Petitioners still continue to argue denial of intervention after choosing to prosecute an appeal from the district court's judgment and refusing the opportunity to prosecute their appeal concerning denial of intervention. Respondents submit that this is totally improper and that petitioners desire the better part of two worlds at respondents' expense without even showing any basis therefor.

The only other contention made in the brief *amicus curiae* is also lacking in merit, in that another selective reference is made to the year 1967 in respect to "evening out production", a phrase that obviously has many meanings. The accuracy of such figure is irrelevant in any event, even if attributable to the expansion of the coverage of the order in that year, since the nearby producer is already compensated for such factor under the seasonal incentive plan that rewards even producers. It is inequitable to contend that a producer should be compensated twice for the same factor, and it is also inequitable to imply that such factor is not already compensated for in contending that further proceedings are necessary for such reason. The same inequity is apparent in respect to the nearby differential payments, since nearby producers are already compensated under the zone differential of the milk order for any possible location value of their milk. 7 C.F.R. 1001.62. The petitioners or *amicus curiae* do not even suggest a plausible or proper basis for any further proceedings of any nature, and the other contentions made in the brief *amicus curiae* of the Commonwealth

of Massachusetts are either too lacking in substance to merit a reply or are treated in the other briefs filed by the respondents herein.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES P. RYAN
EDWARD J. RYAN
JOHN J. SIMARD
Counsel for Respondents

March, 1969.

COPY

No. [illegible]

IN THE

Supreme Court of the United States

October Term, 1968

Office-Supreme Court, U.S.
FILED
MAR 26 1969
JOHN F. DAVIS, CLERK

FREDERICK T. ZUBER, ET AL.,

Petitioners,

v.

RUSSELL ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR RESPONDENTS RUSSELL ALLEN, ET AL., IN OPPOSITION TO BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CHARLES P. RYAN
EDWARD J. RYAN
JOHN J. SIMARD

400 Prudential Building
Washington, D. C. 20005

Counsel for Respondents

IN THE

Supreme Court of the United States

October Term, 1968

No. 861

FREDERICK T. ZUBER, ET AL.,

Petitioners,

v.

RUSSELL ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM FOR RESPONDENTS RUSSELL ALLEN, ET AL., IN OPPOSITION TO BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The respondents initially note that Rhode Island nearby producers supply but about 2 percent of the milk for the Massachusetts–Rhode Island marketing area, and that their number are steadily dwindling as a reliable source of the milk supply. On January 1, 1965, there were 262 nearby producers located in Rhode Island, and this number was decreased to 203 as of January 1, 1967, a drop of 59 producers in the two-year period preceding the escrowing

of respondents' monies in this case. The brief *amicus curiae* states that Rhode Island's "many producers" now number but 178, a decline of 25 in the two-year period that the nearby differentials have not been paid to Rhode Island producers. The respondents respectfully submit that these figures reflect that Rhode Island producers are in no manner dependent upon non-nearby dairy farmers for economic survival.

The brief relates primarily to an interpretation of the plain language of the Act concerning payment of a uniform price to all producers for all of their milk irrespective of the use thereof by the handler to whom they deliver the same. This matter has been treated in the other briefs filed herein by respondents, and they respectfully maintain that such interpretation is in conflict with the many statements of this Court in various milk cases and is totally devoid of reason because of its failure to realize that the entire Congressional program would be completely nullified by such interpretation.

Respondents respectfully say that the quotation of a few sentences of this Court's opinion in the case of *Lehigh Valley Farmers Cooperative v. United States,* 370 U. S. 76 (1962), is taken entirely out of context and that it is clear that said decision supports the respondents' position in this case concerning payment of a uniform price irrespective of use, for the Court stated as follows in respect to the Congressional program that provided for such uniformity of price:

> "The net effect is that each handler pays for his milk at the price he would have paid had it been earmarked at the outset for the use to which it was ultimately put. *But the farmer who produces the milk is protected from the effects of competition for premium outlets since he is automatically allotted a proportional share of each of the different 'use' markets.*"

The *amicus curiae* fails to understand that all producers serving the same handler under individual-handler pooling also receive a uniform price irrespective of the use made of their particular milk by the handler to whom they deliver. Nor is there a wide variance in price among handlers in the few markets which have individual-handler pooling, in that such type of pooling must be approved by at least three-fourths (instead of two-thirds) of the producers serving the marketing area. Additionally, individual-handler pooling must be approved by such producers in a separate referendum on this issue alone and not by acceptance or rejection of all provisions of an order at the same time as in marketwide pooling of milk. This type of handling is appropriate for areas having a short supply of milk and where supplies are evenly distributed among the handlers, a feature not prevailing in the Massachusetts–Rhode Island market. Moreover, the Secretary specifically found that institution of such type pooling in New England would create disorderly marketing and would be financially injurious to producer and consumer alike. (App. E, p. 19e).

The contentions of the *amicus curiae* concerning the remarks of Representative Plumley in the Congressional Record are both irrelevant and inaccurate. This individual acknowledged the need for federal regulation under then existing circumstances, and the respondents have always acknowledged that all producers were in dire financial straights prior to the Congressional legislation. Representative Plumley was actually against the various features of the Act, however, although he noted its need at the time. Respondents are of the view that federal regulation is still beneficial to all dairymen, and they fail to perceive the significance of such citation from the Congressional Record, other than to respectfully suggest that its citation illustrates the dearth of any substantial support for the contentions of petitioners. The admitted interpretation necessary in respect to Representative Plumley's remarks and those of Senator Copeland illustrate such lack of support with even greater clarity.

The reference of the *amicus curiae* to the cases discussed in *Rock Royal* also reflects a failure to appreciate the constitutional arguments made by the handlers in the lower court in that case, and the rejection of the applicability of the various cases voiding equalization for lack of due process or for violation of other Constitutional limitations. Those cases were distinguished in *Rock Royal* because of its recognition that the very disorder of the market and poor financial position of all producers predominated over the narrow interests of a few individuals. The welfare of the milk consuming public was involved, and, in short, the public interest predominates over private interests under such circumstances.

In respect to the contention of the *amicus curiae* that Rhode Island producers obtained higher prices for their milk prior to federal regulation under the Southeastern New England, the respondents' merely cite the following from the same decision of the Secretary cited by the *amicus curiae,* the decision evidencing that Rhode Island producers could not market their milk under the higher prices of the state's preferential price program for local producers; that the higher prices were also in part attributable to the fact that Rhode Island would obtain much of its milk as needed from the Greater Boston market, thus forcing the respondents to bear the burden of surplus that should have been properly associated with the Rhode Island and Southeastern New England markets, and that Rhode Island producers would have lost their markets to non-nearby producers in the absence of federal regulation:

> "The Southeastern New England market is an interstate market encompassing all of the State of Rhode Island and a substantial area in Southeastern Massachusetts. Within this market there is a substantial and continuing interstate commerce, both in the procurement of milk and in the sale of fluid milk and its products."
>
> * * *

"More than one-third of the fluid requirements for the Southeastern New England area originates from sources outside the States of Massachusetts, Connecticut and Rhode Island. Much of the up-country milk is assembled and received at country plants in Vermont and New Hampshire and is then transported to the Southeastern market for processing and distribution. Additional quantities are handled by bulk farm tank pick-up and moved directly from farms in northern New England to plants in the local market.

The situation in both Fall River and New Bedford has continued to deteriorate as handlers, seeking to avail themselves of milk supplies at the most advantageous price, have tended to look to up-country unregulated supplies . . . As a result, local producers have had difficulties in maintaining regular outlets for their productions. . . . Much of this (local) milk is sold at *manufacturing* milk prices *even though the local supply is inadequate to meet the market demands.*

The situation in the Rhode Island part of the market is substantially similar to that in the Fall River–New Bedford area. Early in 1951 the association representing a large segment of the registered Rhode Island producers requested a hearing to consider a Federal order for that market because of the then existent market disorder. On the basis of the facts presented at that hearing it was recommended that an order be issued. However, following that decision the association negotiated a settlement with local handlers which minimized the effect of the disorder and accordingly the association asked that the order not be issued.

The increase in available milk supplies generally and the fact that milk is readily available from up-country sources at prices approximating the Boston blend has provided a strong incentive for handlers

to drop local producers in favor of cheaper sources of supply.

"Less than one-third of the fluid requirements of Rhode Island dealers are supplied by Rhode Island dairy farmers. An additional forty-five percent is supplied by dairy farmers located in nearby Massachusetts and Connecticut and the remainder is secured from other sources, primarily from the States of Vermont and New York. Several of the larger handlers in the market customarily have secured a lesser proportion of their necessary supplies from local producers than have other handlers. The buying advantage that these handlers have had on their purchases of outside milk has prompted other handlers to drop local producers in favor of sources of supply at upcountry points also.

* * *

Relatively large quantities of local producer milk were dropped during the latter months of 1957 and early 1958; in some cases entire pickup routes were dropped at one time.

Registered Rhode Island producers have enjoyed a preferential market over an extended period of years. The allocation program and the procedure employed by the responsible officials of the State in issuing permits for importation of nonregistered milk have tended to maintain such preferential market to the detriment of other dairy farmers whose production is an essential part of the market supply."

* * *

"Local producers, however, do not carry an unreasonable volume of the necessary market surplus. The overall Class II utilization for the market is only 5.8 percent of total market utilization and less than 10 percent of receipts from registered producers which, from experience in other federally regulated fluid markets, is substantially less than the necessary

reserve which a market such as Rhode Island must carry to assure a continuing adequate supply to meet daily and seasonal fluctuations in supply and demand. Hence, the market relies primarily on upcountry unregulated supplies and surrounding Federal order markets to provide the necessary reserves. . . .

"A market structure which grants a preferential price to registered Rhode Island producers cannot provide a stable market for such producers over any extended period while handlers have the opportunity to gain a procurement advantage through the use of lower priced milk from upcountry sources. The State, as a practical matter, cannot effectively regulate milk which moves across State lines, and while local dealers may voluntarily reduce imports of outside milk temporarily to gain support from local producers, it is inevitable that the incentives for using unregulated milk will result in a loss of market for local producers.

The Southeastern New England market is a deficit market and must rely on sources of supply in northern New England and New York to supplement the local supply. Recent developments in bulk tank cooling and transportation facilities have contributed to efficiencies which permit greater flexibility of handler operations at greater distances from the consumption center in Southeastern New England."

* * *

"The marketing situation as it now exists constitutes a serious and continuing threat to the stable and orderly marketing of milk and to the maintenance of an adequate supply of pure and wholesome milk for the Southeastern New England marketing area.

The issuance of a marketing agreement and order for the Southeastern New England marketing area will contribute to greater stability of the fluid milk market and will tend to effectuate the declared policy of the act. The adoption of a classified pricing plan

based on audited utilization of handlers will provide a uniform system of pricing throughout the area and assure a fair and equitable return to all producers."

The foregoing findings of the Secretary disclose the utter lack of merit in the contentions of the *amicus curiae.*

Respectfully submitted,

CHARLES P. RYAN
EDWARD J. RYAN
JOHN J. SIMARD

Counsel for Respondents

March, 1969

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No. 885

Office-Supreme Court, U.S.
FILED
MAR 26 1969

IN THE

Supreme Court of the United States

October Term, 1968

FREDERICK T. ZUBER, *ET AL.*,
Petitioners,

v.

RUSSELL ALLEN, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF FOR RESPONDENTS RUSSELL ALLEN, *ET AL.*, IN OPPOSITION TO BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF CONNECTICUT

EDWARD J. RYAN
CHARLES P. RYAN
JOHN J. SIMARD
400 Prudential Building
Washington, D. C. 20005
Counsel for Respondents

CASILLAS PRESS, INC. – 1717 K Street, N. W. – Washington, D. C. 20006

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IN THE

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October Term, 1968

No. 861

FREDERICK T. ZUBER, *ET AL.*,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS RUSSELL ALLEN, *ET AL.*, IN OPPOSITION TO BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF CONNECTICUT

OPINION BELOW

The opinion of the Court of Appeals is reported at 402 F.2d 660.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether, under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*, the Secretary of Agriculture was authorized to include in the Massachusetts-Rhode Island milk order of October 1, 1964, a nearby farm location differential provision 7 C.F.R. 1001.72, under which producers whose farms are located in either of two designated "nearby" areas are entitled to receive a differential payment which varies the uniform price required under Sec. 8c(5)(B)(ii) in recognition of (1) the use made of nearby producers' milk or (2) the allegedly higher prices received by nearby producers prior to Federal regulation, the aforesaid section providing that all producers are to receive a uniform price for all of their milk irrespective of the use thereof.

2. Whether the nearby differential provision promulgated on October 1, 1964, is an authorized adjustment to the uniform price, either under Sec. 8c(5)(B)(ii)(c) concerning "the locations at which delivery of such milk is made", or under (a) relating to "market * * * differentials customarily applied by the *handlers*", when such payments are made by "non-nearby" dairy farmers regularly supplying the fluid milk market to other producers whose farms are located in certain designated "nearby" areas, and when the "nearby" producers are already compensated for any location value of their milk under the zone differential of the milk order, 7 C.F.R. 1001.62, which includes an additional payment over the uniform price and includes (1) the authorized market differential for direct delivery of milk to a city plant or market; (2) the transportation differential paid for milk delivered progressively closer to the primary market; and (3) the higher transportation rates paid within the "nearby" zone as contrasted with the rates for each 10-mile zone in the balance of the milkshed.

3. Whether the Secretary's findings were deficient, inconsistent and unsupported by valid and substantial

evidence, and his conclusions and decisions irrational, inconsistent and arbitrary.

4. Whether the operation of the nearby differential is illegally discriminatory and violative of constitutional rights to due process and equal protection of law.

STATUTES AND REGULATIONS

The pertinent provisions of the Agricultural Marketing Agreement Act of 1937, as amended, and the regulations involved are set forth in the Appendix to the Petition. The related findings of the Secretary are set forth in the Appendix to this brief, as well as in the Appendix to the Petition in No. 874 and in the Joint Appendix below which has been filed herein.

STATEMENT

A statement of the case is set forth in respondents' brief in opposition to the Petition in No. 1076, the related petition of the Secretary of Agriculture, as well as in respondents' brief in opposition in No. 861.

ARGUMENT

THE NEARBY FARM LOCATION DIFFERENTIAL OF THE CONNECTICUT MILK ORDER, THE ONLY ORDER OUT OF 75 FEDERAL MILK ORDERS THAT CONTAINS A NEARBY DIFFERENTIAL, GRAPHICALLY ILLUSTRATES (1) THE LACK OF ANY IMPORTANT FEDERAL QUESTION; (2) THE CORRECTNESS OF THE DECISION BELOW; (3) THE IRRATIONAL AND DISCRIMINATORY NATURE OF SUCH DIFFERENTIAL; AND (4) THE CHAOTIC CONDITIONS THAT WOULD ARISE IN EVERY MILK MARKET IF JUDICIALLY VALIDATED AND EXTENDED.

The brief of the State of Connecticut makes the primary contention that invalidation of the nearby farm location

differential by the lower courts "threatens to visit a substantial decline in price on Connecticut's many dairy farmers and thus a serious blow to the State's dairy economy". However, the brief never actually explains how or why this indicated result would occur, and it even neglects to proffer any approximation of such purported loss to Connecticut producers. These unexplained omissions require at least a brief examination of the Connecticut milk order in the light of illuminating facts, particularly since the reasons advanced for the granting of the writ – continuation of the Connecticut nearby differential and the citation of the *Cranston* district court decision – are formulated in large part on the basis of this primary contention.

Initially, the respondents note that the marketing area of the Connecticut federal order is defined as the State of Connecticut,[1] and this is the only milk order out of about 75 federal orders wherein the marketing area is defined by the borders of a state. *It is also the only milk order in the United States that contains a nearby differential provision,* a fact that attests to its invalidity and the lack of necessity therefor.[2]

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[1] See 7 C.F.R. 1015.2, set forth in the Appendix (App. B, p. 1b) appended hereto, the same listing relevant matters that evidence the inaccuracy of the contentions of petitioners and *amicus curiae,* and the total error of the *Cranston* district court decision. An examination of the index of the Appendix will disclose a *brief* reference to virtually any matter upon which the Court might have a question, and the index is arranged under appropriate headings for the Court's convenience. The Joint Appendix in *Allen* in the court below contains more detail in respect to findings of the Secretary, testimony at administrative hearings, etc., and said Joint Appendix of 323 pages is also filed in this Court.

[2] In spite of this admitted fact, the *Cranston* district court decision, like the briefs filed herein, fails to mention that no other milk order contains a nearby differential. Indeed, both imply that the nearby differential is found in other orders, the *Cranston*

(Cont'd.)

All producers in the State of Connecticut and the small number in the State of Rhode Island are eligible for the 46-cents nearby differential of the Connecticut order,[3] along with a limited number of producers located in minor areas of New York and Massachusetts. 7 C.F.R. 1015.72-(a). Producers with farms located in other limited areas of the latter two states are eligible for a 23-cents nearby differential over and above the uniform price under subsection 1015.72(b) of the Order. It is indisputable that these provisions are for the benefit of Connecticut producers, the enumeration of the aforesaid limited areas outside of Connecticut being more evidential of this fact than of any true desire to accord fair and equal treatment to non-Connecticut producers or to comply with the Commerce Clause and other Constitutional limitations. The producers in the 23-cents "nearby" areas number about 90 and those in the unenumerated non-nearby areas who serve the Connecticut market approximate the same number. Significantly, there are so few non-nearby producers under the Connecticut order that the nearby differential thereof results in the payment of but 2-cents per hundredweight or $12.50 monthly to Connecticut producers at a cost of about 44-cents per cwt. to the non-nearby producers, the gain to the Connecticut producers being at the rate of a penny per cwt. as recently as 1963. The following testimony of James Lee, economist for the N.E.M.P.A. and formerly with Office of the Market Administrator at Boston, was given during the 1963

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[2] (Cont'd.)
district court decision stating that "they are vital to achieve orderly markets, an avowed objective of the Act", and the Connecticut brief referring to regulation of "milk markets throughout the Nation" in a manner which would indicate that such a differential existed in numerous other markets or orders. (See p. 13 of brief *amicus curiae*).

[3] Rhode Island producers supply only about 2 percent of the Mass.–R.I. market's milk supply (R.A. 224) and a very small part of the Connecticut milk supply.

administrative hearings when Mr. Lee testified in favor of such nearby differential in the Connecticut and consolidated Massachusetts-Rhode Island milk orders:

"Cross-examination by Mr. Tipton:

"Q. All right. Let me ask it another way. Are you familiar with the amount that the Connecticut market takes out per hundredweight in order to obtain an aggregate amount of money to pay nearby farm location differentials? A. Yes. And the values and rates are set forth in table 2.

"Q. In Table 2 it is shown for all producers as 45 cents, is that correct, for the period of 1962? A. Yes.

"Q. And the differential is 46 cents, is that correct? A. The value per hundredweight of all of the differentials in Connecticut was 45 cents. The rate to the nearby producer was 46 cents.

"Q. The rate that they received was 46 cents? A. Yes.

"Q. And the amount that was deducted from all the milk in the pool was 45 cents. If the nearby farm location differentials were deleted from the Connecticut market, there would be a net loss of approximately one cent, is that correct? A. Yes.

"Q. So what advantage does the nearby farm location differential give to the nearby producers other than a one cent gain in their price, anything? A. I didn't mean to imply there was any substantial advantage in that regard.

"Q. Well, is there any substantial advantage in that regard? A. I said no."

* * *

"Q. Just so we understand, the deletion of the nearby farm location differential would not affect the

the Connecticut price to nearby producers of a very substantial amount, and by that I mean one or two or three or four cents, something like this? A. The rate makes that obvious.

"Q. Continuing that line just a moment then, would you anticipate that if the nearby farm location differential was removed, there would be an increase of supplies in milk into the Connecticut market? A. No."

It would require the essence of legal legerdemain to argue that the Connecticut nearby differential provision is intended to reward nearby producers with a 2-cents differential payment rather than to penalize non-nearby producers at the rate of 44-cents for each hundred pounds of milk they market in Connecticut. The brief *amicus curiae* understandably does not mention any of these relevant facts in stating that "removal of the differential for the New England orders will reduce prices to nearby producers by significant amounts, and that a further result will undoubtedly be a marked acceleration in the number of producers leaving the market."

If the nearby milk of Connecticut producers has any "extra inherent value" whatsoever, it is clear that the 2-cents differential payments could be obtained as a premium from handlers who receive such alleged value rather than by exactions of 44-cents per cwt. from non-nearby producers' pockets. Any contrary argument or refusal to test the value of such milk in the marketplace is an admission that the cited factors of value are in fact nonexistent. Handlers can pay any premium over the uniform minimum price, but they will not do so for an illusionary value. The nearby differential is hardly "economically legitimate" under such circumstances, and it is equally obvious that there would be no price reduction or decline in respect to nearby producers if their milk is actually worth 2-cents over the uniform minimum price as the *amicus curiae* alleges in its brief.

The brief also understandably fails to advise that producers in the 23-cents "nearby" areas outside of Connecticut actually sustain a *loss* of approximately 17 cents instead of a gain of 23 cents by virtue of the existence of the nearby differential provision in the Connecticut order. This irrational result is likewise due to the fact that there are too few non-nearby producers to fully pay for the 46-cents nearby differential when access to the market is conditioned upon such a large penalty or tribute payment to the preferred producers within the State of Connecticut. The irrational and arbitrary action in continuing such a differential provision for 7 years when it admittedly operates in a manner totally inconsistent with its stated purpose is not only independent ground for striking it down but an acknowledgment that it is intended to operate as a trade barrier which reserves the fluid milk market or a larger part thereof to Connecticut producers.

The *amicus curiae* evidences awareness of these facts and the complete lack of any justification therefor by the unexplained failure to even mention the same in its brief. It merely speaks in generalities and without any substantiation for the implied and specific assertions made therein. For example, it states that "a substantial number of New York and Massachusetts producers are also located within the Connecticut Order nearby zone", but it neglects to inform that many of these producers are in the 23-cents "nearby" zone and that they sustain a *loss* instead of a gain as a result of the existence and operation of the nearby differential provision. Moreover, it fails to cite the following finding of the Secretary at 25 Fed. Reg. 7834 on August 16, 1960, in contending in the brief that the elimination of the nearby differential would substantially lower prices to Connecticut producers in some undefined manner:

> "*Complete elimination of the nearby farm location differential* would improve slightly the price disparity existing in the Dutchess County and Columbia County areas now in the 46-cents area and *would not*

significantly affect returns to producers in Connecticut. It would, however, increase the price to producers in the existing 23-cents area by about 17 cents and the price to upcountry producers by about 42 cents, * * *."

The Secretary also stated at page 7833 of his said Decision that, "Although the Connecticut blend prices have been substantially in excess of the New York–New Jersey price in competing areas, this situation would not have been changed appreciably in the absence of a nearby location differential provision". If the differential is not intended to act as a trade or market barrier, then there is no factual reason for its existence when its elimination would not affect Connecticut producers and its major effect is to injure non-nearby dairy farmers who *regularly* supply the Connecticut market's fluid milk needs. Its elimination could hardly result in disorderly marketing in view of the specific findings of the Secretary, particularly when the nearby differentials have been eliminated in the two adjacent markets and are not found in any other milk order in the country.

Additionally, the Report of the Federal Milk Order Study Committee (Nourse Committee), composed of a number of experts of national stature appointed by the Secretary, found that the Connecticut nearby differential payments by non-Connecticut producers constituted 'a barrier to the entry of additional supplies from adjacent production areas and tend to prevent desirable intermarket adjustments". The Committee singled out the Connecticut order in respect to other restrictive and unfair measures employed in that market to maintain an unnaturally high fluid utilization rate to the detriment of outside producers, and excerpts from such Report are set forth at pages 25-29e of App. E to this brief. Such restrictions are injurious pricewise to consumers and represent a continuing threat to an adequate milk supply in some instances. Moreover, the preferences shown a local milk source may result in an

overall lowering of the quality of the milk supply and an actual health hazard to consumers within the marketing area.[4]

In ignoring all of the foregoing, the brief observes that "the payment of higher prices to nearby producers in unregulated markets and as a part of cooperative producer payment plans was at the time of passage of the Act a phenomenon of which dairy economists, dairy industry personnel, and farmers were well aware". In support of these generalities, the brief refers to a 1929 map of producer prices, the Act being passed in 1933, amended in 1935, and reenacted in 1937, and to an isolated comment concerning seasonality of production in a book by Cassels. Respondents note that pre-1929 prices are not only incompetent to illustrate the conditions and prices prevailing at the time of passage of the Act, when the low prices to *all* producers necessitated its enactment, but that rapid improvements took place in the early 1930s' in respect to motor trucks, highways, technological advances, refrigeration, etc., that affected milk supplies and prices. It is also a well known fact that cooperative associations were organized by producers in metropolitan areas, and that such nearby-dominated associations accepted more distant members only as a matter of self-preservation in order to maintain some control over alternative milk supplies, the failure to do so enabling handlers to pit one area against another to the mutual disadvantage of all producers. In view of these facts and the refusal of the Massachusetts Milk Control Board to assist in the enforcement of the new federal program unless its producers were given a supposedly temporary price preference, it is not surprising that "nearby" producers were awarded preferential

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[4] See testimony of Dr. Stewart Johnson, economist for Connecticut Milk Producers Association (CMPA), set forth in App. E, pp. 19-25e, of this brief, testifying in 1956 N.Y.–N.J. administrative hearings. Dr. Johnson also testified in favor of the nearby differential in *Cranston*.

by nearby-dominated associations prior to the Act[5] and under the early federal licenses that were obtained by them without the procedural safeguards enacted in 1935 when orders replaced the licenses. However, the repetitive usage of the term "similar differentials" to equate such early base-rating with the nearby differential not only confuses two different things but actually constitutes an admission of the illegality of the nearby differential. The illegality of the early base-rating whereby nearby producers were paid a Class I or fluid milk price for their base milk and the non-nearby producers a composite or blend price that carried the surplus of the market is pointed up by the 1965 amendments to the Act. The Act clearly requires that all producers be paid a Class I price for their base milk, and their bases are computed in relation to their marketings over a representative period of time. Producers may produce more than their "base" under a Class I base-rating or base-excess plan, but they receive the Class II or surplus price for such excess over their base. The purpose of the plan is to bring production within the needs of the market and to thereby eliminate unnecessary surplus. It is in no way comparable to the nearby differential, for it applies to all individual producers, not to groups or classes of producers. Secondly, it must be separately approved in a referendum among individual producers on this question alone, not in connection with bloc voting by an association for its membership on a milk order as a whole. Thirdly, it is a method for seasonal adjustment of production to control unnecessary surplus, not for the apportionment of the fluid market to one group of producers

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[5] But see App. C, pp. 1-5c, to this brief re normal operation of classified use plans of most cooperative associations and that contemplated by the Act.

in a particular area of the milkshed and the necessary surplus to the remainder in another area without consideration of the individual variations among each group and area. Fourth, the Secretary specifically found in his 1964 decision, 29 Fed. Reg. at 11225, that a base-rating or base-excess plan was inappropriate for the New England markets. (See App. E, pp. 10-11e, of this brief). Moreover, the New England orders already include a seasonal incentive plan to reward evenness of production. (See App. E, p. 11e, to this brief).

Additionally, the reliance of the *amicus curiae* and the *Cranston* decision on the early base-rating provisions in the Greater Boston licenses is clearly misplaced, both in respect to justification for awarding a larger share of the fluid milk market to nearby producers through the nearby differential and in respect to Congressional ratification of such allegedly "similar differentials" by the 1937 re-enactment of the Act.[6] In allotting preferential bases under License 15 in 1933, the License specified three exceptions to the general method of awarding bases.[7] One related to producers whose milk on September 1, 1933, was being trucked *directly* from farms to plants located in the marketing area.[8] The second

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[6] See App. C, pp. 33-35c, to this brief for excerpts from the Congressional reports re reasons for re-enactment of the Act and the language of this Court in *Brannan v. Stark*, 342 U.S. at 465-66 regarding such re-enactment and lack of administrative construction of import because of infrequency of order provision.

[7] See App. E, pp. 1-2e, to this brief for description of bases in 1933-35 Greater Boston milk licenses.

[8] This is the market or direct delivery differential specifically authorized by the 1935 amendments to the Act, and it was the "practice of business" referred to in the Congressional Reports and Record.

related to country producers delivering milk under a base-rating plan in effect on said date, and the third exception was in favor of the Guernsey producers who received bases equal to the average daily sales of Golden Guernsey milk in the market as Grade A fluid milk or under the Golden Guernsey trade name during the general base period.

However, the "similar differentials" and "ratification" arguments did not enable Golden Guernsey producers to obtain an added differential for their milk under the New York federal order when they argued that the butterfat differential did not adequately compensate them for the greater marketability of their milk for fluid use or for their additional production costs. *N. Y. State Guernsey Breeders Co-op v. Wickard,* (CAA 2, 1944) 141 F.2d 805, *cert. denied,* 323 U.S. 725 (1944). Although the Guernsey producers were able to show that they had been able "to secure a higher-than-average Class I (fluid milk) utilization for the milk of their members" prior to regulation, the Second Circuit still held that they were not entitled to a differential over the uniform minimum price:

> "This finally is the ultimate issue in the case – one, of course, of outstanding importance in milk regulation. It seems to us that the Secretary has correctly construed the law, and that production costs or marketability are not in themselves factors to influence minimum milk prices. For such prices it hardly seems pertinent that special allowances should be made for milk more expensively produced, or more extensively and successfully advertised, but not better in grade or quality. In a purely competitive industry factors of this kind may well affect the market price, *but when regulation by way of minimum price is substituted by reason of the very disorder of*

the market and its effect in impairing farmer purchasing power (Sec. 1, 7 U.S.C.A. 601), *it is not surprising to discover no allowance for them in the governing authority.*"

Moreover, the Second Circuit noted that the high fluid utilization rate and resultant higher prices might have been due to extensive advertising, superior selling practices, *or proximity to fluid markets,* the specific inclusion of the latter factor indicating that the Second Circuit did not view such proximity to fluid milk markets, or any previous higher-than-average Class I or fluid utilization as a result of such location of certain producers, as a valid reason for special treatment of such "nearby" producers. Significantly, Circuit Judge Frank was a member of the panel that rendered this unanimous decision, and he obviously did not regard the Secretary as having unfettered discretion under the Act as contended by the *amicus curiae.* The *Cranston* decision thus purports to "overrule" not only the *Allen* courts in respect to a differential and milk order that was solely before the District of Columbia Circuit, but it is obviously in conflict with the Second Circuit and this Court. (See also *Knudsen Bros. Dairy v. Freeman,* 303 F.2d 886 (1962), and *Kass v. Brannan,* 196 F.2d 791, *cert. denied,* 344 U.S. 891, from the Second Circuit, as well as the decisions of this Court in *Lehigh Valley Cooperative v. United States,* 370 U.S. 76 (1962), even the dissent in the latter case upholding the concept of price uniformity under marketwide equalization that is set forth in numerous decisions of this Court and lower courts).

The antiquated contentions concerning accessibility or reliability of nearby milk are also devoid of merit. Nearby producers supply a lesser part of the fluid milk under the New England orders, and the Secretary has previously stated that this factor is "appropriate for consideration with direct delivery differentials payable by handlers

rather than out of the pool". 22 Fed. Reg. 4213. Even the economists for the nearby associations have acknowledged that such factors do not form a basis for the promulgation or present existence of the nearby differential,[9] and it is clear that the differential would not have been grounded on the historical use of nearby milk if any legal and rational basis existed for its issuance. Additionally, the findings of the Secretary also acknowledge that higher prices to nearby producers in Massachusetts, Connecticut and Rhode Island were attributable to the artificial prices *required* to be paid to local producers under State regulation when the latter were able to market their milk.[10]

The brief makes the same inapt reference to the 1929 map in citing Dr. John D. Black's book on the AAA program in support of the value of nearby milk.[11] In addition to the foregoing reasons for the inapplicability and incompetency of such contentions, it should be realized that Dr. Black's book was published about one month after the passage of the 1935 amendments to the Act involved in this case, and there is little discussion of the same therein, other than to quote approvingly from the definitions in the Congressional Reports in explanation of differentials enumerated in the Act. Moreover, Dr. Black, a Massachusetts resident, refused to endorse the nearby differential when he testified during the 1956 administrative hearings for the New

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[9] See testimony set forth in App. D, pp. 18-19d; App. E, pp. 12-16e and 19-25e, in Appendix to this brief, and the testimony set forth in detail at pp. 141-98 of the Joint Appendix below.

[10] See App. D, pp. 4-5d, 10d, 14-15d, 16d, to this brief, and pp. 112-41 of Joint Appendix below.

[11] It is a little known fact that Dr. Black was employed by the USDA at the time he was writing said book.

York-New Jersey order, and it is understandable that he did not wish to directly contradict any earlier views that he possibly had when he stated in 1956:

> "Q. And you don't believe that nearby milk has any further value than indicated by that principle?
>
> A. That involves the question of the 40-mile zone which you had up earlier before, and I begged off on answering that one because, frankly, I haven't studied that one in the different markets. I have set in on the discussions of it when they first set up the Boston milk order. *I had a personal interest in it because it happens that a brother of mine has a dairy farm a few rods short of 40 miles from the State House in Boston.* He gets the 46 cents premium on his milk because he is there. The justification for it in those days may be different from the justification for it now. * * * I would rather not venture a judgment on that." (R. 4446, N.Y.-N.J. administrative hearings, 1956).

Dr. Black further testified against the "un-American" exclusion of "distant" dairy farmers from sharing in the fluid milk markets; the inability to "defend present arrangements or future arrangements too much on the long distant past"; the failure of the Connecticut market to carry its fair share of surplus because of "the administrators in Washington"; and the fact that nearby milk in non-federal markets would be priced at virtually manufacturing milk prices except for the stabilizing effect of the federal orders in adjacent markets.[12] Dr. Black also rejected the view of some nearby producers that if a particular area does not produce as much milk as it consumes, the prices to producers in that area should be

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[12]See App. C, pp. 30-31c; App. D, pp. 19-20d; App. E, pp. 30-31e, to this brief for Dr. Black's testimony during the 1956 N.Y.-N.J. hearings, which also involved the Connecticut marketing area.

raised high enough to induce the extra production or a large part of it. This policy, detrimental to consumers and the producers excluded from such a controlled market, is pursued with governmental approval in the Connecticut market at the insistence of politically influential groups such as the CMPA, and the brief *amicus curiae* fails to cite Dr. Black's testimony in 1956 concerning such an un-American and monopolistic approach which also injures "outside" dairy farmers by the exaction of the subsidy payments:

> "This is of course contrary to the whole conception and principle of free trade among the states upon which our republic was founded. That principle says that all milk of the same quality moving to one market shall sell at the same price delivered in that market, but that the price received for it at the farm will decrease with distance from this market strictly in line with the increase in transport and related handling costs. Furthermore, milk will move to this market from points outward from the market till a point is reached where the milk will net more if shipped to some other market or put to some other use * * * ."

The maintenance of a high fluid utilization rate by restrictive techniques which constitute a refusal to bear the necessary surplus associated with the Connecticut market results in a corresponding decrease in the fluid utilization rate and milk price in the Massachusetts-Rhode Island market, in that such adjacent market must bear much of the surplus that should be borne by Connecticut producers. The resulting price disparity is increased when the Connecticut producers dump milk in the Massachusetts-Rhode Island market during periods of flush production, the control of virtually all Connecticut milk by the Connecticut Milk Producers' Association facilitating such disposition of excess milk in adjacent

markets. Moreover, a large number of Connecticut producers are entitled to receive a "nearby" differential of 46-cents per cwt. when their milk is dumped in the Massachusetts-Rhode Island market, and this additional reduction in the non-nearby producers' minimum milk price is utterly indefensible when one considers that Connecticut is a deficit market and the Massachusetts-Rhode Island market already has an excessive surplus of milk. Finally, the non-nearby producer must pay an additional "nearby" differential of 46-cents per cwt. to Connecticut producers whenever his milk is needed in the deficit Connecticut market.[13] It is clear that the discriminatory differential never existed prior to federal regulation, and it would have been an impossibility for handlers to "customarily apply" such a differential when marketwide pooling and a producer settlement fund did not exist in any market. The Act was passed because of such deficiencies and accompanying low prices to all dairy farmers, and the primary purpose of marketwide equalization pooling of milk and the basic purpose and policy of the Act are equally violated by such a discriminatory exception. It is obvious that the discriminatory device creates disorderly marketing of milk both within and between markets and that it is utilized for such purpose for the benefit of politically influential associations dominated by nearby interests.[14]

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[13] In spite of the related facts evidencing the interest of respondents, the *Cranston* court denied their motion for leave to intervene in that suit on the ground that respondents had no interest whatsoever in that litigation. Respondents had requested intervention for the purpose of moving to hold that suit in abeyance pending a decision on the *Allen* appeals, the latter motion also being denied by the *Cranston* court.

[14] The brief *amicus curiae* refers to an unsupported statement of Herbert L. Forest, USDA official, concerning a "new approach" (cont'd.)

In respect to the public interest aspects of Dr. Black's testimony, it should be noted that approximately 50 percent of the required milk supply for the Connecticut market is obtained from out-of-state sources, although a good part of the latter is not qualified as "pool milk" because of various restrictive provisions of that order. The ever-increasing population of the Northeastern metropolitan areas will necessitate additional procurement from non-Connecticut and non-Massachusetts sources, the dairy farms in the latter states being sold with increasing frequency for large housing subdivisions or presently run with this inevitable result and objective in mind. However, many non-nearby producers in primarily rural states are abandoning dairy farming because of inadequate returns, and such discriminatory devices as the nearby differential definitely accelerate the rate thereof and the resultant problems engendered for both rural and urban areas.

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[14] (cont'd.) to achieve orderly marketing if the nearby differential is eliminated, presumably to comply with sections 8c(5)(B)(ii), 8c(5)(D), and 8c(5)(G) of the Act. The utter lack of merit in such an "in terrorem" contention is illustrated by the fact that no unspecified "new approach" was necessary in the large New York-New Jersey milk order and market when that nearby differential was terminated after *Blair v. Freeman,* 370 F.2d 229 (1966), and the returns to all milk producers under that milk order were the highest in the history of that order within two months of such termination. (See App. E, pp. 33-35e, to this brief). In view of the fact that the Connecticut order provides for the payment of a differential of 46-cents and other price preferences to all Connecticut producers when they market their milk in the deficit Connecticut market, it is difficult to perceive the logic or consistency in Mr. Forest's contention that disorderly marketing will result if the Connecticut producers who market in the Massachusetts-Rhode Island market change to the Connecticut market. Moreover, it must be assumed that they have done so since (cont'd.)

Unlike the nearby producers, the non-nearby dairy farmer has no alternative economic opportunity in most rural areas when low returns and high costs drive him from dairy farming. He is unable to sell his land at huge profits for housing subdivisions or commercial development. He usually salvages a small piece of land with his modest homestead and thenceforth contributes little or nothing to the growth and economy of his community. His children or hired help migrate to cities which are already overcrowded with individuals who are ill-equipped by training and background for urban absorption. The present extent of this mounting problem cannot be overstated and is receiving the attention of the Congress, governmental agencies, a large number of states and many private organizations.[15] It is significant that the record below contains numerous affidavits from local and state officials in Vermont attesting to the loss of dairy farms in that state, and many non-nearby producers in upstate New York who market under the Connecticut order often lose $5,000 or more annually by virtue of that nearby differential. Many marginal dairy farmers could have stayed in business if the differential payments had not been exacted from their uniform minimum price, and their remaining in business would have inured to the

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[14] (cont'd.) the invalidation of the nearby differential of the Massachusetts-Rhode Island order, but there has been no "new approach" or "chaotic" marketing, and such contentions actually contradict the prior findings of the Secretary. Such illogical statements are made for the sole purpose of inducing judicial inaction and facilitating remand to the agency for disbursement of respondents' monies to nearby interests and attorneys.

[15] See Congressional Record, 91st Cong., 1st Sess., at S2034-S2040, E1214-E1215, and bills H.R. 7336, 7575, 7617, 7789 re "tax farmers"; also at H13227, H1007, E1421 re program to aid rural areas, rural job development, and rural migration to cities.

benefit of small business communities and the financial support of local governments.[16] A growing threat to the consumer welfare and an adequate milk supply is also inherent in an inconsistent and discriminatory differential that precipitates such problems and the demise of natural dairying areas which have no other substantial economic opportunities or industries.

The respondents respectfully submit that the Connecticut nearby differential, rather than serving as a reason for the granting of the petitions, actually demonstrates that the lower court's decision was correct and that such petitions should be denied. It graphically illustrates how such a device can be utilized in a most unjustifiable and discriminatory manner to injure producers and consumers alike. It forecasts the complete chaos and disorderly marketing that would occur in every market if such an illegal price preference could be obtained through political and group pressures. It predicts the nullification of the very purpose and policy of the Agricultural Marketing Agreement Act and a return to the cut-throat competition that led to a national emergency in the milk supply. It is clear that the narrow interest of Connecticut producers or Massachusetts producers may not predominate over the public interest or constitute a singular exception to the Act and Constitution. The *amicus curiae* have presented no reason that would justify the granting of the writ requested by the petitioners, and the Court is respectfully referred to the respondents' briefs in opposition to the petitions in respect to any contentions made by the *amicus curiae* that may not be treated herein because of undue repetition.

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[16] See affidavits from the record below filed in No. 1076.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. RYAN
CHARLES P. RYAN
JOHN J. SIMARD
Counsel for Respondents.

March, 1969

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(t) Excerpts from Market Administrator's Bulletin, N.Y.–N.J. milk order, re receipt of highest milk prices in history of milk order from April, 1967 to date. 34e

APPENDIX A

RELEVANT PROVISIONS OF THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, AS AMENDED, 7 U.S.C. 601 ET SEQ.

§ 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

§ 602. Declaration of policy: . . .

It is declared to be the policy of Congress –

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

* * *

§ 608c. Orders regulating handling of commodity –

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or

product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * *

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(5) Milk and its products; terms and conditions of orders

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such

prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk

by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year. . . . Notwithstanding the provisions of subsection (12) of this section and the last sentence of subsection (19) of this section, order provisions under (d) above shall not become effective in any marketing order unless separately approved by producers in a referendum in which each individual producer shall have one vote and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this

subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

* * *

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * *

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

* * *

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order.

* * *

(11) Regional Application.

* * *

(B) *Except in the case of milk and its products*, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

* * *

(16) Termination of orders and marketing agreements

(A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

* * *

§ 672. Agreements; licenses, regulations, programs, etc., unaffected.

(a) Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done *under* sections 601-604, 607, 608, 608a, 608b, 608c, 608d, 608e-1, 608f-612, 613, 614-619, 620, 623 and 624 of this title, but such marketing agreements, licenses, orders, regulations, provisions, and acts are expressly ratified, legalized, and confirmed.

(b) Any program in effect under sections 601, 602, 608a, 608b, 608c, 608d, 610, 612, 614, and 624 of this title, on January 1, 1950, shall continue in effect without the necessity for any amendatory action relative to such program, *but any such program shall be continued in operation by the Secretary of Agriculture only to establish and maintain such orderly marketing conditions as will tend to effectuate the declared purpose set out in section 602 or 608c of this title.*

APPENDIX B

RELEVANT PROVISIONS OF CONNECTICUT FEDERAL MILK ORDER

1015.2 Connecticut Marketing Area

"Connecticut marketing area" referred to in this part as the "marketing area", means all territory within the State of Connecticut, together with all waterfront facilities connected therewith and craft moored thereat, and all territory therein occupied by government (municipal, State or Federal) installations, institutions or other establishments.

* * *

1015.62 Plant zone price differentials.

The class prices and the basic uniform price computed under sections 1015.60, 1015.61 and 1015.64 shall be subject to zone price differentials based upon the zone location of the plant at which producer milk is received. . .

* * *

1015.72 Farm location differentials.

(a) In making payments to producers for milk received from a farm located in Connecticut, Rhode Island, in that portion of New York State east of the Hudson River and south of the Berkshire Section of the New York State Thruway, or in that portion of Massachusetts south of the Massachusetts Turnpike, there shall be added 46 cents per hundredweight.

(b) In making payments to producers for milk received from a farm located outside the area described in paragraph (a) of this section, but within that portion of New York State east of the Hudson River and south of the northern boundaries of North Greenbush, Sand Lake, and Stephentown townships in Rensselaer County, and within that portion of Berkshire County, Massachusetts north of the Massachusetts Turnpike, there shall be added 23 cents per hundredweight.

* * *

1015.91 Suspension or termination.

The Secretary may suspend or terminate this part or any provision thereof whenever he finds that it obstructs or does not tend to effectuate the declared policy of the Act. This part, in any event, shall terminate whenever the provisions of the Act authorizing it cease to be in effect.

* * *

1015.96 Separability of provisions.

If any provision of this part, or its application to any person or circumstances, is held invalid, the application of the provision, and of the remaining provisions of this part, to other persons or circumstances shall not be affected thereby."

RELEVANT PROVISIONS OF MASSACHUSETTS–RHODE ISLAND–NEW HAMPSHIRE MILK ORDER (LISTING CONNECTICUT PRODUCERS IN NEARBY ZONE).

1001.72 Farm location differentials.

In making the payments to producers required under § 1001.70, each handler shall add any applicable farm location differential specified in this section.

(a) With respect to milk received from a producer whose farm is located within any of the places specified in this paragraph, the differential shall be 46 cents per hundredweight, unless the addition of 46 cents gives a result greater than the Class I price determined under §§ 1001.60 and 1001.62 which is effective at the plant at which the milk is received. In that event there shall be added a rate which will produce that price.

CONNECTICUT

All of the State of Connecticut east of the Connecticut River and the towns of:

Granby. Suffield."

* * *

APPENDIX C

RELEVANT EXCERPTS FROM TESTIMONY AND STATEMENTS OF SECRETARY, AAA ADMINISTRATOR AND USDA OFFICIALS, CONGRESSIONAL MEMBERS, ETC., RE CONGRESSIONAL INTENT AND LEGISLATIVE HISTORY OF ACT, IN RESPECT TO PRICE UNIFORMITY FOR ALL PRODUCERS.

1. **Relevant excerpts from Economic Brief, USDA, paper no. 12, pages 82-84, re marketwide pooling or equalization; filed in Administrative Record of 1937 Greater Boston Milk Order**

"F. Equalization of fluid milk sales among producers

"The use plan of payment for milk puts all handlers in the market on an equitable competitive basis, and equalization of fluid milk sales is intended to do the same thing for all producers. Equalization of fluid milk sales is simply an extension of a plan that has been employed by each handler and each cooperative creamery. If a creamery sold 75% of its milk as whole milk and the remainder as cream, it did not pay 75% of its producers the fluid milk price for all their milk and the remaining 25% the cream price for all their milk. Such a method obviously would have been inequitable. Instead each producer was paid the whole milk price for 75% of his deliveries and the cream price for the remaining 25%. Under the proposed amendment to Order No. 4 the fluid milk sales of the whole market are distributed among all producers in the milkshed in exactly the same way as though they were all members of a cooperative association which equalized its fluid milk sales among its members.

The lack of any plan for an equitable distribution of fluid milk sales among all producers has been one of the principal causes of unsatisfactory conditions in the Greater

Boston Marketing Area during past years, for it has led to destructive competition among groups of producers. Under normal conditions in the Eastern markets, whole milk prices average approximately twice as high as the prices paid for milk reported for use as cream. However, the milk used as cream is of the same quality as the milk used for fluid milk and can at any time be sold as whole milk in competition with it. A handler's ability to pay his producers a favorable composite price, as compared with the price of competitors, has depended largely upon his not having so great a volume of surplus sales (in this case cream) as his competitors. If, by cutting prices, a group succeeded in selling a large percentage of its milk as fluid milk, its composite price would be higher than that of another group that received the full market price but carried a larger percentage of the surplus. Thus it was that a handler could cut the price of fluid milk in the city and still pay a composite price in the country, as high or even higher than that of the competitors who did not cut prices. (See part IV above for discussion regarding flat price buying.)

A few simple examples will illustrate the situation. If the Class I price is $3.00 and the Class II price is $1.50, and if there is 60% of the total milk sold as Class I, then a group of producers carrying its share of the market's surplus would return to its producers per hundredweight as follows:

60 pounds as Class I at $3.00	= $1.80
40 pounds as Class II at 1.50	= .60
Composite price per hundredweight	= $2.40

This group of producers has more surplus than it needs to take care of the daily fluctuations in its sales. Therefore, if it can contract to sell a portion of its surplus milk at any price above $1.50 per hundredweight, it will obtain a greater return for its milk. If it sold half of its surplus milk for fluid milk consumption at $2.25 per hundredweight, which is slightly more than one-half cent per quart under

the market price for fluid milk, and still continues (a practice not uncommon in Boston, particularly in the wholesale trade), the return to this group of producers per hundredweight would be as follows:

60 pounds as Class I at $3.00	= $1.80
20 pounds as Class I at 2.25	= .45
20 pounds as Class II at 1.50	= .30
Composite price per hundredweight	= $2.55

This group will have undersold the market by more than one-half cent per quart and by so doing [illegible] ave increased its composite price to producers for [illegible]k by $.15 per hundredweight. If the handler were a proprietary concern rather than a cooperative, he probably would continue to pay his producers approximately the same net price as competing dealers in the territory and pocket the increased return.

Normally, this group of producers will have increased its fluid milk sales only at the expense of another group in the market. Assuming that this other group carried originally the same amount of surplus, the return to its producers per hundredweight would now be as follows:

40 pounds as Class I at $3.00	= $1.20
60 pounds as Class II at 1.50	= .90
Composite price per hundredweight	= $2.10

More likely, however, in order to retain its fluid milk sales and maintain its price to producers, the second group, as well as other similarly threatened, would lower its own price to whom the cut-price milk was offered. Eventually, before the cut-price group succeeds in placing its surplus milk at a cut price, it might have to offer it to several customers and thereby have forced down the price on fluid milk sales of several times the volume of milk which it has to offer. If any considerable amount of surplus milk is thus offered to the trade at a cut price, it tends to force the fluid milk if the fluid milk price were eventually reduced to $2.25 as a result of this price cutting, it would

still be enough above the price of surplus milk so that the process could be repeated. It is by this method that competition among a few groups of producers or handlers has often reduced the net return to all producers in the Boston milkshed much below a fair market level. Sufficient control of milk markets to prevent such practices is highly desirable from the producer's standpoint. In many markets, price cutting has been carried to the point that producers withheld their milk from the market, causing a shortage of milk in the market. It should be obvious that when price cutting is carried to this point, it is inimical to the public interest.

The history of the Boston milkshed has shown that no group of producers can be kept from participating in the fluid milk market. The different groups either cut prices and share the fluid milk market on a lower price level, or else they cooperate and share the market on a fair and reasonable price level. Equalization of fluid milk sales throughout the market entitles each group of producers to maintain its share of the fluid milk sales without price cutting.

The actual operation of the equalization plan is simply a means of distributing to all producers equally the value of the fluid milk sales in the market by all handlers. With a 40% surplus in a market, each producer should get surplus prices on 40% of his deliveries. The Class I and Class II sales are not distributed equally among handlers. One handler may have no Class I sales, yet his producers are entitled to Class I price for 60% of their deliveries. But another handler may sell 100% of his producers' milk as Class I and his producers, if they are to carry the same amount of surplus as other producers, should get Class I price for only 60% of their deliveries. The equalization is made by the several handlers paying to producers through the equalization pool the difference between the Class I and Class II price on 40% of their total sales and to pay their producers Class I price for 60% of their deliveries, and for 40%, the Class II price. The first handler pays his producers Class I

price for 60% of their deliveries by receiving from the equalization pool enough money to enable him to pay producers for 60 percent of the milk received at Class I prices, and Class II price for the remaining 40%. If a handler happened to sell exactly 60% of his milk as fluid milk, he would pay producers directly for 60 percent of the milk at Class I prices, and for 40 percent at Class II, rather than paying them partly through the equalization pool.

The whole plan works exactly as if all handlers paid into the pool the value of their Class I milk times the Class I price plus the value of the Class II milk times the Class II price, whereupon the total sum would be distributed equitably among producers according to their deliveries. The Administrator's office acts merely as a clearing house for transactions. Thus there remains room for any gains through superior quality or differences in efficiency of any individual handler or association of producers, because any gain from operations after the milk has passed the receiving room door is retained by the handler or cooperative and not shared by the rest of the market."

2. **Relevant excerpts from the Congressional Record re price uniformity for all producers and inconsistency of "historically-higher price" preferences for certain producers:**

"MR. COPELAND: What has the Senator to say to the suggestion that in a number of communities in upstate New York there is not a sufficient supply of milk surrounding the market to take care of the demand; therefore, milk must be brought into the market from more distant points? The provisions of the equalization which we are now discussing provide that a producer who is producing his milk on farms near to the cities would receive the same price for his product as a farmer who produces his milk, say, 40 or 50 miles away from the same community.

MR. MURPHY: If they were embraced in the same marketing area, that would be true. * * * ." (79 Cong. Rec. 11140)

* * *

"MR. LA FOLLETTE: And insofar as whole milk is concerned it is my understanding that the agreements could apply, so far as the shippers of whole milk are concerned, only to those who have not, at the time the orders are issued, been shipping regularly into the given market.

MR. MURPHY: Precisely.

MR. LA FOLLETTE: In such a case, as to those who have not been accustomed to ship into such market, the terms would apply which apply to everyone else within the marketing area. In case an order is issued, however, and a particular shipper of whole milk, who had not been previously shipping into the marketing area, desires then to enter the marketing area, he would for a 3 months period have to take the lowest price classification for his product, after which time he would obtain the same prices as provided for others who had been regularly shipping in or who were producing within the area. Is that the Senator's understanding?

MR. MURPHY: The Senator has stated my understanding of the matter.

MR. LA FOLLETTE: I thank the Senator."

* * *

"MR. SNELL: . . . I do not understand exactly what this means, 'No marketing agreement or order applicable to milk and its products', and so forth.

"MR. JONES: That simply applies to fluid milk. You cannot make any limitation at all on the amount of butter or cheese or milk products that are shipped from any one area to another, and the limitation that may be applied on milk is only such limitation as puts

each area on an equality with the other areas after a certain period of about 2½ months." (79th Cong. Record 13022)

* * *

"MR. BOILEAU: . . . Mr. Chairman, I should like to ask the distinguished chairman of the Committee if in his opinion there is anything in this bill that gives to the Secretary of Agriculture or to anyone else any power to restrict the free flow of milk or any other commodity between the various States?

MR. JONES: No; there is nothing in it that will do that. The only tendency is to make all sections comply with the same rules." (79th Cong. Record 9572; *Lehigh Valley Co-op. v. United States*, 287 F.2d 726, *affirmed*, 370 U. S. 76, 93-94).

3. **Relevant excerpts from testimony by Administration before House Agriculture Committee in 1934:**

". . . Use of governmental powers to discriminate as between different groups of farmers has seemed to this Administration undemocratic and unjustifiable. The erection of 'tariff walls' around milksheds, creation of monopoly for farmers within, the exclusion by law of those outside, have the same unfortunate effects inside this country as erection of international trade barriers has upon world commerce. They lead to retaliatory action, which is injurious to the farmers and the public because it interrupts the economic flow of commerce." *Barriers To Internal Trade In Farm Products*, a Special Report to the Secretary of Agriculture by the Bureau of Agricultural Economics, USDA, March, 1939).

4. Relevant excerpts from Congressional Committee Reports re Section 8c(5)(D)* of Act and non-historical prices.

"To prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural expansion of the area supplying any market by the introduction of new producers or new producing areas, orders may provide that for the first 3 months of regular delivery, payments should be made to producers not theretofore selling milk in the area covered by the order at the price fixed for the lowest use classification. *This is the only limitation upon the entry of new producers – wherever located – into a market, and it can remain effective only for the specified 3 month period.*" (H.R. Rep. No. 1241, 74th Cong., 1st Sess. 11 (1935)

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* "608c(5)(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection."

5. Relevant AAA memoranda re interpretation of Sec. 8c(D) as only price limitation or "use" payment authorized by Act:

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
WASHINGTON, D. C.

June 19, 1935
AAA-Solicitor

MEMORANDUM FOR MR. SETH THOMAS
Solicitor

Dear Mr. Thomas:

We are informed that the following section was inserted in H.R. 8492 as passed by the House on June 18.

Page 14 following line 11

"(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit the marketing in that area of any milk or products thereof produced in any production area in the United States."

Will you kindly advise us if, in your opinion, this added section will in any way adversely affect us, *particularly with reference to the interpretation of subsection (D)* on page 13, and if so, what further modification should be made.

Very truly yours,

/s/ J. W. Tapp,
Director,
Agreement and License
Division.

June 20, 1935
AAA-Solicitor

MEMORANDUM TO THE ADMINISTRATOR
Re: H.R. 8492

Dear Mr. Davis:

I have Mr. Tapp's request for my opinion as to the effect upon paragraph (D) of section 8c(5) of H.R. 8492 (p. 12) of the following amendment which was adopted June 18, 1935 by the House of Representatives.

> On page 14, after line 11, insert a new subsection, as follows: "(g) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit the marketing in that area of any milk or product thereof produced in any production area in the United States."

The provisions authorized to be included in orders regulating the handling of milk and its products are enumerated in subsections (5) and (7) of section 8(c). None of these provisions contemplate a prohibition of the marketing, within an area subject to such an order, of milk produced anywhere within the country. Paragraph (D) of section 8c (5), however, authorizes the inclusion in such orders of a provision requiring handlers to pay, for a period of ninety days, the price specified in the order to be paid for manufacturing milk, to producers who were not, prior to the effective date of the order, regularly selling milk for consumption in the area covered thereby.

From the language of paragraph (D) of section 8c(5), it is apparent that the inclusion of a provision *prohibiting* the marketing of milk from any production area is not intended to be authorized. What is authorized by that paragraph is a *limitation for a specified time* upon the price which handlers may be required to pay to "new producers." This interpretation of subsection (D) is apparent from the face of

the provision and, in addition, is borne out by the legislative history of H.R. 8492.

Concerning paragraph (D) of section 8c(5), the House Committee on Agriculture in its report on H.R. 8492 stated (Report No. 1241, p. 11):

> "To prevent the destruction of the minimum price schedules which may be fixed in an order, handlers subject to it may be required to pay, for a period of 90 days, the price fixed for milk classified for manufacturing purposes to producers not theretofore selling milk for consumption in the area covered by the order. This time *limitation* is designed to prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural expansion of the area supplying any market by the introduction of new producers or new producing areas. This is the only *limitation* upon the entry of new producers – wherever located – into a market, and it can remain effective only for the specified 90-day period." (Emphasis supplied).

It is also significant that in the House of Representatives an effort was made to amend the amendment adopted on June 18, so that it would have provided that no milk marketing agreement or order should "limit or tend to limit", (instead of "prohibit") in any marketing area prescribed therein, the marketing of milk produced in any production area in the United States. This proposed change in the amendment was defeated, (Cong. Rec. Vol. 79, No. 125, pp. 9987 ff), indicating clearly that the distinction between a "prohibition" and a "limitation" was recognized by Congress.

It is my opinion, therefore, that the amendment in question will not in any way adversely affect the formulation and administration of orders relating to the handling of milk.

Very truly yours,

/s/ Seth Thomas
Solicitor

6. Relevant material re Section 8c(5)(B)(ii)(a) of act or authorized market differential

(a) Relevant excerpts from 1935 draft of "Proposed Changes In Pending Draft Of Amendments To The Agricultural Adjustment Act As Requested By The National Cooperative Milk Producers' Federation":

"3. Rewrite sub-section A(i) of Sec. 8c(5) as follows:

(A) In the case of milk and its products, terms and conditions:

(i) Classifying milk in accordance with the form in which it is ultimately used or consumed, and fixing, or providing a method for fixing, minimum prices for each such use classification, which all purchasers of milk subject to such order shall pay, and the time when payments shall be made for milk purchased from producers or associations of producers. Such prices shall be uniform minimum prices for milk purchased from producers or associations of producers, subject only to adjustments for (a) the grade or quality of the milk purchased, and (b) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers and (c) volume, market or production differentials *or other differentials* customarily used in the market covered by such license.

4. Eliminate entirely sub-section (A)(ii)(a) of Section 8(c)(5) which provides for individual dealer pools.

5. Rewrite sub-section (A)(ii) of Section 8c(5) by eliminating the (b) before the second paragraph and rewrite this paragraph as follows:

(ii) Providing: That all producers and associations of producers delivering milk to handlers covered by such order shall receive uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered, subject only to adjustments for (a) the grade or quality of the milk delivered, (b) the locations at which delivery of such milk is made, (c) volume, market or production differentials *or other differentials customarily used in the market covered by such order,* and/or (d) a further adjustment, . . . "

(b) **Relevant excerpts from Act as enacted evidencing Congressional refusal to make such proposed changes:**

"(5) Milk and its products; terms and conditions of orders.

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) *no others*:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject *only* to adjustments for (1) *volume, market, and production differentials customarily applied by the handlers subject to such order,* (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

"(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, *only* to adjustments for (a) *volume, market, and production differentials customarily applied by the handlers* subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, . . . "

(c) Relevant excerpts from Congressional reports defining market differential in sub-section (a), as set forth in Secretary's brief in *Blair v. Freeman:*

"Authorization for the promulgation of *location* differentials had its inception in the 1935 amendments to the Agricultural Adjustment Act of 1933. See 49 Stat. 750, 753. *By way of explanation,* the Committee Reports state:

'The market differential is a differential which is given to the producer to compensate him for delivering his milk to a

> city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets. (H. Rept. No. 1241, 74th Cong., 1st Sess., p. 10; S. Rept. No. 1011, 74th Cong., 1st Sess., p. 10.)'

"*From the foregoing we think it evident that Congress intended* by *location* differentials to compensate producers for the added value of their milk which is attributable to his 'distance from a primary market'. That, precisely, is the objective of the 'nearby differential'. . . . Nearby differentials were considered justified principally because nearby producers historically enjoyed a greater percentage of the marketwide Class I sales (*hence they received more for their milk than did producers located more distant to the center of consumption*); . . . 7 U.S.C. 608c(5)(B)(c) was first enacted in 1935 by amendment to the Agricultural Adjustment Act of 1933. . . .

"The New York Milk Marketing Order, notwithstanding its early vintage, was not the first to recognize the need for nearby differentials; such adjustments were incorporated in the first Greater Boston Marketing Order promulgated on February 7, 1936 – less than six months after the enactment of the amendments to the Agricultural Adjustment Act which permitted adjustments for *'the locations at which delivery of such milk is made'*. See 2 F.R. 1331. . . . Indeed, the nearby differential provisions of the 1936 Boston and 1957 New York–New Jersey orders are, in substance, *identical in purpose and effect*. . . .

Thus, dating almost to the very enactment of 7 U.S.C. 608c(5)(B)(*c*) the Secretary has construed *that* provision as permitting the very type of nearby differential which the appellants would have this Court declare unauthorized. *It is, of course, axiomatic that such a long-standing contemporaneous administrative construction of the Section by the official charged with its administration is entitled to great weight. . . .* Finally, while we think that 7 U.S.C. 608c(5)(B)(c) plainly permits differential payments to nearby producers, the authority to promulgate such differentials is certainly to be found in 7 U.S.C. 608c(7)(D), which authorizes such other terms and conditions in addition to those expressly stated as are 'incidental to, and not inconsistwith the terms and conditions specified in subsections (5)-(7) . . . ' As we have shown, the nearby differential provided for in the 1957 New York Order, in substance, is *identical* to a similar provision in the 1936 Boston Order – *both provisions were promulgated on the basis of the same statutory provision; . . .* "

(d) Complete text of 7 U.S.C. 608c(7)(D) referred to above:

"(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section *and necessary* to effectuate the other provisions of such order."

(e) Relevant excerpts from testimony of Donald Kane, Esquire, counsel for National Cooperative Milk Producers' Federation from 1933-39, called as witness by defendant-intervenors on October 20, 1967, in *Cranston v. Freeman: & Guilian, et al.*:

BY MR. CONARD:

"Q. Now what types of provisions could you recall were generally included in these various licenses that you actually worked on relative to the distribution of the proceeds from milk? . . . A. . . . I am interested in the dairy farm as such, but in practically every market by reason of economics there was a nearby differential, because the

nearby farmer's production was more even; *he delivered usually to the dealer's plant* or the dealer came out to his farm and picked up his milk. *It didn't have to go to a cooling station or receiving station and be cooled and then re-transported.* There are various reasons why nearby milk had a premium back in 1933, and I don't know anything about it today – I mean I can't make any statement about today, but from 1933 to '39 it was my experience that both in marketing, in licenses, and thereafter in orders, the orders varied with the markets and there are all kinds of differentials.

Q. But these differentials *that you have been describing* to the court here were included in licenses that you helped to prepare, is that right? A. That's right.

Q. And these included the differential between farmers in that particular marketing area that had to do with this relative nearness to the market *beyond the cost of transportation?* A. That's right.

Q. Now, Colonel Kane, what were your activities in 1935 in connection with your work with the Federation? A. In 1935 due to the decision in the Schechter v. United States, whatever the correct ruling was, we people in the Federation, our members and myself and my boss were afraid that the Agricultural Adjustment Act was going to be declared unconstitutional on the same ground, and that we better do something about having legislation ready to plug up the hole if the existing law was declared unconstitutional, and so over a period of about six months myself, as counsel for the National Federation, and ten or twelve attorneys for cooperative marketing associations throughout the United States, members of the Dairy staff of the Agricultural Adjustment Administration, certain members of Congress, Congressman Marvin Jones who was Chairman of the House Committee on Agriculture, Senator Pope of Idaho, Senator Murphy of Iowa was interested in

milk marketing, we all worked on legislation designed to get around the *Schecter* decision, that is, to provide a basis for milk marketing agreements and licenses that would not be subject to the criticism of unwarranted delegation of power, and still would be flexible enough so that these varying conditions in milk markets throughout the United States could be covered by a general statute.

And after a good bit of work, six months of it or better, I would guess, of continuous conferences, various drafts, we finally came up – my recollection is that it was pretty near to the last day, we had a bill that was fairly satisfactory to us, *and then on the final day when we had the final conference of all of our groups, we put some new language in the final draft,* and Mr. Jones introduced it the next day, I think, in the House of Representatives and it was introduced on the Senate side, I don't know whether by Congressman Smith of South Carolina or by Senator Pope, and that legislation was adopted and it is known as the Agricultural Marketing Agreement Act, I think, of 1935.

Q. Now, Colonel Kane, I show you the United States Code Annotated, Section 608c(5) and I ask you if by reading it you can recall this language you have just testified you recall was added near the very last day? A. Yes. In paragraph (B) (ii), and I think in other places – I would have to look through it – but we had provided the farmers would be paid for their milk subject to differentials for quality and for the place at which the milk would be delivered.

We were still trying to find broader language. So we started with the basic two things that we knew had to be in, the grade of the milk and freight.

But we couldn't find language that would give us a wide area that we wanted to operate in that was satisfactory to everybody, and I think finally what was

added in addition to the freight and quality and grade of the milk, we added these words that payments to producers were to be subject in addition to freight, in addition to quality, to differentials for volume, market and production differentials customarily applied by the handlers subject to such order.

I think that was the last thing we agreed on the day before Mr. Jones introduced the bill in Congress."

* * *

CROSS-EXAMINATION

BY MR. WEATHERWAX:

* * *

"Colonel, I think you said that preceding the submission to Congress of the Agricultural Marketing Act in 1935, *your committee*, comprised of many people, including, I think you said twelve lawyers and yourself, Mr. Hall, who was the previous witness, other lawyers, cooperative leaders, members of Congress, worked for a period of at least six months to prepare the drafting of the Agricultural Marketing Act to be submitted to Congress in 1935; is that correct? A. Yes, sir.

Q. And that on the last day when you thought you had prepared a suitable draft of the proposed legislation, you found out that a portion of Section (5) (B) (ii) was not suitable, and in haste you drafted *what appears to be presently in the Act as published in the statute*, official statute, as paragraph (5) (B) (ii) and then you submitted it that day to Congress for its consideration; is that correct? A. I certainly didn't want to give you that impression.

Q. Isn't that what you testified to? A. I don't think so. The quality differential and the location and

the transportation differential there was no difficulty about. We knew we had to have that for six months.

Q. But I am getting at this point – A. (Interrupting) We had to find language which would cover every market, and it took us six months to get it.

Q. And that is the language you are talking about, that is the language you came up with the last day? A. That's right.

Q. Is what is encompassed in this subparagraph of the section, that is it, is that correct? A. That's correct."

* * *

"Q. Now where was the change made in this paragraph or subparagraph that was made the last day? What was the change made? A. In the drafts – and these were simply drafts – the paragraph about payment to producers said that producers would be paid an equalized price subject to differentials for the quality and for transportation. They were always in it, and the last day we finally agreed on language which we thought would cover every other kind of differential from one end of America to the other.

Q. So, Colonel, do I understand it was then the last day that you agreed on the language which is as you indicated "provide for other differentials or other adjustments"? A. That's right.

Q. And the language that is incorporated in this subsection that I have referred to with respect to "(d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time;" was that the change made or was it the change made in the preceding part which is labeled (b)? A. We added (a), "volume, market, and production differentials customarily applied by the handlers subject to such order."

Q. *That was the part that was added the last day, "(a)"?* A. *Yes.*

Q. And that was incorporated into the statute when it was enacted by Congress? A. That's correct.

(f) Relevant excerpts from testimony of Richard Alpin, Market Administrator for Mass. – R.I. milk order, on Oct. 24, 1967, in *Cranston* case regarding market differential defined by Congress:

DIRECT TESTIMONY:

By MR. KRAUSE (Attorney, USDA):

"Q. Let me go on to the market differential, which is covered by the next full paragraph, being the first full paragraph on page 10.

> 'The market differential is a differential which is given to the producer to compensate him for delivering his milk to the city market instead of a country plant. These differentials vary with the markets and cannot be qualified as a 'location' differential, because of the fact that location is usually determined on the distance from a primary market, whereas market differentials are usually paid in secondary markets.'

Mr. Aplin, do you know of any differential that would come close to meeting the first sentence of that? Would this be something akin to the country station differential that you mentioned earlier? A. *I think so, because the first sentence of that paragraph refers to a differential for milk delivered to a city market instead of the country plant,* and I have described the differentials, the prices at country plants as compared to prices at city plants because of the country allowance in addition to the transportation allowance, so this might refer to that sort of differential, I think.

Q. But would such differentials be usually paid in secondary markets? A. No, because secondary

markets – at least, in my experience in New England, *the secondary markets tend to receive all or nearly all of their milk at city plants directly from farmers,* and it is the primary market, rather than secondary markets, that tend to jump over into other territory at country stations in order to obtain enough to provide for the primary market, and this has certainly been true in New England."

(g) Findings of Secretary re payment of "customary market differential" or premium for direct delivery prior and subsequent to Federal regulation in Troy, N.Y., area, 22 F.R. 4216 (1957):

"Although premiums to producers over the uniform price undoubtedly will continue to be paid by dealers in various areas in Upstate New York, provisions should be made for the payment of direct delivery differentials on deliveries to producers delivering to plants in and around Albany and Syracuse in order to insure an orderly transition from nonregulated to regulated status. Such differentials should be paid for all milk delivered by producers to pool plants located in the area and at rates as follows:

County–City or township	*Rate–dollars per hundred weight*
Albany:	
Albany	$0.10
Colonie	.10
Watervliet	.10
Green Island	.10
Cohoes	.10
Guilderland	.05
New Scotland	.05
Bethlehem	.05
Cocymanas	.05
Schenectady:	
Schenectady	.10

Glenville	.05
Niskayuna	.05
Rotterdam	.05
Montgomery:	
Amsterdam (city)	.05
Amsterdam (township)	.05
Saratoga:	
Waterford	.10
Rensselaer:	
Troy	.10
Rennsselaer	.10
Brunswick	.05
N. Greenbush	.05
E. Greenbush	.05
Schodack	.05
Onondaga:	
Syracuse	.05
Manlius	.05
De Witt	.05
Onondaga	.05
Camillus	.05
Solvay	.05
Geddos	.05
Salina	.05

Exceptions were taken to the proposed differential rates payable at plants in the city of Albany on grounds that operating conditions relating to producer receipts and distribution were no differnt at such plants than at plants just outside the city limits, thus subjecting operators of plants in the city to undue competitive disadvantage. Exceptions also were taken to the difference between the proposed rates in the city of Syracuse and those in surrounding towns on much the same basis and on the basis that the Syracuse rate is not in line with the *historical* pattern of producer payments. After reviewing these exceptions and the pertinent record evidence, it is concluded that the rate

applicable at plants in Albany should be reduced to 10 cents (from 15) and that the rate at plants in the city of Syracuse should be reduced from 10 cents to 5 cents."

7. Relevant illustrative excerpts from testimony of economists and officials of "nearby" associations re lack of a nearby differential as such prior to Federal regulation, 1963 Mass. – R.I. hearing record:

(a) From testimony of James Lee, economist for N.E.M.P.A. and former official of Administrator's Office For Greater Boston milk order.

CROSS-EXAMINATION

By Mr. Tipton:

"Q. I am sure you are very familiar with Exhibit 24, which contains an article on farm location differentials. In this article you portray or make a statement as to what testimony was entered at a hearing prior to the issuance of the order in 1937, which happens to correspond with the differential rate that was put into effect in 1937.

That differential, or the testimony that was given, closely related to the 46 cent differential, did it not? A. Yes.

Q. Now, can you tell me: Who paid that differential? I do not mean by name, but as a group. A. *Who paid the differential? There was no differential.*

Q. Did the handlers pay the differential? A. The handlers paid the producers who delivered the milk at the city plants a level of prices which was in relation to the up-country prices. as the evidence in the hearing record at that time, which is quoted in the article, explains." (R. 1718-19, Mass.–R.I. hearings).

* * *

"Such payments have been justified over the years as a recognition of the historical pattern of prices which existed prior to regulation, or as compensating nearby producers for sharing a part of the fluid milk market which they formerly enjoyed, with producers more

distant from the market. * * *" (R. 3393, Mass. – R.I. hearings).

(b) From testimony of Christopher B. Sykes, official of nearby organization:

CROSS-EXAMINATION

BY MR. TIPTON:

"Q. I am asking though what contributed to this higher price being paid? A. I have not made any statement that I know of about that. . . .

Q. Well, in the next sentence you say, *'This higher rate per hundredweight was not arrived at by milk dealers then through the process of computing a distant price and adding thereto a premium or differential in order to arrive at a final figure.'* Now I think that statement probably stands correct. However, did not these handlers arrive at the price at which they were willing to pay for the nearby milk by comparing that to a price at some other source? A. I think undoubtedly being big men they assessed the economic situation, yes, if that is what you mean.

Q. And they paid a higher price for milk from nearby sources as compared to milk from more distant sources for some reason, is that right? A. They must have had some reason, yes.

Q. Well, can you tell me some of the reasons you think it might have contributed to that higher payment? . . . A. No, I have no knowledge of the individual reasons that each individual handler might have used in arriving at this price. I make no assertion that I do know. . . .

Q. Who paid the differential prior to Federal regulation, producers or – A. If you read my direct testimony or heard me give it, Mr. Tipton, you know I have adopted the position that *it never was in fact paid by handlers to producers by such at all."*

(c) From testimony of Dr. David Clark, economist for nearby organizations:

BY MR. TIPTON:

Q. My last question was: What do you imply by the last portion of the sentence that I was referring to, on page 20? A. And the question is the one that reads: "These differentials *developed* in response to the need for some compensation to induce local producers to accept the provisions and consequences of marketwide pooling."

Well, what I had in mind here is that apparently historically producers located relatively close to the market had generally enjoyed a higher percentage of Class I utilization, either because of favorable relationships with local distributors or alternatively because of the fact that they were possibly in a better position to go into a producer-dealer type of operation, and thereby increase their Class I utilization.

Now, this particular advantage, under marketwide pooling – they were more or less asked to relinquish, *and as a compensation for relinquishing this advantage, the differentials were encompassed in the order.* This is my understanding of the material quoted at the hearing.

(d) From testimony of William J. Newman, Official of a nearby R.I. organization:

Q. Just one question, Mr. Newman. In the time in the southeast area prior to the promulgation of the market wide pool order, were these higher prices that were being received by local producers the result of any computation of distant prices *and then the adding of some amount to it* or was this just the product of Class I utilization in a handler's plant and reflected in the prices received by the producer shipping to him? A. Prior to the southeast order nearby farmers got returns that reflected the use value of that milk and we feel again that the nearby differential despite the arguments that were given for

discontinuance does reflect the added use value of nearby milk over distant milk and it should be continued.

Q. Let me ask one further question then. These handlers that were paying these prices as a result of higher utilization, they did not arrive at the final pay price to producers, did they, by any computation of any other price than the adding to it of a set figure like a differential? A. *No, that is right.*

(e) From the Federal Milk Order Study Report (Nourse Committee), Dec., 1962, introduced into evidence at the Mass. – R.I. hearing:

"However, the major *purpose* of nearby differentials apparently has been to compensate nearby producers for sharing market Class I sales with more distant producers in a marketwide pool. This principle seemingly was *founded* on the belief that in the absence of regulation, a higher percentage of nearby milk would be sold for fluid use."

(f) From the testimony of Irving E. Sutin, General Ice Cream Co., during 1949 administrative hearings on Springfield, Mass., milk order:

"It does seem that the 46-cents and 23-cents farm differential of the NEMPA would be illegal since it is contrary to the AAA of 1937. The Act provides for differentials 'customarily applied by handlers subject to such order'. *No farm differentials had ever been paid in the Springfield market.*" (R. 537, Springfield hearings).

8. **Testimony (conflicting) of Reuben Hall, Esquire, counsel for NEMPA, CMPA and others favoring nearby differential in *Blair* and *Allen*, on Oct. 20, 1967, in *Cranston* case:**

Q. Mr. Hall, you took your law degree in the year 1918, is that correct; A. Yes, sir.

Q. And in 1917 did you commence your association with a firm of lawyers in the practice of law? A. Yes, sir.

Q. And would you describe that very briefly to His Honor? A. I became associated in September of 1917, on entering my last year at law school, as a part-time assistant in the firm of Hoar and Dewey. Mr. Hoar at that time was counsel for the New England Milk Producers Association, and in that connection in October of 1917 I, with Mr. Dewey, Mr. Hoar and two or three other people, connected with the milk business, went to Washington and asked Mr. Hoover, who was then the Food Administrator, if he would create a regional milk commission who might under the Food Administrator's Authority, fix the prices to be paid to producers for milk which they delivered to dealers and otherwise regulate the marketing of milk in the Boston market, principally, but secondarily in smaller markets which were tributary to Boston.

Q. Did that assignment give you your initial work in the field of milk regulation and milk marketing?
A. Yes, sir."

* * *

"Q. Now am I not correct in stating the New England Milk Producers Association on the occasion of your trip to Washington, D.C., in 1918 and *your* meeting with Mr. Hoover – A. (Interrupting) 1917.

Q. 1917, *you* were concerned, were you not, primarily with the situation within the Boston milk market?
A. Yes, sir.

Q. And would you describe for His Honor the condition then prevailing in the Boston milk market? Also, the situation as it developed over the next few ensuing years?"

* * *

"Q. (Interrupting) To the northern producer?
A. Well, I speak of the northern producer, I mean the producer who was beyond 150 miles from Boston, and this figure, this differential which they paid to the nearby producer would be taken up in the overall accounting to all producers, so that on a use plan for milk delivered at the market, they paid for the percentage which they used as class 1, the class 1 price, they would account for what they used as class 2 at the class 2 price, then they would deduct from the overall amount, let's say if it was a cent a quart, 46¢ a hundredweight, it would be paid to the nearby producers as his premium or location preference, whatever you want to call it, and that would be deducted before the overall price to all producers was computed.

Q. And who was it that did this? A. The dealer, and the dealer did this under contract with the cooperative association, New England Milk Producers organization that I represented.

Q. So it was this voluntary program that was continued until 1933? A. Yes. But I would like to clarify one aspect of that voluntary program. *It didn't always measure the recognition of the nearby producer in terms of so many cents a hundredweight or so much per quart.* It might have been reflected in allocating under a so called base rating plan.

Q. You say it might have – did it, from time to time? A. It did. A preferential basis. Now the basis was an allocation to each producer of a fixed percentage of the milk which he produced and sold to a dealer for which he was to receive the class 1 price, and *the preferential provision of the nearby producer was to accord him a greater percentage of class 1 of his total production than was accorded to the producer who was beyond 150 miles.*

Q. And how was this reflected? A. This reflected itself in the price return to the nearby producer of approximately a cent a quart or 46¢ a hundredweight. It might vary one or two cents up or down, depending upon the total volume of milk."

9. From testimony of Dr. John D. Black during 1956 New York–New Jersey administrative hearings:

BY MR. LENT:

"Q. In speaking of the outlying portions of the area which are sometimes called in the New York milkshed, and of the reaching out for milk under historical circumstances that you have repeated and which I do not dispute, are you aware that as early as 1908 milk train service – Have you got a copy of Exhibit 59? A. I have it here, yes.

Q. – was in effect on the Rutland (Vermont) Railroad which crosses the upper part of the State of New York just south of the Canadian border and then goes over into Vermont and then down into New York City with milk for fluid use – do you know that development up there was as early as that? A. I didn't know that it was as early as that. It points, of course, to the fact which was more true in the early days than now, before we got our highways and our transport, that a railroad line, wherever there was a railroad line, just pushed its way out into a channel of transportation.

Your milkshed was like this (indicating) according to the railroad lines. That is the explanation of how that could happen way back in that period, you see.

Q. Let me review a little more history. You spoke of the spread of the milkshed in the late 1920's, I believe, if I remember right. Were you aware that in the late 1920's, I think along about 1926 or 1927, the Mayor of the City of New York called in the milk industry and said he was going to enlarge the milkshed

into Ohio unless more milk could be obtained from the present milkshed, and that as a result of that, milk train service was put in on the D and H Railroad, up along the east side of Lake Champlain, and many plants were started up just east of the Buffalo milkshed part of New York State in what had previously been fruit and vegetable territory?

Did you know that? A. Only in a very faint way.

Q. And that the supply so organized has been used to supply the fluid market as late as 1945, 1946 and 1947, when the percentage of Class I utilization in November of those three respective years was, respectively, 89 percent, 90.1 percent, and 88.9 percent? A. I was aware of those circumstances.

Q. When the farmers started producing more milk because of increased technology, that was a move that applied throughout the milkshed, was it not? It was no particular sin of these distant producers that had been shipping milk to the market since 1908, or since 1927, was it? A. No.

Q. And if there is going to be any carving or tailoring or cutting off done here, they shouldn't be singled out because of mere distance in any such plan, should they? A. You are offering an historical argument in favor of what I attempted to defend on other grounds.

Q. I appreciate that, Doctor, and I think you called it national economy. But the Act under which we are having this hearing speaks of the public interest, too, and I think we have a right to consider that. A. I agree.

Q. Have you any further comment to make in view of those historical facts and my calling your attention to the public interest feature of the Act? A. No, I haven't, except that we can't defend present arrangements or future arrangements too much on the long distant past, or what was just in the long distant past. Conditions change." (R. 4455-58, N.J.–N.J. hearings)

10. From the motion to intervene of Vermont (non-nearby) dairy farmers who intervened in *Hood & Sons v. United States*, 26 F. Supp. 672, *affirmed*, 307 U.S. 588, and pursued their claim concerning entitlement to "historical" fluid prices in Supreme Court, 59 S. Ct. 791, 306 U.S. 629, 83 L.Ed. 1032:

"Your petitioner has a further interest in the litigation in the above entitled suit arising out of the following facts:

Your petitioner has sold and delivered milk to the defendant H.P. Hood & Sons, Inc., for a period of many years prior to August 1, 1937. Since that date he has been and is now contiuing to sell and deliver milk to said defendant; and he has every reasonable expectation of continuing his present business relations with said defendant and of selling and delivering milk to said defendant in the future. The effect of Order No. 4, as amended, has been and now is to reduce and lower the price which your petitioner can obtain for milk sold by him to said defendant, and if said order is enforced against said defendant in the future, the prices which your petitioner will be able to obtain for his milk sold to said defendant will continue to be so reduced and lowered. Your petitioner is informed and believes and, therefore, avers that for many years the proportion of Class I milk purchased by the defendant, H.P. Hood & Sons, Inc., to the total milk purchased by it has been greatly in excess of the proportion of Class I milk purchased by all handlers in the Greater Boston, Mass., Marketing Area to the total milk purchased by all such handlers and that the defendant, H.P. Hood & Sons, Inc., has similarly purchased a higher percentage of Class I milk during each delivery period from August 1, 1937 to October

15, 1937. The 'blended price' computed and announced by the Market Administrator under the terms of Order No. 4, as amended, is based on the prices for Class I and Class II sales equalized among all producers selling to all handlers in said marketing area. If your petitioner were paid on the basis of Class I and Class II prices equalized among all producers selling to the defendant, H.P. Hood & Sons, he would receive a higher price for his milk than if he is paid on the basis of such prices equalized among all producers selling to all handlers in said marketing area."

11. **From the Congressional Reports re necessity for re-enactment of marketing provisions of Act:**

(a)From S. Rep. No. 565, 75th Cong. 1st Sess. 2-3 (1937):

"NECESSITY FOR REENACTMENT OF THE MARKETING AGREEMENT AND ORDER PROVISIONS

Certain district courts have interpreted the Hoosac Mills decision, which invalidated the processing-tax and production-control provisions of the Agricultural Adjustment Act, as also rendering the marketing agreement and order provisions of the act invalid. These programs, as authorized by the act and as administered by the Secretary of Agriculture, are designed to improve the purchasing power of farmers by encouraging orderly marketing through the regulation of interstate commerce. These marketing programs are not for the purpose of controlling agricultural production and, in fact, they do not control the production of any agricultural commodity. Furthermore, under the provisions of the act such programs were contemplated to operate separately and independently and not as a part of, or in conjunction with the production-control programs.

While to date the question of the constitutionality of

such regulation of interstate commerce has not been considered by the Supreme Court, the interpretation placed upon the Hoosac Mills decision by certain lower courts has rendered such programs temporarily ineffective in the districts to which such decisions apply; because these courts maintain that the Hoosac Mills decision invalidated the entire act, including this type of regulation in spite of the fact that the present act contains a separable provision.

The immediate reenactment of the marketing agreement and order provisions of the Agricultural Adjustment Act would remove the technical basis upon which such adverse decisions rest and enable producers to receive the benefits of such programs without the necessity of waiting until these cases have been finally acted upon by the Supreme Court."

(b)From H.R. Rep. No. 468, 75th Cong., 1st Sess. 2 (1937):

"REASONS FOR REENACTING THE MARKETING AGREEMENT AND ORDER PROVISIONS

The Supreme Court in *United States v. Butler* ((1936), 297 U.S. 1), declared invalid the provisions of the Agricultural Adjustment Act authorizing production adjustment programs involving processing taxes and benefit payments. The question as to whether Congress has the constitutional power to regulate interstate and foreign commerce in agricultural commodities through marketing agreements and orders as provided in the Agricultural Adjustment Act was not before the court and has not yet been determined by the court. Lower Federal court decisions have differed on the question, and in two cases courts have held that the marketing agreement and order provisions were inseparable from the production adjustment provisions which fell in the *Butler case.* As a consequence of these decisions, doubt has been cast on the validity of all the agreements and orders, and producers of

milk, particularly in New England, are now suffering from a seriously demoralized price situation.

The committee is of the opinion that Congress has the power to regulate interstate and foreign commerce in agricultural commodities in the manner provided in the act, and that an examination of the text and organization of the act and of its history shows these provisions are and were intended to be effective independently of the production adjustment provisions. The committee believes that this view will find the support of the Supreme Court.

Whatever may be the case, in order that whatever decision which may ultimately be rendered with respect to these provisions may turn on their constitutional validity rather than on their separability, and in order that express authority be given to enter into new agreements and orders in the areas in which they are necessary, it is highly desirable that these provisions be reenacted."

APPENDIX D

RELEVANT FINDINGS IN SECRETARY'S DECISIONS AND RELATED MATERIAL RE LOW PRICES AND DISORDERLY MARKETING CONDITIONS PRIOR TO ACT; NEARBY PRODUCERS' NEED FOR FEDERAL ORDER; AND BENEFITS TO ALL PRODUCERS FROM LEGISLATION.

1. (a) **From Findings In Promulgating First Greater Boston Milk Order, Feb. 7, 1936:**

"3. That the prices received by producers for milk sold in the marketing area were, for a long time prior to said hearings, at a level that gave such milk a purchasing power with respect to articles that producers buy considerably below the purchasing power in the base period."

(b) **From brief of Secretary in *Blair v. Freeman* and House of Rep. Concurrent Resolution No. 32, 73rd Cong., 2nd Sess., May 14, 1934, directing FTC to investigate the milk industry:**

"In the five-year period ending December 31, 1933, the wholesale price of milk sold by farmers fell fifty percent, although, at the same time, milk companies were still able to make a net profit on their investment in excess of 25 percent. Extreme cut-throat competition for the more lucrative fluid milk market engendered business practices which jeopardized 'the quality and in the end the quantity' of the vital fluid milk supply."

(c) **From the opinion in *Nebbia v. New York*, 291 U. S. 502 (1934):**

"In the four years from March, 1929 to March, 1933, the retail price of milk fell 37 percent, but the price paid to the farmer fell 61 percent. The dealer's margin was decreased only 17 percent. *** A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed.

(d) From the opinion in *United States v. Whiting Milk Co.*, 21 F. Supp. 321 (D.C. Mass., 1937):

"A continuous flow of fresh milk into the Boston area *** from rural New England is imperative. *From the urban viewpoint, it is a matter of real necessity*. From the producer's viewpoint, it provides a dependable market for their product, and it is an important source of income to them. Less than 12 per centum of the milk brought into the Boston area originates in Massachusetts, and less than 2 per centum of it is handled exclusively in intrastate commerce. From 1929 to 1933 the prices paid for milk to the producers of New England declined steadily. In 1936, the price paid to producers of Vermont was 34 per centum below the 1929 level. *Conditions in other states were comparable*. Effective regulation has in the past proven to be a boon to milk producers. Heretofore, when federal regulation has failed, a resumption of chaotic marketing conditions and a lowering of the price levels has occurred. Experience teaches that a resumption of such conditions will occur if the defendant and others similarly situated are permitted to avoid compliance with the law."

(e) From the testimony of William Newman, Official of R.I. nearby organization, during 1963 Mass.–R.I. hearing:

"In the absence of government regulation of market milk prices during the past several years, prices received by producers for milk would be lower than they currently are in New England and other markets in the Northeastern states. A precise demonstration does not seem to be necessary to establish this fact. Government regulation has maintained prices to producers at a level more favorable than would have been the situation in the absence of such regulation." (R. 2647, Mass.–R.I. hearing)

(f) From testimony of W.A. Bronson, economist for NEMPA, hearings of Dec. 10-12, 1935, Greater Boston milk order, page 66:

"MR. LE BLANC: Mr. Bronson, can you tell us what is the real cost of production for 100 pounds of milk, now?

MR. BRONSON: I think the cost is very much greater than the price being received for the milk."

(g) From the testimony of Market Administrator in 1935 Greater Boston hearings, pp. 210-11:

"MR. TATOR: ... On this matter, *we have to confess to you that there is no one who has any accurate figure computed on just how much more those Massachusetts producers should receive for their milk*... It is different from what they have demanded. They have demanded, through their representative, that every drop of milk they make should be paid for at the Class I price... We do not recognize state lines, but if we were to take the position presented to us, the Massachusetts position, that you are really a tariff problem, we would set up a tariff barrier and say you cannot sell us lemons from Italy, or some other place. Now, these people want a better price down there. The Government has not recognized that. Whether these men who put in this license have put in too high a price, I do not know, but I can assure you men we will find out what the facts are and attempt to see that it is right."

(h) From testimony of Mr. Alpin, present Market Administrator and former USDA official, pp. 425-26 of 1937 hearings:

"MR. ALPIN: *You have heard the testimony here that these producer associations have nothing to say about the price of milk.* When we were operating in Boston we were continually told by the dealers, the large dealers, that they had to own their milk as cheap as their competitors, and that they intended to own their milk as cheap as their competitors. That being their policy, *and it has been their policy for years,* and they admitted under their own testimony yesterday that *the dealer sets the price and the producers have nothing to say about it. I think that you have very little assurance as to what the price will be without a Federal Order...*"

(i) From testimony of Mr. Carten, President, Nearby Producers Association, in 1937 Greater Boston hearing:

"MR. CARTEN: ... we have figures here from *one* of our producers from 1920 to 1930 for the price received for milk shipped to Salem, Massachusetts, to the H. P. Hood Company and they averaged – it is hard to average them exactly, because in all cases the butterfat wasn't given, but it was between – somewhere between $1.20 and $1.30 over the NEMPA price in the 19-mile zone. We should have at least a cent a quart over the equalized price to be protected. That would be 46¢ instead of 36¢, wouldn't it, Mr. Alpin?" (pp. 281-82)

(j) From testimony of W. A. Bronson, economist for NEMPA, pp. 267-68, hearings of June 30, July 1-2, 1937, Greater Boston milk order, re prices after suspension of order effective August 1, 1936:

"WITNESS BRONSON: Each year. I think the necessity of a Federal order is borne out by the situation this year and last year, *as far as nearby producers are concerned. Prices paid for milk to nearby producers inside the 40-mile zone in May last year under the Federal Order averaged 64 cents per hundredweight or nearly a cent and one-half per quart higher than the price received in May this year under the Milk Control Board basis of price.* A year ago the producers in the 40-mile zone averaged $3.10 per hundredweight for their milk – this year $2.46 per hundredweight, a decrease of 64 cents per hundredweight.

The comparison of milk prices under the Federal Order as compared with prices under the (Massachusetts) Control Board is still more unfavorable when compared with the prices paid last year and this year for dairy feeds. A year ago grain cost $1.64 per hundredweight, this year $2.50 per hundredweight. Last year 100 pounds of milk would buy 188 pounds of grain – this year only 102 pounds, a decrease of 86 pounds of grain or 46% in the ability of the milk price to purchase the most important item of expense

the dairyman has. There appears to be no question that *based on past history* a Federal Order can give these Massachusetts producers more money for their milk than a Milk Control Board Order without assistance from the Federal Government, and that even more money can be obtained for these producers under a joint order of both agencies."

(k) From the Report of the Massachusetts Milk Control Board of November 30, 1936, page 9, filed in 1937 hearings:

"In the opinion of the Board, Massachusetts producers cannot expect over any long period of time special protection against the competition of producers in other States ..."

(l) From the findings of the Secretary in promulgating the Springfield, Massachusetts Milk Order in 1949, 14 Federal Register 7085

"(a) ... Producers supplying milk to the Springfield market are located in Massachusetts, Vermont, New York, New Hampshire and Connecticut. Witnesses estimated that the number of producers outside the State of Massachusetts as from 30 to 40 percent of the total number supplying the market ..."

"(b) ... The record shows that conditions exist in the Springfield market which have resulted in a loss of market for several producers ... The unsettling conditions which are disrupting the Springfield market result from the opportunity on the part of milk handlers to purchase milk from producers outside Massachusetts wholly on an unregulated price basis *whereas the handlers who purchase milk from Massachusetts producers are required to make payments to producers in accordance with a classified price plan enforced by the Massachusetts Milk Control Board ...*"

* * *

"... The evidence in this record shows the need for Federal regulation *of all of the sources of milk* supplies for the Springfield market in order to give *Massachusetts* producers who are now supplying the market an *opportunity* to retain the market *on an equal basis with out-of-state producers.*

Any delay to study possible alternatives as suggested by the excepters threatens certain producers with the loss of their market with resultant unstable marketing conditions."

* * *

"Handlers purchasing milk under the regulations of the Massachusetts Milk Control Board are required to pay Massachusetts producers delivering milk to their plants these prices for the quantitites of milk utilized in such classes. Handlers buying milk out of State are subject to no governmental price regulation and purchase milk at a price competitive with the prices paid to producers in those areas for all milk. The level of the competitive price is dominated by either the uniform price established for producers delivering milk to plants regulated by the New York Federal milk order or the Boston Federal milk order or both. The uniform prices established under the Boston and New York Federal milk orders reflect the average percentage of Class I and of Class II in each of these markets. To the extent that any handler in the Springfield areas has sales of Class I milk which give him a higher utilization of Class I milk than the average for either the New York or Boston markets, that handler can purchase milk for such Class I sales at the uniform blend price paid producers in the Boston and New York markets for all milk. The evidence in this record indicates that handlers are aware of this opportunity, that some handlers have acquired milk on this flat price basis and that at least one handler intends to expand this type of buying in preference to purchasing milk from Massachusetts producers.

The advantage accruing to a handler purchasing milk outside the State of Massachusetts has increased in recent months as the uniform blend prices in the New York and Boston markets have dropped relative to the Class I price in each of these markets and in the Springfield market. The lower uniform prices result from substantial declines in excess milk values and in an increase in the quantity of milk utilized in excess classes.

In addition to the disturbing influence of out-of-state milk in the Springfield market, the lack of a uniform marketwide price plan for all producers supplying the market is a disrupting factor. The range in prices paid by 16 large handlers in the Springfield market to producers per hundredweight of milk testing 3.7 percent butterfat was, delivered at city plants, from $5 40 to $6.326 in June 1948 and from $6.05 to $7.005 in November 1948. In May 1949 the range in prices handlers paid producers in that region was from a low of $4.2162 to a high of $5.8177 per hundredweight of milk testing 3.7 percent butterfat.

The lack of price regulation effective with respect to all of the sources of fluid milk for the Springfield market and the absence of a uniform pricing method are contributing to the growth of an unstable milk market in this area. A marketing order is needed in the area to assure producers of a market for their milk at reasonable and uniform prices."

* * *

"The sources of milk supply for the various cities and towns in the proposed marketing area overlap and are intermingled to such an extent that the general supply area may be considered as one milkshed for the entire marketing area. In many cases handlers receive milk at a plant supplying several of the towns in the marketing area."

* * *

"The supply area for the Springfield market overlaps with the supply areas of other markets. . . "

* * *

"(6) *Payments to producers.* The percentage of milk utilized by individual handlers in Class I varies so widely that prices to producers have differed under an individual handler type pool by over $1.00 per hundredweight. Provision should be made for a market-wide type of pool in order that all producers delivering milk to all handlers may receive a uniform price for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered. This method of paying producers will require a producer-settlement fund for making adjustments in payments

by handlers so that the total sum paid by each handler shall equal the value of milk received by him and utilized in the classes established by the proposed marketing agreement and order."

* * *

"Most of the dairy farms in Massachusetts are close to urban centers. This probably explains why prices to Massachusetts farmers for milk sold wholesale average considerably more than the prices paid to Vermont farmers. This difference cannot be attributed to transportation cost alone. The many opportunities for dairymen to market their own milk directly influence the price which they demand for their product."

* * *

"Certain producers located outside the proposed differential area claimed that they should receive differential payments because they had been supplying the Springfield market for a number of years and they had received the Springfield price less a hauling charge. Some of these producers testified that they received prices approximately equal to the Boston blend prices at nearby country points. Other producers did testify that they were currently receiving a price which was about 50 cents over the competitive price in their territory. A price difference of that amount cannot be expected to be maintained in a period of adequate milk supplies."

(m) From testimony of C. W. Swonger, economist for NEMPA, at Springfield promulgation hearings:

"MR. SWONGER: ... what is needed is a type of regulation that would price all milk in the market on a uniform basis regardless of its source, and remove the incentive to drop local producers in order to obtain cheaper milk from outside unregulated sources... It is not possible to operate under a type of regulation that prices only about 60 percent of the milk. Unless a means can be developed to regulate all the milk in the market on a uniform basis, the price structure will collapse and local producers will be left without a market."

(n) **From the testimony of Irving E. Sutin, General Ice Cream Corp., at the Springfield promulgation hearings:**

"The past experience in the Springfield market fails to indicate any justification for these proposed differentials. A producer whose milk is delivered to a milk plant in the marketing area has been receiving the same price as other producers delivering to the same plant regardless of the location of his farm or the other farms from which the milk was shipped to the same plant. To provide differentials listed in the proposed Order would be a radical departure from accepted practice in the Springfield market. The proposed differentials would not only give premiums to producers whose farms are located in the cities and towns named and whose milk is delivered directly to plants in Springfield but would also be paid to those producers located in those cities and towns whose milk is delivered to country plants. This, likewise, is a departure from the marketing practices which have been followed in the Springfield market.

Adoption of the proposed differentials would impose without any justification a penalty and hardship on those producers who have been delivering milk to Springfield plants for many years...." (R. 333-34)...

"It does seem that the proposal of 46 cents and 23 cents farm differential of the NEMPA would be illegal since it is contrary to the AAA of 1937. The Act provides for differentials "customarily applied by handlers subject to such order". No farm differentials had ever been paid in the Springfield market." (R. 537) ...

"The other twenty per cent of producers would be penalized to pay for the gravy that the others would enjoy; or, if not penalized the alternative would be that they would be driven from the market. In effect, a Federal marketing order of the Federal Government would have the tendency to make second class citizens of those producers who did not happen to be located in the preferential area arbitrarily drawn." (R. 538).

(o) From the findings of the Secretary in Promulgating the 1949 Worcester, Massachusetts, Milk Order 14 Federal Register 7097

* * *

". . .The evidence in this record shows the need for Federal regulation of all of the sources of milk supplies for the Worcester market in order to give Massachusetts producers who are now supplying the market an opportunity to retain the market on an equal basis with out-of-state producers. Any delay to study possible alternatives as suggested by the excepters threatens certain producers with the loss of their market with resulting unstable marketing conditions."

* * *

"Producers supplying milk to the Worcester market are located principally in Massachusetts, Vermont and New York."

* * *

"The record shows that conditions exist in the Worcester market which permit handlers to purchase milk for fluid use at substantially different prices. These conditions must be remedied in order to establish and maintain such orderly marketing conditions as will establish prices to producers for milk delivered to the Worcester market that reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and milk products in the marketing area and which will insure a sufficient quantity of pure and wholesome milk and be in the public interest."

* * *

"Handlers purchasing milk under the regulations of the Massachusetts Milk Control Board are required to pay Massachusetts producers delivering milk to their plants these prices for the quantities of milk utilized in such classes. Handlers buying milk out of State are subject to no governmental price regulation and purchase milk at a price competitive with the prices paid to producers in those areas for all milk. The level of the competitive price is dominated by either the uniform price established for producers delivering milk to plants regulated by the New York Federal milk order or the Boston Federal milk order or both. The uniform prices established under the Boston

and New York Federal milk orders reflect the average percentage of Class I and of Class II in each of these markets. To the extent that any handler in the Worcester area has sales of Class I milk which give him a higher utilization of Class I milk than the average for either the New York or Boston markets, that handler can purchase milk from producers outside Massachusetts for such Class I sales at the uniform blend price paid producers in the Boston and New York markets for all milk. The evidence in this record indicates that handlers are aware of this opportunity, that some handlers have acquired milk on this flat price basis and that at least one handler intends to expand this type of buying in preference to purchasing milk from Massachusetts producers.

The advantage accruing to a handler purchasing milk outside the state of Massachusetts has increased in recent months as the uniform blend prices in the New York and Boston markets have dropped relative to the Class I price in each of these markets and in the Worcester market. The lower uniform prices result from substantial declines in excess milk values and in an increase in the quantity of milk utilized in excess classes.

In addition to the disturbing influence of out-of-State milk in the Worcester market, the lack of a uniform marketwide price plan for all producers supplying the market is a disrupting factor. In May 1949 prices paid to producers delivering to different handlers varried as much as $1.24 per hundredweight in this area for milk of basic 3.7 percent butterfat content.

The lack of price regulation effective with respect to all of the sources of fluid milk for the Worcester market and the absence of a uniform market-wide pricing method are contributing to the growth of an unstable milk market in this area. A marketing order is needed in the area to assure producers of a market for their milk at reasonable and uniform prices."

* * *

"The sources of milk supply for the various cities and towns in the proposed marketing area overlap and are intermingled to such an extent that the general supply area may be considered as one milkshed for the entire marketing area. In many cases handlers receive milk at a plant supplying several of the towns in the marketing area."

* * *

"(5) *Class prices.* Class prices for the Worcester market should be established on a formula basis similar to that under which class prices are determined for the Boston market. The Boston and Worcester milk markets are so interrelated that a close correlation of price changes is necessary to maintain stable market conditions. Boston is the larger market and therefore the dominant one in effecting price changes. The milksheds of these two markets overlap so that there is opportunity for producers to shift their supply from one market to the other if substantially different prices are offered. The Worcester market draws milk directly from plants at which milk is priced under the Boston milk order. Careful alignment of prices in the two markets is necessary to maintain equal cost of milk to handlers for milk used similarly."

* * *

"(6) *Payments to producers.* The percentage of milk utilized by individual handlers in Class I varies so widely that prices to producers have differed under an individual handler type pool by over $1.00 per hundredweight. Provision should be made for a market-wide type of pool in order that all producers delivering milk to all handlers may receive a uniform minimum price for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered. This method of paying producers will require a producer-settlement fund for making adjustments in payments by handlers so that the total sum paid by each handler shall equal the value of milk received by him and utilized in the classes established by the proposed marketing order."

(p) From the findings of the Secretary in Promulgating the Southeastern (State of Rhode Island and Southeastern Massachusetts) Milk Order in 1958, 23 Fed. Reg. 8225

"The Southeastern New England market is an interstate market encompassing all of the State of Rhode Island and a substantial area in Southeastern Massachusetts. Within this market there is a substantial and continuing interstate commerce, both in the procurement of milk and in the sale of fluid milk and its products."

* * *

"More than one-third of the fluid requirements for the Southeastern New England area originates from sources outside the States of Massachusetts, Connecticut and Rhode Island. Much of the upcountry milk is assembled and received at country plants in Vermont and New Hampshire and is then transported to the Southeastern market for processing and distribution. Additional quantities are handled by bulk farm tank pick-up and moved directly from farms in northern New England to plants in the local market.

The situation in both Fall River and New Bedford has continued to deteriorate as handlers, seeking to avail themselves of milk supplies at the most advantageous price, have tended to look to up-country unregulated supplies... As a result, local producers have had difficulties in maintaining regular outlets for their productions.... Much of this (local) milk is sold at *manufacturing* milk prices *even though the local supply is inadequate to meet the market demands.*

The situation in the Rhode Island part of the market is substantially similar to that in the Fall River–New Bedford area. Early in 1951 the association representing a large segment of the registered Rhode Island producers requested a hearing to consider a Federal order for that market because of the then existent market disorder. On the basis of the facts presented at that hearing it was recommended that an order be issued. However, following that decision the

association negotiated a settlement with local handlers which minimized the effect of the disorder and accordingly the association asked that the order not be issued.

The increase in available milk supplies generally and the fact that milk is readily available from upcountry sources at prices approximating the Boston blend has provided a strong incentive for handlers to drop local producers in favor of cheaper sources of supply.

Less than one-third of the fluid requirements of Rhode Island dealers are supplied by Rhode Island dairy farmers. An additional forty-five percent is supplied by dairy farmers located in nearby Massachusetts and Connecticut and the remainder is secured from other sources, primarily from the States of Vermont and New York. Several of the larger handlers in the market customarily have secured a lesser proportion of their necessary supplies from local producers than have other handlers. The buying advantage that these handlers have had on their purchases of outside milk has prompted other handlers to drop local producers in favor of sources of supply at upcountry points also.

* * *

Relatively large quantities of local producer milk were dropped during the latter months of 1957 and early 1958; in some cases entire pickup routes were dropped at one time.

Registered Rhode Island producers have enjoyed a preferential market over an extended period of years. The allocation program and the procedure employed by the responsible officials of the State in issuing permits for importation of nonregistered milk have tended to maintain such preferential market to the detriment of other dairy farmers whose production is an essential part of the market supply."

* * *

"Local producers, however, do not carry an unreasonable volume of the necessary market surplus. The overall Class II utilization for the market is only 5.8 percent of total market utilization and less than 10 percent of receipts from

registered producers which, from experience in other federally regulated fluid markets, is substantially less than the necessary reserve which a market such as Rhode Island must carry to assure a continuing adequate supply to meet daily and seasonal fluctuations in supply and demand. Hence, the market relies primarily on upcountry unregulated supplies and surrounding Federal order markets to provide the necessary reserves.... "

"A market structure which grants a preferential price to registered Rhode Island producers cannot provide a stable market for such producers over any extended period while handlers have the opportunity to gain a procurement advantage through the use of lower priced milk from upcountry sources. The State, as a practical matter, cannot effectively regulate milk which moves across State lines, and while local dealers may voluntarily reduce imports of outside milk temporarily to gain support from local producers, it is inevitable that the incentives for using unregulated milk will result in a loss of market for local producers.

The Southeastern New England market is a deficit market and must rely on sources of supply in northern New England and New York to supplement the local supply. Recent developments in bulk tank cooling and transportation facilities have contributed to efficiencies which permit greater flexibility of handler operations at greater distances from the consumption center in Southeastern New England."

* * *

"The marketing situation as it now exists constitutes a serious and continuing threat to the stable and orderly marketing of milk and to the maintenance of an adequate supply of pure and wholesome milk for the Southeastern New England marketing area.

The issuance of a marketing agreement and order for the Southeastern New England marketing area will contribute to greater stability of the fluid milk market and will tend to effectuate the declared policy of the act. The adoption of a classified pricing plan based on audited utilization of

handlers will provide a uniform system of pricing throughout the area and assure a fair and equitable return to all producers."

(q) From the findings of the Secretary promulgating the Connecticut federal milk order, 24 F.R. 1049, Feb. 11, 1959:

"Producers and plants outside Connecticut account, in total, for about 37 percent of the milk supplies of Connecticut handlers (not including producer-handlers). Volumewise, this quantity exceeds 30 million pounds per month. Such milk is commingled with milk produced in Connecticut for bottling and is then distributed on wholesale and retail routes throughout the State in competition with other milk processed both at plants receiving Connecticut and out-of-state milk supplies and plants receiving only Connecticut produced milk.... Since the period of milk shortages created by World War II, consumption of fluid milk in Connecticut has increased more rapidly than milk production by Connecticut producers. Each year, to satisfy consumers' needs, increasing quantities of milk have been imported from out-of-state sources, not subject to price control pursuant to the Connecticut Milk Marketing Act, for *fluid* distribution to wholesale and retail outlets.... These producers have become *regular* suppliers of the Connecticut market and their milk is delivered to plants located in such State on a year-round basis by direct delivery either in cans or in bulk tank trucks for principal use in *fluid* milk distribution. Prices paid for such milk generally have been lower than those *required* to be paid by the respective recipient handlers *pursuant to the Connecticut Milk Marketing Act to Connecticut producers* for that portion of milk produced in the State and distributed as fluid milk.... In addition, Connecticut handlers purchase tank truck loads of milk from unregulated country receiving stations or plants in eastern New York, Massachusetts, and Vermont. The lower prices paid by Connecticut handlers for this out-of-state country plant milk have caused appreciable competitive advantage for the purchasers, since such handlers are in daily competition for

both wholesale and retail customers with handlers who purchase all of their milk within Connecticut and account for it at the minimum class prices *established by State price control....* As the quantities imported have increased, market stability has deteriorated. The State price control authority, as a practical matter, cannot regulate effectively the pricing of milk supplies which move across the State's boundaries to remove the price incentives which are causing unstable marketing conditions for Connecticut producers."

* * *

"While the Connecticut market is in large measure supplied by dairy farmers whose milk is received regularly at distributing plants located in the marketing area, *such receipts are not sufficient to meet the total market demand for milk in all months.* Substantial quantities of milk are received *regularly* by certain handlers from distantly situated "country supply plants. The *greatest* need for milk from country plant sources occurs during the period July through November. These months are normally the months of lowest production for the State and adjacent areas production areas ... " 24 F.R. 1053.

(r) From the findings of the Secretary in promulgating the Massachusetts–Rhode Island milk order, 29 F.R. 11208, Aug. 4, 1964:

"... Distinguishable markets for milk in most of eastern Massachusetts and Rhode Island no longer exist, ... It is clear that a single marketing area has developed where previously separate markets existed. Under this circumstance, the economic stresses, marketing instability, and price uncertainties which have developed and persisted must be eliminated by the adoption of a single milk order with a single marketwide pool.... Moreover, as described under Issue No. 3, milk produced in these (nearby) areas has become overpriced under the order relative to country plant milk, and city plant operators often have preferred to purchase milk from country sources rather than from local producers. The situation is, in fact, one of the major marketing problems

dealt with in this decision because recently much of the locally-produced milk has had to be disposed of in manufacturing channels."

(s) From testimony of James Lee, NEMPA Economist and formerly with Market Administrator's Office, Greater Boston milk order, testifying for nearby differential during 1963 hearings:

"Q. So you are saying that in general handlers do not pay for milk according to its value? A. No, I didn't say that.

Q. Then in general do handlers pay for milk according to the value, too? A. Yes.

Q. So in general would a handler customarily apply a differential to milk which did not have an additional value to him over some other source?"

* * *

"THE WITNESS: I would not want to speculate now as to just what handlers would do price-wise, if we had this changed situation.

By Mr. Tipton:

Q. Well, do you know of handlers that are customarily applying the differential today to nearby milk? A. All handlers who are buying nearby milk are required by the order to pay producers the differential.

Q. They are paying a differential above the Class I price? A. No. What I mean is that the handlers are paying the blended prices established by the order.

Q. Do you know of any handlers in the nearby area that are paying in addition to the blend price a premium? A. I don't of my own knowledge know any handlers who are now, but if I said I did know that there are such, your next question would be "Who are they," and I just have the feeling that there are some –

Examiner Holstein: Let's not anticipate what Mr. Tipton's next question will be. This question is: Do you know of any? If you can answer that, do so; then when he asks his next question we will decide on that.

The Witness: I don't know the names of any handlers paying premiums."

* * *

"Q. So the handlers were purchasing milk on some kind of an opportunity basis. They were looking for the cheapest source of milk that met their demands. Is this correct? A. Well, I don't want to put all handlers in bed together on this, because they weren't all doing this. Some were paying the prices that the state control boards specified, and they did not seek this commerce that we are talking about now.

Q. But if the situation would have continued without Federal regulation, then you might have anticipated that all of them would have attempted to have got the cheapest supply possible that still met their demands as far as quality and regularity and all of these things? A. Yes, I pointed that out in my testimony."

(t) Testimony of Dr. John D. Black in 1956 administrative hearings involving N.Y.–N.J. milk order:

"... Of course, I do not understand fully what in recent years has been motivating the demand of strong groups in New Jersey for a separate milk market and federal order. But I suspect that some among them are still thinking more or less that since northern New Jersey does not produce as much milk as northern New Jersey consumes, the prices to producers in this area should be enough higher to induce this more production, or at least a good part of it.

This is of course contrary to the whole conception and principle of free trade among the states upon which our republic was founded. That principle says that all milk of the same quality moving to one market shall sell at the same price delivered in that market, but that the price received for it at the farm will decrease with distance from this market strictly in line with the increase in transport and related handling costs. Furthermore, milk will move to this market from points outward from the market till a point is reached where the milk will net more if shipped to some other

market or put to some other use. The first of these other uses is of course as fluid cream...."

"The opposition to including this outer territory within the big milksheds of course comes from the producers near to the big city markets. They insist that they are sharing the Class I markets with distant producers whose milk supply is not needed, and are getting too low blended prices in consequence. The near-in producers in New England and in New York State have generally come round to accepting the larger market-wide viewpoint in this matter. But very many in northern New Jersey apparently have not. Near-in producers should bear in mind that without the stabilizing effect of Order 27 and Order 4 their milk would now be priced at manufacturing values in the outer parts of the milkshed plus transportation costs and a small risk factor."

(u) From the findings in the Secretary's decision re amendments to New York–New Jersey and Connecticut milk orders, 28 F.R. 11956, Nov. 8, 1963:

"The reason for these depressed prices primarily was that an excess of milk above the quantity which could be used in whole fluid form was being produced and delivered to market. *It was demonstrated that whenever any significant excess of milk was produced for the fluid market, prices would fall to the level of manufacturing milk prices. The major problem now, as it was when the order was first established,* is to maintain orderly marketing for milk in this market in a situation where in order to assure consumers of sufficient quantities of milk at all times, it is *necessary* that more milk be produced and delivered to market than can be used as fluid milk. *In the absence of regulation, the maintenance of a necessary reserve of milk above Class I requirements has a depressing effect upon the prices for all uses of milk, including producer returns and an unstabilizing effect upon the marketing of milk int he area.* The institution of a classified pricing plan and marketwide pooling through the Federal milk order is the means for achieving

adequate and dependable supplies for consumers (which includes the necessary reserve) without the unstabilizing conditions and depressed prices to producers *which would otherwise result*. Under marketwide pooling *all* producers for the market share *proportionately* in the Class I market regardless of the individual handler's use of the milk."

(v) Relevant excerpts from article by Assistant General Counsel, USDA, entitled "The Pricing of Milk Under Federal Marketing Orders," 26 G. W. Law Review 180 (1958):

"The entire supply of milk which is approved by the health authorities for fluid use in a particular marketing area is fungible and homogenous. *There is no discernable basis for selecting out of the approved supply one producer's milk rather than that of another for sale on the fluid market*, and also a particular producer's milk cannot be distinguished in a milk plant from that of another. All of the milk approved by the health authorities for the fluid use in a particular marketing area is available for disposition on the fluid milk market. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor."

APPENDIX E

RELEVANT FINDINGS OF SECRETARY, ETC., RE JUSTIFICATION FOR PREFERENTIAL BASES OR FARM LOCATION DIFFERENTIAL TO NEARBY

1.(a) From Barnhart's treatise, Exhibit 77A in Mass.–R.I. promulgation hearing, filed in *Allen* and *Cranston* cases:

"I. Establishment of Bases.
C. For special classes of producers.
1. Nearby producers.

Effective March 16, 1935, an administrative change of considerable significance took place in the percentage applied in the establishment of near-by producers' bases. Before this date producers whose farms were located within 35 miles of the State House had been assigned bases equal to 85 percent of their average daily deliveries in September, October, and November, 1933, or 85 percent of their average daily deliveries for the entire calendar year 1933, whichever amount was greater. But by the middle of March 1935, a large proportion of small handlers buying Massachusetts milk were not complying with the license. *So, as a concession to win the cooperation of the Massachusetts Milk Control Board in enforcing, or trying to enforce, the terms of the federal license on intrastate handlers,* the cooperative associations agreed to allow to producers whose farms were located within 40 miles of the State House bases equal to 100 percent of the higher figure yielded by the two alternatives mentioned above. These bases became effective March 16, 1935. *Less than five percent of the producers in the market were within the 40-mile zone.*[12] Apparently this was the first appearance of the 40-mile zone as a definite working concept in the market regulation, although it did not appear in the official language until Order No. 4 became effective." (Feb. 9, 1936). [Footnote omitted.]

(b) Relevant excerpts from testimony of Administrator Davis, AAA, in 1935 Congressional hearings re discrepancies in AAA objectives under Act and market regulations, Feb. 26, 1935:

"I want to say that any difference in the whole-milk marketing program has been due to a lack of prosecution or vehicle of enforcement, or the means of securing prompt compliance with the provisions. In the main, the whole-milk program has been aimed at two things: First, to secure a minimum price to the farmer who supplied that market, and second, the provision on some basis for equalizing it among the various classes of milk marketed in that region among the various producers, so that there would be an equal division of the high price received for the milk put on the market, and they would all share equally in caring for the surplus. * * * Milk producers have told us that, while conditions are not altogether satisfactory to them, they would be considerably worse off if Federal assistance in their markets were withdrawn." (Pg. 12 of 1935 Hearings)

(c) From findings in promulgation of first Greater Boston milk order, February 7, 1936:

"4. That the determination of uniform prices to producers and the payment of such prices through a marketwide equalization pool founded upon a base-rating plan is a fair and reasonable method of distributing to producers the proceeds of sales to handlers; that the country station, transportation, butter-fat and other differentials are proper differentials to be used in calculating such prices; that the payment of *Class 1 prices* for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, *due to the greater availability of their milk for Class I use;* . . ."

(d) From findings in promulgating second Greater Boston milk order and first nearby differential, Aug. 1, 1937:

"2. That in view of the changes in economic conditions since the date of the original findings, the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for milk so delivered, without the use of a base-rating plan, but with the inclusion of special *location* differentials, is a fair and reasonable method of distributing to producers the proceeds of sales of milk to handlers;"

(e) From findings in promulgating nearby differential of New York–New Jersey milk order, 22 F.R. 4213, (1957):

". . . Several factors and considerations have been advanced in support of nearby location differentials among which are * * *, (3) *the inherent value of nearby milk to the market because of its availability and the high quality of such milk,*(4) the more intimate relation between producer and dealer, * * *."

"Cost of production is a criterion for establishing prices under an order only to the extent that it affects the supply of milk for the market. Orders do not guarantee a price equal to or exceeding the cost of production, and therefore, producers generally should not be required to pay a minority an increased return because of high production costs. Accordingly, it is concluded that factor (1) above does not provide a legitimate basis for nearby location differentials. A history of paying nearby location differentials (factor (2) above) has merit only if the historical basis for such differentials is found to be sound, and therefore, must be considered in the light of other factors.

Factors *(3) and (4) above, to the extent that they are valid, are related to the extra value of such milk to the handler who buys it rather than to producers generally and are, therefore, appropriate for consideration in connection with direct delivery differentials payable by handlers rather than out of the pool. . .*"

(f) From the Secretary's brief filed in 1937 Greater Boston hearing record, p. 94, and in *Allen* and *Cranston*:

"In the study, a sample of approximately 15 percent of the producers in the market was taken. These producers were classified as even or uneven. Even producers were defined as all those producers whose deliveries in the quarter of the year in which their daily deliveries were lowest were at least 70 percent of their deliveries in their highest quarter. It was found that only around one-fifth of the producers in the market could be called even under this definition. *These even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors.*"

(g) From the testimony in the 1951 Greater Boston hearings, 16 F.R. 9250,

Testimony of Clifton Whitney:

"The Witness: . . .

The question raised is how long should order No. 4 be the means for perpetuating special differentials to nearby producers. We feel that the time has come for termination of these special location differentials under the minimum price provisions of the Boston order.

During the past decade, the number of producers within the 40-mile zone has declined more than half even with the 46 cent subsidy paid by more distant producers. Alternative opportunities and the continued growth of cities in the geographical area have been among the principal factors responsible for this change. It is inevitable that land in this area continues to become more valuable for other uses than dairy farming. Capital invested in other enterprises in this area yields greater returns than from dairy farming.

As a result of these economic developments, dairy farmers close to the market are being outbid for their land and capital. They, in turn, cite the high cost of production

as a reason for special location differentials. It is time that we remove from the Boston order the provision which encourages nearby farmers to oppose the gradual economic trends and development in this 40-mile metropolitan area at the expense of producers in Maine, New Hampshire, Vermont and part of New York State.

If these special location differentials can still be called customary it is primarily because the Boston milk order has been the instrument which has preserved them.

One of the common arguments advanced as to why nearby producers should receive a special premium for their milk over and above the premium reflected by freight advantage, is that these producers produce more evenly than producers more distant from the market. We contend that evenness of production provides no justification for establishing location differentials. For the sake of the record, however, let us examine some facts on this question of even production. The Market Administrator's monthly statements show the following information for 1950:

	Total Receipts of Milk (Thousands of Lbs.)	Receipts from Producers Over 80 Miles from Boston (Thousands of Lbs.)	% of Total
June	166,995	154,353	92.4
November	98,152	90,695	92.4

This comparison shows that receipts from producers whose farms are located more than 80 miles from Boston shipped exactly the same proportion of the total receipts for the market as a whole in June as they did in November – namely 92.4%. This would indicate that there is little justification to be found in these figures for penalizing more distant producers with a deduction from the pool called "Location differentials" for nearby producers.

Next, let us examine a comparison of the daily average deliveries per producer during the months of highest and lowest productions this past year, by areas, according to their distance from the Boston market.

I would like to offer this as an exhibit.

Examiner Rogers: Give me the title of the document.

The Witness: The title is "Comparison, of Daily Average Deliveries Per Producer During the Months of Highest and Lowest Production in 1950, by areas, according to distance from Boston" . . .

(The document marked Exhibit No. 20 for identification, submitted by Witness Whitney, was received in evidence.)"

Portion of Exhibit No. 20

Introduced by Mr. Whitney

COMPARISON OF DAILY AVERAGE DELIVERIES PER PRODUCER DURING THE MONTHS OF HIGHEST AND LOWEST PRODUCTION IN 1950, BY AREAS, ACCORDING TO DISTANCE FROM BOSTON

	High Month (1)	Low Month (2)	Difference
Within 40 miles	490	390	100
41–80 miles	310	205	105
Zones 11–15	318	228	90
Zones 16–17	348	258	90
Zones 18	338	266	72
Zones 19	352	232	120
Zones 20	356	245	111
Zones 21	328	237	71

* * *

"The Witness: It can be seen from this table that producers within the 40-mile zone produce 100 pounds more milk each day in the month of high production than they do in the month of low production, and that producers within the 41

to 80 mile zone produce 105 pounds more milk each day in the month of high production than they do in the month of low production. In contrast, producers from the 11th to the 18th zones produce on an average 90 pounds per day or less in the month of highest production over the month of lowest production. In fact, the average producer from the 11th through the 22d zones inclusive produces less pounds of surplus milk in the months of high production compared with the month of low production than do producers within the 40-mile and 41 to 80 mile areas."

". . . We contend that the pattern of seasonal pricing provided in the Class I pricing provisions of the order has provided encouragement for more even production. Any further encouragement to changes in the producers seasonal production patterns should be provided in this same section. This method compensates all producers equally, and permits each producer to determine his individual production pattern on an equal footing.

If a producer can command a premium for his milk due to quality, nearness to the market or any other reason, he can still command it under the minimum price provisions of the proposed order. If that extra quality or service rendered by a producer has a real value to the handler of that milk, then the handler should pay for it and not the producer on the outside of some arbitrary line.

The assertion is made that producers near a market have the alternative of delivering their own milk to consumers and that somehow or other this opportunity justifies their receiving a special slice from the total pool payments in addition to the differences in freight. This thinking seems particularly unjustified in case of producers living from 41 to 80 miles from the market. It's a long haul for bottled milk in addition to the fact that if they are interested in the retailing of milk there are sizeable cities and towns much closer to them.

With regard to those producers living close enough to the Boston marketing area who wish to engage in retail

distribution following the removal of locations differentials, let them do so. They will have substantial investments to make in pasteurization and other plant equipment; delivery trucks; and bottles. They will need additional labor of various skills. Let them do it. We believe any loss of Class I sales will be more than offset by ridding ourselves of these special location differentials in excess of a quarter of a million dollars annually.

Times have changed. Raw milk has been replaced with pasteurized milk. Deliverymen on milk routes have become unionized. Transportation facilities have been improved. Milk quality has been improved. No provisions in the order provide that we should follow the customary practices practices of 15 or 20 years ago with regard to these factors which influence the pricing of milk. No more is there reason for maintaining these out-dated special location differentials supposed to represent values which no longer exist." (R. 716-721, Mass.–R.I. hearings)

From the testimony of Chester Smith, economist:

". . . I am also convinced, . . . that this section 9(e) of the Boston Order has no economic justification; that it is becoming worse as it has since January 1, 1950, when it now becomes the keystone of the arch which supports similar location differentials in three other Federal Orders, Worcester, Springfield and Lowell-Lawrence, the whole system in general, it seems to me, is not much more or less in effect than the sharp and clear economic trade barrier which starts at a radius of 80 miles of Boston at that point there is a hurdle; this is a fence 23¢ high, and as you move in and get to a radius of 40 miles there is another fence on top of that of an additional 23¢. If that 46¢ and 23¢ respectively are justifications for more even production, then certainly geographic farm location is certainly a very, very crude testimony of where they should be applied.

There is specific authorization in the Marketing Act for plans and techniques generally known as the base rating

plan, but as the law says based on marketing during a representative period of time. . . .

If the technique of a particular payment came out of the pool, out of the value of all members, all producers is justified, and I think it may be, as an inducement for more even production, then any producer no matter where located in the milkshed should have such opportunity to earn that premium as any other producer. I venture to say that an analysis of the record of say 5,000 producers, up country producers, would reveal at least several hundred. I am sure they would reveal many more producers located in the distant zones who as individuals have more even production than these particular producers in the 40 mile zone and the 80 mile zone who are now getting back those premiums just because their farm is located there.

It is true in general the whole group has evener production than the milkshed as a whole, but I have looked and I have listed lots of individual farm production patterns seasonality and know that there is a wide range even in a small locality, so that within this 40 and 80 mile zone, while the production is evener than for the milkshed as a whole, there are no doubt numerous producers who are just as uneven as the most uneven of up country producers, and conversely there are no doubt many up country producers who are just as even as the group within 40 miles and 80 miles, as a whole.

As one example, Mr. Montgomery, a producer of Randolph, Vermont testified up in Burlington that he produces milk almost exactly evenly on his farm the year round. He is within the neighborhood of 150 and 160 miles from Boston. No doubt there are many others like him, and if there is justification for an evenness of production incentive of that type, then it seems to me it is quite unfair if all producers in the milkshed do not have an opportunity to earn it.

That certainly would be a much more scientific basis than the present plan. I don't want to take up time by

laboring that point any further because that is not precisely the proposal. All I would say is for organizations who take positions in hearings here, characterizing or indicating a conclusion from presumed knowledge that the operations of other organizations are inefficient and certain changes ought to be made, I cite specifically the conclusion by one witness that it is a known fact that Milton Cooperative, for example, is inefficient to the extent of keeping a feeder plant system in operation and it ought to close some and concentrate their milk in one plant, I will say that to have to subsidize these producers in the 40 mile zone and 80 mile zone is certainly an indication that we are keeping even, efficient production in this milk shed. And the sooner we eliminate that drag on the rest of the producers, I think the more economic justice we will have for all producers in the market." (R. 720-30)

(h) From findings of Secretary, 29 F.R. 11205, Aug. 4, 1964, re incorporation of base plans into New England orders:

"(c) No provision should be made in the New England orders for a 'base-excess' plan of distributing producer returns. A cooperative association in the Southeastern New England market proposed that such a plan, which would provide for a system of Class I bases for all producers presently shipping to the New England markets, be incorporated in the New England orders. Proponent contended that the present method of pricing milk under these orders does not provide sufficient incentive for producers to adjust their production to the Class I utilization of milk in the market.

The Agricultural Marketing Agreement Act of 1937, as amended, authorizes the inclusion of base plans in Federal orders. Such plans have been incorporated in a number of Federal orders, *but only for the statutory purpose of minimizing seasonal fluctuations in milk production.* The objective of the type of base plan proposed, *i.e.*, the reduction of aggregate deliveries of milk by producers to pool plants in relation to the market's fluid needs

irrespective of price, would supplant the function which is intended under the Act to be performed by prices established at the levels required by the Act. Prices under milk orders must be established at levels which will tend to equate demand and supply for the market, insure a sufficient supply of pure and wholesome milk, and be in the public interest. Order pricing is intended to operate under conditions where milk supplies will remain reasonably free to respond to changing price conditions. Under a base plan of the type proposed, total production would be influenced greatly by the impact of the base plan rather than by the level of prices provided under the order and would be in conflict with the price criteria of the Act. The proposal therefore is denied."

(i) From the findings of the Secretary in promulgating seasonal incentive plan in Connecticut order, Mass.–R.I. order, and N.Y.–N.J. order, 32 F.R. 5288, March 29, 1967:

"Seasonal adjustments should be made in the blend price computations under each of these orders. The months in which adjustments are made should be identical under all orders. The adjustment rates should be as follows under the New York–New Jersey and Massachusetts–Rhode Island orders: Deductions from the pool fund per 100 pounds of pool milk in the respective month – March, 10 cents; April, 20 cents; May and June, 30 cents. Payments through the pool fund (percentage of the total money accumulated from the aforesaid deductions) – August, 25 percent; September and October, each 30 percent; November, the remainder plus all accrued interest. The adjustments under the Connecticut order should be the same except that deduction rates should be 10 cents greater than the deduction rates for New York–New Jersey and for Massachusetts–Rhode Island orders.

This arrangement of seasonal incentive payments is designed to give financial rewards to farmers who are producing milk when it is needed most. The incentives proposed herein are intended to encourage the adjustment of pool milk supplies for the three markets combined."

(j) From testimony of James D. Lee, Economist for NEMPA, during 1963 Mass.–R.I. hearings:

CROSS EXAMINATION BY MR. TIPTON:

Q. If there were producers up country that had just as even production as in the nearby area, then should they receive some type of differential? Does the nearby differential indicate – necessarily compensate them for the evenness of their production? A. No, it does not, and that could be compensated for only under a base rating which we do not have.

Q. Then would it not appear more equitable to have some type of a basis that would compensate all producers whether they are nearby or whether they are most distant if they have the same type of production that you determine is desirable? A. I didn't testify against the desirability of having a base rating plan.

Q. No, sir, it is not in that connection. You did testify to the effect that nearby producers bdcause they had more evenness are compensateu, nearby farm location differential. However, I am asking you in relation to producers up country which had even production also, should they not be compensated on the same basis then? A. They should be if the order is providing a base rating plan, which they do not."

* * *

"Q. Well, do you think that the handlers paid that because this milk had some additional value to them as compared with uncountry milk, or was there some other reason? A. I have already explained why the producers received the higher prices on account of supplying handlers who did have a larger share of the fluid milk market at the time.

Q. Was it because the milk from the nearby area had more value to them? A. I didn't say that.

Q. I am asking you. A. I don't wish to get into controversial milk quality or things of that kind.

Q. If the milk didn't have additional value to them then why would not a handler go to an alternative source and buy the milk? A. Some did. I don't know. I merely say the facts are that the nearby producers were determined by survey to have received those higher prices.

Q. But you don't know why? A. I offered the possible explanation, yes, that they were supplying handlers who had a larger share of the milk market.

Q. I will ask the question again in another sense and see if we can get the answer.

Assume for the moment if you will that there is not a federal regulation in effect and that there is not a state regulation in effect, it is completedly free. The handler located in Boston has received milk from producers that are within forty miles of the State House in Boston. He has also received milk from producers that are 200 miles from Boston. He has this milk now in his plant in the city. Is it exactly the same quality, he knows what portions of the milk came from the nearby or from the producers of within forty miles and he knows what milk came from the up country sources and where it came from. Will he pay any difference for these two volumes of milk?

Mr. Hall: I think that question is objectionable on the grounds that it calls for a great deal of speculation. Maybe Mr. Lee can speculate on all these hypothetical questions that Mr. Tipton has included in his question.

Examiner Holstein: No, I think that is a fair question, Mr. Hall. Mr. Tipton wants to know why a handler should pay more for milk which comes from forty miles from his plant than he does for milk which comes 200 miles from his plant, all other things being equal . . .

The Witness: It is conceivable that the handler had an arrangement with the cooperative association which we will assume the nearby producers belonged to and that in the absence of federal regulations would pay more than

he might be able to procure fluid milk of the same quality from some up country supplier that might wish to supply the milk at a discount.

By Mr. Tipton:

Q. Now assume that we are at the end of the period of this contract or the agreement with the producer and association and that is it is time to renegotiate this. Would your answer be the same, that he would renegotiate the price possibly higher? A. I don't know. I don't know whether he would or not.

Q. In Table II, that is in this exhibit you show some computations relating to the value of farm location differentials in 1962. In this table under Worcester you show that producers in the nearby area contribute toward the nearby farm location differential amount of 34 cents per 4000 hundredweight. However if your proposal were adopted that the three markets of Boston, Worcester and Springfield were adopted, that the contributions of the nearby producers under Worcester would decrease from 34 cents to 9 cents, is that correct? A. I have stated the amount in my testimony but –

Examiner Holstein: That is what is shown on here.

By Mr. Tipton:

Q. Then this would have the effect of causing up country producers under the Boston market to pay an increased proportion of the nearby farm location differentials, is that correct? A. Yes, it would.

Q. Do you represent producers in the up country area? A. Yes.

Q. Do you represent producers in the nearby area? A. Yes.

Q. About what proportion in each of the areas? A. I don't know.

Q. Do you have any idea? A. No.

Q. On page 14 in the first full paragraph which is an excerpt from Exhibit 77-B there are stated several reasons

as to why the differential of 46 cents was apparently justified or paid or what have you prior to federal regulations. Could you identify now what items of those, if any, would cause a differential to be paid under present conditions without federal regulations? A. I think the point of Professor Bell in his second sentence went on to say, "In addition it is recognized by sellers more remote from the market that sellers near to market must received an additional amount commensurate with their current opportunities of sales which are naturally economic to their location."

Q. Well, I had specific reference to the first sentence and the items listed in the first sentence. A. I think we will concede that those are similar. I will agree that they are similar.

Q. That those are similar to what? A. You asked me to name any one of those factors which today would be a factor for a difference which is in excess of them and I say not one of them. It is the second sentence which contains the germ of Professor Bell's thought in that paragraph.

Q. So none of the items in the first sentence would constitute a reason for justification of the 46 cent differential, is that what you are saying?

Examiner Holstein: I think he said it once, Mr. Lee, didn't you?

The Witness: Yes.

Mr. Tipton: I didn't understand he had said it. He said similar and I didn't follow what he meant by similar.

The Witness: I would not want to speculate on exactly what he had in mind on other charges but –

Examiner Holstein: No, that is not Mr. Tipton's question. Mr. Tipton's question is which one of these items in the first sentence, first full paragraph on page 14, would have a reason for justification to day for the differential.

The Witness: I have answered that. The justification for a location differential today is the same as it was – turning to nearby producers, would exceed these –

Examiner Holstein: Mr. Tipton is entitled to an answer to that question. Which ones of those items, they are specifically set down here – one, freight, two company assembling container services, three, refrigeration and so forth – are any of those valid today?

Is that what you meant?

Mr. Tipton: Are any one of those a reason for justification of the 46 cent transportation differential?

The Witness: No.

Examiner Holstein: That question is answered, we can move on."

(k) Comparison of findings of Secretary in promulgating nearby farm location differential in milk orders:

SOUTHEASTERN NEW ENGLAND MILK ORDER

Handling of Milk in Southeastern New England Marketing Area 23 F.R. 8238 (1958)

Historically, dairy farmers in the States of Massachusetts, Rhode Island and Connecticut, because of their location with reference to the large population concentrations of New England have disposed of a substantially larger percentage of their production for fluid uses than have dairy farmers in the upcountry area. Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. Under the marketwide pooling herein proposed and without some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk on the milkshed rather than according to the utilization of his milk. Under a regulated market, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and has assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources. The distant producer also benefits from an established Class I price, and by the fact that he gains a larger share of the fluid market than is likely without marketwide equalization.

The use of a nearby differential will return to nearby producers a somewhat greater share of the Class I price than they would otherwise obtain through marketwide pooling. Moreover such a differential will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization.

The scheme of nearby farm location differentials and the amount thereof is identical with that employed in adjacent Federal order markets.

NEW YORK–NEW JERSEY ORDER

Milk in New York Metropolitan Marketing Area 22 F.R. 4213 (1957)

Historically, the percentage of the milk produced nearest to metropolitan New York–New Jersey which is used for fluid purposes is higher than the percentage of more distant production which is used in fluid form. Over 92 percent of the milk received in 1956 at pool plants within 125 miles was for fluid use. Nearby producers have been able to get a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. When milk is pooled on a marketwide basis, the nearby producer is paid on the basis of the average utilization of all milk in the milkshed rather than according to the utilization of his milk. Together with equalization, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and is protected to some extent from the loss of a market because of competition of cheap milk from more distant sources. The distant producer also benefits from an established Class I price, and in addition gains a larger share of the fluid market than is likely without equalization.

In order to provide benefits of more nearly equal value both to nearby and distant producers, some form of special location differential is needed, the effect of which is to give the nearby producer a somewhat greater share of the high-priced Class I-A milk than he would obtain through marketwide pooling without such a differential, but a smaller share than he would be expected to obtain under an order with handler pools.

CONNECTICUT MILK ORDER

Handling of Milk in Connecticut; New York–New Jersey; and Springfield, Mass., Marketing Areas 24 F.R. 1049, 1063 (1959)

The Federal order markets in New England and the New York–New Jersey market provide for similar differentials to their procedures with nearby farms. The major portion of the area herein proposed as the nearby differential area for Connecticut producers overlaps or is adjacent to the nearby differential areas of other Federally-regulated markets competing for supply.

Milk received from the nearby area has long represented the major part of the total Connecticut supply. The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes. Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern of pricing has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated markets. The differentials adopted will reflect more representative values with respect to the milk of both nearby and distant producers since the nearby producer will share in the higher-priced Class I market to an extent somewhat greater than otherwise would be the case under market-wide pooling.

MASSACHUSETTS–RHODE ISLAND MILK ORDER

Milk in Certain New England Marketing Areas 29 F.R. 11213 (1964)

The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.

While considerable testimony in support of removal of the provisions was received, it was not established that the farm location differential provisions *are resulting in unstable or disruptive marketing conditions which warrant their* deletion from the orders at this time.

CONNECTICUT MILK ORDER

Milk in Greater Boston, Mass.; Southeastern New England: Springfield, Mass.; Worcester, Mass.; and Connecticut Marketing Areas 25 F.R. 7833 (1960)

As stated in the Secretary's decision of February 9, 1959 (24 F.R. 1049), the present provisions were established in recognition of the higher Class I utilization, and higher returns that nearby producers had customarily received over more distant producers. In addition, the use of a nearby differential was expected to implement price alignments with adjacent Federal order markets and thus assure Connecticut handlers of the ability to compete in the purchase of milk on reasonable terms with dealers in adjacent markets.

(l) From the findings of Secretary, 29 F.R. 11205, Aug. 4, 1964, re rejection of individual-handler pools for New England orders:

"The major readjustment of the entire marketing structure in New England which undoubtedly would accompany the institution of individual-handler pooling would add to marketing costs and thus be uneconomical and undesirable. The differences in producer prices which could be expected to ensue from such method of pooling would not promote the objective of more uniform alignment of prices to producers which, as elsewhere described in the decision, is important to orderly marketing in New England. The application of marketwide pooling under a merged order will promote market stability by insuring that all producers supplying the Massachusetts–Rhode Island market will share on a uniform basis the Class I and Class II utilization in the entire market and thus assist to permit the assembly of supplies in an economical manner for available outlets. Accordingly, the proposals for individual-handler pooling are denied."

(m) From testimony of Dr. Stuart Johnson, C.M.P.A. economist, during 1956 N.Y.–N.J. administrative hearings, re reasons for higher price statistics for nearby milk:

CROSS EXAMINATION BY MR. WINTON:

"Q. Do you know how much milk is being sold at those prices, or whether the producers regulated by OMI aren't losing markets? A. I have no comment on that. Dr. Waller covered that on need for market.

Q. You recognize there is a difference between fixing a price and marketing milk at that price, don't you? A. I recognize that difference, Mr. Winton.

Q. And you are not going to testify how successfully milk is being marketed at the prices fixed by OMI though you cite price fixed by OMI? A. I am interested in prices received by farmers.

Q. And not how many of them receive it? A. And how many receive it.

Q. Then you must be interested in whether they are able to market their milk, the thing which you said you weren't interested in. A. I think most farmers in Northern New Jersey do have a market. I haven't heard of any of them dumping their milk or feeding it to calves because they had no market whatsoever.

Q. You have read about them switching under Order 27, haven't you? A. I have general knowledge that there have been transfers from one market outlet to another.

Q. No, from OMI regulation to Order 27. You know that, don't you? There has been an increasing number going to Order 27 because they didn't have another market. A. It depends on what time period you choose, but you can find periods of recent years when shifts took place in that direction.

Q. As an expert in the milk business, don't you know, and isn't it something that would occur to you, that when differences exist between two markets, they are often the result of manipulation of health approval? . . .

THE WITNESS: I wouldn't use the word "manipulation" because it has an inference that Health Departments were doing something wrong. But I would say that price differences have been associated with Health Department requirements in some instances.

Q. Assuming that that was the responsible policy of the officials of the State of New Jersey, would you say that the Secretary of Agriculture would be warranted in adopting price differences resulting from such policy as the basis for pricing milk under a Federal order? A. I don't know whether that was the policy and, if so, for how long, and I have no comment.

Q. Do you think that irrespective of what the health practice of regulating milk was, for purposes other than health regulations, the resulting price situation should be perpetuated by Federal order?

EXAMINER HYDE: He has indicated he is not going to talk about these health matters, Mr. Winton.

Q. You are aware, are you not, you are from Connecticut, that health practices have also been utilized in Connecticut, similarly, and that this is something which an economist should be aware of?

MR. DOLAN: I object as immaterial . . . .

EXAMINER HYDE: The witness has indicated that he is not going to talk about health matters, Mr. Winton, and you have asked him five or six times. In my opinion, that is ample to show his attitude. Pass to something else."

* * *

"Q. Did you give the testimony which I have marked off here? A. I did."

* * *

"MR. WINTON: 'Mr. Andresen: In other words, at any time a farmer can meet the sanitary requirements of Connecticut he can ship milk or cream into the area?

> "Mr. Johnson. With that proviso of meeting the sanitary requirements and obtaining approval, the answer is yes.'

By Mr. Winton:

Q. Wasn't it clear to you that there was something more to getting into a market than meeting the sanitary requirements? You also had to have an authority that was willing to approve you, even if you met the sanitary requirements?"

* * *

"MR. LENT: The witness has testified to a locational differential for the separate New Jersey order, which is higher than the locational differential in the present New York order to producers across the line in Orange County. He has said that the justification for that is an historical record of higher prices on the New Jersey side of the line.

Mr. Winton is trying to show that that justification was based on a restricted, competitive situation, caused by the Health Department of New Jersey activities. It seems to me it is directly connected with his direct testimony, and

while this question is more important to the proposition of the requirement of Jersey Health Department approval for admission to the New Jersey order pool, it nevertheless has pertinence to the amount of the location differential as well. . . .

MR. WINTON: In that connection, the refusal of the witness to discuss the underlying facts which an economist should take into effect when considering the reasons for the prices, I think should give rise to the inference that the difference is due entirely to the reasons which the witness refuses to discuss."

* * *

"Q. You refer on page 25 of Exhibit 34, to a letter of Dr. Vial pointing out the existence of premiums. In that same letter, was it not pointed out that the premiums did not exist in Orange County, New York, in anywhere near the amount shown for Sussex County? A. That is correct, Mr. Winton.

Q. And Orange County and Sussex County are situated relatively the same distance from the market, are they not? A. I think they are about the same.

Q. In your opinion, what is the difference between Orange and Sussex County due to? A. I don't know exactly, Mr. Winton, and I don't know whether I should speculate on a matter on which I do not have detailed knowledge.

Q. The next paragraph on page 25 says, "Whatever the reason, whether seasonally uniform production, a schedule of transportation differentials under Order 27, which underprices nearby milk, or a more marketable product than more distant milk, the fact is clear that historically the nearby producers who likely would be included in a North Jersey pool have received substantial premiums over Order 27 prices, which prices include the Order 27 location differential."

There you are referring to New Jersey producers, aren't you? A. Primarily so, Mr. Winton.

Q. Secondly, your conclusion in this paragraph is you don't know the reason why the New Jersey producers have gotten more money than other producers similarly situated, because you say whatever the reason, and you don't state what the reason is, is that correct? A. Well, I state whatever the reason, and then I give three reasons that I think are pertinent in making possible the premium.

Q. The first two you have already admitted have nothing to do with location differentials as you propose them under Order 90, that is, seasonally uniform production, and under-pricing transportation differentials. A. I have said they have little to do with it, yes.

Q. Now we get, then, to what we have been getting to gradually, the more marketable product.

Do you say that North Jersey milk is more marketable than Orange County milk or other milk that is further away in the milkshed? A. Do you have a question?

Q. Yes. I say, do you say that? A. Yes, I do.

Q. And by more marketable, do you mean marketable at a higher price? A. That is what I mean.

Q. Then does that mean anything other than that historically New Jersey producers have received somewhat more than other producers? A. The two go along together, Mr. Winton.

Q. They are the same thing, aren't they? A. Well, they are not identities, but because of greater marketability the price is higher.

Q. Would one of the factors of marketability be that the Department of Health of the State of New Jersey has restricted outside milk coming into the state so that the nearby milk occupies the Class I market to a greater degree? Is that one of the factors? That is, of marketability? A. It may or may not have been, Mr. Winton. I see we are back on the health question again. . . .

Q. Did it come to your attention that surveys by the New Jersey Health Department, published in its official

bulletin, showed that milk produced outside the State of New Jersey and approved for New Jersey had less bacteria than milk produced within the State of New Jersey? I show you, in that connection, Exhibit 98. A. Exhibit 98 had not come to my attention, Mr. Winton. . . .

Q. Don't you think before you discuss the greater marketability of milk produced nearby, you should have checked either in the Department of Health of the State of New Jersey or its official publications, data showing that the nearby milk was not of as high a quality as the far away milk, because for this reason stated by the Health Department, "The comparison may be explained in part because we select and license from all available supplies situated outside our borders only those that comply with our laws, but at the same time we must live with, and by means of education improve, supplies located in New Jersey". A. A more pertinent factor, it seemed to me, Mr. Winton, was that a large number of producers were approved and many more than needed, to supply the fluid market. . . . "

"Q. Did you notice this, that the state Health Department said that, as to out of state supplies, they enforce their laws strictly, but they went on to say, "Definite health hazards must be proven before we close a man's business in the state and deprive him of a means of livelihood?"

Don't you think that is also a factor which you should consider in talking about the greater marketability of nearby milk? A. I did not read the sentence that you have pointed out to me, Mr. Winton."

* * *

"Q. As an economist, and student of milk marketing, do you think that regulation should put a higher tag on milk produced under less rigorous sanitary requirements than out of state milk? A. By a higher tag, Mr. Winton, what do you mean?

Q. The price tag. To price it higher because of the bacteria count or other quality? A. No, I do not think so, Mr. Winton."

(n) From the 1962 Report of the Federal Milk Order Study Committee (Nourse Committee) appointed by the Secretary:

"OBSTACLES TO INTER-ORDER TRANSFERS OF MILK SUPPLIES

Among the order provisions and other factors that have interfered with normal adjustment of utilization patterns and uniform producer prices through orderly transfers of milk supplies from one market order pool to another are the following: individual handler pooling, pooling requirements, assignment of other source milk to lower classes, compensatory payments, special location differentials to "nearby" producers, sanitary regulations and other institutional factors."

* * *

"*Sanitary regulations.* When the system of Federal milk orders was inaugurated, lists of plants and producers approved by the health authorities of various states and municipalities were useful as a basis for identifying the milk supplies to be priced and pooled under the orders. Thus in many instances municipal or State health authorities found themselves in a position to determine what milk supplies could be pooled under a given order. The situation has changed, however, and health authorities now have much less influence over the composition of Federal order pools than they had during the early years of the program.

The requirements for pooling make it necessary in most instances that the sources be approved by local or State milk inspection authorities. Many of the orders embrace the jurisdictional areas of more than one such agency thus limiting the opportunity of any one agency to control access to the pool. During recent years there apparently have been few instances in which sanitary inspection

agencies have attempted to restrict entry of milk supplies to the marketing area for other than valid sanitary reasons.

The Connecticut milk order pool is a noteworthy exception to this general condition of freedom from control by milk inspection agencies. The milk marketing area defined by the Connecticut order is completely within the jurisdiction of the State Commission of Agriculture and Natural Resources who administers the dairy laws of Connecticut, including the so-called "Connecticut Milkshed Law." This law among other things authorizes the Commissioner to approve new sources of milk supply only when the receipts of Connecticut handlers exceed their fluid sales by less than 10 percent in November or December or by less than 25 percent in other months.

From the viewpoint of milk producers and public authorities in Connecticut this system of regulation undoubtedly has great merit. But from the viewpoint of achieving equitable relationships among producers and handlers under the Federal orders for Connecticut and adjacent areas it constitutes an arbitrary barrier. It accounts to a considerable degree for the high Class I utilization under the Connecticut order as compared with the much lower utilization percentages for the adjacent Boston and New York-New Jersey orders.

Such extra-order control of access to market order pools should be a matter of serious concern to the Department. As suggested in the preceding discussion of Marketing Areas, one promising remedy for such outside interference with a Federal order is to so define the marketing area that it will embrace the jurisdictional districts of more than one sanitary control agency. But this remedy alone may not be adequate in all cases."

* * *

"*Individual handler pooling.*

. . . Individual handler pooling and market-wide pooling in the orders for adjacent or competing markets are incompatible for two reasons: first, because individual handler

pooling tends to cause handlers to restrict their purchases of milk and to throw a disproportionate burden of maintaining regional reserves upon neighboring market pool orders, and second, because operating cooperatives under orders with individual handler pools have an economic incentive to move their surpluses into other markets at cut prices.

Only by keeping his milk supply closely adjusted to his fluid sales can a handler under an order with individual-handler pooling place himself in an advantageous position from the standpoint of procurement. If he fails to maintain a high Class I utilization which permits him to pay attractive blended prices, he will find competitors picking off his more desirable producers. The high Class I utilization and high blended returns are, of course, beneficial to the producers who are fortunate enough to participate in them. But this system usually reacts unfavorably upon the producers whose milk is priced and pooled by other orders in the same region.

Practically without exception, individual handler pools have failed to absorb their proportionate shares of the reserve supplies of market milk in the regional areas where they are used. A comparison of Class I percentages for the 14 handler pool orders and the market pool orders hearest to each of them for the year 1960 reveals the following: the simple average of Class I percentages for the handler pool orders was 84.5 percent; the comparable average for 25 adjacent market pool orders was 67.3 percent.

It is clear that individual handler pooling has a strong tendency to prevent desirable utilization adjustments among Federal order markets and to maintain unwarranted disparities in the blended producer prices established by the two types of orders.

As indicated previously, individual handler pooling in markets where substantial quantities of milk are handled by cooperative associations may generate unfair competition not only in the markets to which this system applies,

but also in others.[3] Since cooperatives are allowed to pay members the net proceeds of their operations, they have a strong incentive under individual handler pooling to dispose of surpluses in outlets that will yield more than the surplus value. This usually means sales for fluid use in outside markets at cut prices." [Foonote omitted]

* * *

Substantial and continuing differences in utilization and in blended producer prices under orders for adjacent markets should be recognized as evidence of discrimination which inevitably leads to disruptive competition."

* * *

"*Special location differentials to "nearby" producers. . .* In fact, the specified rates of nearby differentials are the same under all Federal orders for New England markets (46 cents in the nearby area and 23 cents in the intermediate area) even though the percentages of pooled milk used in Class I differ widely. In 1960, the range of Class I percentages was from 58 percent in Boston to 79 percent in Connecticut. . . .

Under the Boston order, nearby differentials are paid on only about 6 percent of the pooled milk and the uniform price is depressed less than 3 cents per hundredweight by these payments. Under the New York–New Jersey order, slightly less than 20 percent of the pooled milk qualifies for the nearby differentials and the uniform price is depressed about 6 cents per hundredweight.

On the other hand, under the Federal orders for Worcester, Springfield, Southeast New England and Connecticut, nearby differentials are paid on 65 percent to more than 90 percent of the pooled milk and uniform prices are depressed from about 30 cents to more than 40 cents per hundredweight. In 1960, 90 percent of the pooled milk under the Connecticut order qualified for the 46 cent differential, and 3 percent for the 23 cent differential. The total amount paid in nearby location differentials was equivalent to 43 cents per hundred pounds of all pooled

milk and the uniform price to producers outside the differential zones was depressed to that extent. Thus, the attraction of the high blended price resulting from a high Class I utilization under the order is substantially reduced with respect to producers in the outlying areas.

In circumstances where a high percentage of milk qualifies for the nearby differentials the producers who participate derive little net gain except for the pool tightening effect of the lower blended returns in the outer zones. Thus, order provisions for nearby differentials of this magnitude can and do effectively limit access to the pools. . . .

The uniform prices determined under several of the orders are significantly depressed by payment of special differentials out of pool funds to "nearby" producers. In a few instances, a high percentage of the milk in the market order pool qualifies for such payments with the result that returns to producers in the outer zones are substantially reduced. Aside from the equities involved internally, such large special payments constitute a barrier to the entry of additional supplies from adjacent production areas and tend to prevent desirable intermarket adjustments. The Committee suggests that the justification for such differentials be reconsidered, especially in the case of areas with high fluid utilization, with particular attention to the impact of these payments upon producers who are ineligible to participate. . . ."

(o) From article entitled, "The Pricing of Milk Under Federal Orders", by Assistant General Counsel, USDA, 26 Geo. Wash. Law Review 180 (1958):

"Although there is a pronounced seasonal variation in the production of milk, milk consumption is about the same in all months subject, however, to daily fluctuation which requires the industry to carry an operating reserve of approximately 20 percent." (U.S. Department of Agriculture, Marketing Div., 1954 Yearbook of Agriculture, 477).

(p) From the Report of the Pitcher Committee, a special joint legislative committee appointed by the New York State Legislature on March 10, 1932:

"The fact that the larger distributors find it necessary to carry large quantities of surplus milk while the smaller distributors do not, leads to price-cutting and other forms of destructive competition, especially when the surplus is abnormally large. The small distributor can contract for his minimum requirements and depend upon emergency purchases when threatened with a shortage. The larger distributors can not do this since the same percentage deficiency in volume would involve quantities too great to be obtained on short notice. The result of this situation is that the smaller distributors who take no responsibility for the surplus, by purchasing their milk on the basis of the blended returns by the larger organizations, are in a position to undersell the larger distributors in the cities."

(q) From the testimony of Dr. John D. Black during the 1956 N.Y.–N.J. administrative hearings:

"Q. Now let me press the feeling of the Jersey groups, I think, by saying that we believe that the New Jersey market should carry the surplus associated with its fluid sales, in some way. We believe that is true.

We do believe, however, that in this surplus that you mention is surplus that should be carried by still other markets, and we would refer particularly to the secondary markets in New York State. We have heard that there is surplus in Order 27 (New York) that rightfully belongs to Connecticut and Philadelphia. Our position is that we should take, and are prepared to take, that part associated with our markets, but that we should not necessarily assume a portion of surpluses rightfully belonging to other markets.

I have made a statement here, and I would just ask you, then, if you feel there is merit in our position. A. I think there is merit in your position so far as the Philadelphia market not carrying its share of the surplus, and

the Connecticut market, and any other markets, and maybe some upstate markets that are so managing their affairs that they are not shouldering their fair share of it. To the extent that getting them to share their fair share of that will help out in the Northern New Jersey situation, that is all to the good.

The question of the extent to which it becomes necessary to reach out and include these upstate markets into this in order to achieve what you are talking about, of course, is a matter that we discussed this morning. A system of Federal orders such as we have in Massachusetts, to the extent that the Federal Government operating with its – how many markets does it now have under orders – to the extent that it isn't handling relations between the Philadelphia order – . . . – and the New York order in such a way that surplus is not properly shared between them, that is a criticism of the administrators in Washington. I am looking right at them now."

(r) From testimony of James Lee, economist for N.E.M.P.A. and former economist with Boston Mkt. Adm., testifying in favor of nearby differential in Mass.–R.I. hearings:

CROSS EXAMINATION

By Mr. Tipton:

"Q. All right. Let me ask it another way.

Are you familiar with the amount that the Connecticut market takes out per hundredweight in order to obtain an aggregate amount of money to pay nearby farm location differentials? A. Yes. And the values and rates are set forth in table 2.

Q. In Table 2 it is shown for all producers as 45 cents, is that correct, for the period of 1962? A. Yes.

Q. And the differential is 46 cents, is that correct? A. The value per hundredweight of all of the differentials in Connecticut was 45 cents. The rate to the nearby producer was 46 cents.

Q. The rate that they received was 46 cents? A. Yes.

Q. And the amount that was deducted from all the milk in the pool was 45 cents. If the nearby farm location differentials were deleted from the Connecticut market, there would be a net loss of approximately one cent, is that correct? A. Yes.

Q. So what advantage does the nearby farm location differential give to the nearby producers other than a one cent gain in their price, anything? A. I didn't mean to imply there was any substantial advantage in that regard.

Q. Well, is there any substantial advantage in that regard? A. I said no.

Q. Oh, there is no substantial advantage? So the Connecticut nearby farm location differentials could be removed? A. No.

Q. And there would not be a substantial change in the prices that the Connecticut producers would receive, is that correct? A. A substantial change to nearby Connecticut producers?

Q. Yes. A. That is correct.

Q. If there would not be a change we recognize that there would be a one cent change approximately. If this would be the only change, why would you, or would you have an objection to the deletion of the nearby farm location differentials in the Connecticut market? A. I would be in favor of keeping the differential in the Connecticut market on the basis of principal as in all of the other markets. There happen to be more nearby producers in Connecticut which affects the rate substantially but the principal would remain the same whether it is a Connecticut market or a Boston market that we are talking about.

Q. Just so we understand, the deletion of the nearby farm location differential would not affect the Connecticut price to nearby producers of a very substantial amount, and by that I mean one or two or three or four cents, something like this? A. The rate makes that obvious.

Q. Continuing that line just a moment then, would you anticipate that if the nearby farm location differential was removed, that there would be an increase of supplies in milk into the Connecticut market? A. No."

(s) Notice of termination of N.Y.–N.J. nearby farm location differential, 32 F.R. 2807, February 11, 1967, for failure to effectuate purpose of Act, after decision in *Blair*:

PART 1002–MILK IN NEW YORK-NEW JERSEY MARKETING AREA

Order Terminating Certain Provisions

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and of the order regulating the handling of milk in the New York–New Jersey marketing area (7 CFR Part 1002), it is hereby found and determined that:

(a) The following provisions of the order having been declared illegal by a court of competent jurisdiction cannot be enforced and, therefore, no longer tend to effectuate the declared policy of the Act.

1. In paragraph (b) of § 1002.42 the provision "the nearby differential area or in" as it appears in the first sentence thereof.

2. All of subparagraph (b)(7) of § 1002.47.

3. In paragraph (e) of § 1002.65 the first sentece thereof, and

4. All of paragraph (b) of § 1002.71.

(b) Notice of proposed rule making, public procedure thereon, and 30 days notice of the effective date hereof is impractical, unnecessary, and contrary to the public interest in that:

1. It is immediately necessary to delete these provisions from the order as promptly as possible to give effect to the decision of the Circuit Court of Appeals in Lorton Blair et al. v. Orville Freeman, decided November 18, 1966,

holding the nearby differential provisions of the order to be illegal.

2. These provisions were placed in partial suspension immediately following the Circuit Court's decision and the nearby differential monies were placed in escrow pending consideration of a possible appeal to the Supreme Court.

3. It has now been determined that the Government will not take an appeal from the Circuit Court's decision in this case.

4. Prompt deletion of these provisions by termination will allow the blend price for January and subsequent months to be computed without adjustment for the nearby differentials thereby giving full effect to the Court's decision.

Therefore, good cause exists for making this termination order effective February 11, 1967.

It is therefore ordered, That the aforesaid provisions of the order are hereby terminated.

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674)

Effective date: February 11, 1967.

Signed at Washington, D.C., on February 8, 1967.

GEORGE L. MEHREN,
Assistant Secretary.

(t) Excerpts from the Market Administrator's Bulletin for the N.Y.–N.J. milk order re receipt of highest milk prices in history of milk order from April, 1967 to date:

"Dairy farmers in the New York–New Jersey milk shed will get 20 cents more for every 46.5 quarts of milk for April, May and June than they did last year. Each hundredweight of Class I milk will cost handlers $5.86, up about 75 cents over the prices for last April, May and June, A. J. Pollard, market administrator, said Saturday." (News article pursuant to news release from USDA, N.Y.–N.J. marketing area, April, 1967).

* * *

"OCTOBER SAW HIGHEST NYC REGULATED PRICE

October's uniform price of $5.64 per hundredweight was the highest regulated price ever paid dairy farmers for milk deliveries to the New York City market.

It topped by three cents the record set the previous month. Prior to this year, the highest price was $5.52 in November, 1948, before the orders were expanded to include New Jersey and Upstate New York. . . ." (Vol. 27, No. 8, December, 1967 Market Administrator's Bulletin).

* * *

"SEPTEMBER PRICE TOPS RECORD SET IN AUGUST

September's uniform price broke a record set only the previous month. The $6.09 per hundredweight dairy farmers received was the highest price ever paid under an order for the New York City market, topping by 22 cents the former mark set in August.

The price was 48 cents more than was paid in September, 1967. . . ." (Vol. 28, No. 11, Sept. 1968, Bulletin).

* * *

"UNIFORM PRICE WAS AT A RECORD HIGH FOR THIRD STRAIGHT MONTH

The uniform price was at a record high for the third month in a row in October. Dairy farmers received $6.15 per hundredweight, the top price ever paid under an order for the New York City market.

October's price was six cents greater than the previous mark which was set in September and 51 cents more than was paid producers in October, 1967. . . ." (Vol. 28, No. 13, Dec. 1968 Bulletin).

IN THE

Supreme Court of the United States

October Term, 1968

No. 861

FREDERICK T. ZUBER, ET AL.,

Petitioners,

v.

RUSSELL ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS RUSSELL ALLEN, ET AL.

The respondents have made brief reference in No. 874 (as petitioners) concerning the private record and collusive nature of the case of *Cranston v. Freeman,* 290 F. Supp. 785 (1968). In view of the fact that extensions of time for the filing of appellees' briefs in *Cranston,* granted on March 26, 1969, will preclude a final decision by the Second Circuit before this Court acts herein, it is deemed advisable to inform this Court of a few of the factors involved in *Cranston,* the following matters being illustrative rather than exhaustive of the objectionable matters in the *Cranston* suit.

Although that opinion states that two non-nearby dairy farmers (Leonard Duncan and Kenneth Hewitt) charged that the *Cranston* suit had been solicited by the Connecticut Milk Producers Association (CMPA), composed almost entirely of nearby producers, the said applicants for intervention actually charged that Connecticut nearby interests and attorneys involved in both *Blair* and this suit were involved in such solicitation. The record discloses that Attorney Frederick Conard, Counsel for CMPA and the nearby producers in the *Cranston* case, met with a former CMPA official concerning the contacting of the prospective plaintiff Cranston for the purpose of instituting the *Cranston* suit. This occurred shortly after the granting of the preliminary injunction on January 16, 1967, in this case and was obviously to preclude the filing of a suit in the District of Columbia in respect to the Connecticut nearby differential. In fact, the record in *Cranston* discloses that another non-nearby producer (Alexander Marbot) was solicited to bring such a suit in the District of Connecticut prior to the solicitation of Mr. Cranston, and that individual was not re-contacted after he informed that he wished to consult his attorney concerning such a suit. The former CMPA official (John Seremet) who contacted plaintiff Cranston freely admitted that he contacted Cranston for the purpose of instituting a suit, and he positively did *not* testify that he "had heard rumors" that Cranston intended to commence a suit, as stated in the *Cranston* opinion. Moreover, this individual knew of no meeting of the CMPA that preceded or authorized his contacting of Mr. Cranston, although he did testify that Attorney Conard previously gave him the name of an attorney to represent the prospective plaintiffs prior to the contacting of Cranston. Although the *Cranston* opinion states that the CMPA "checked out" the *Cranston* plaintiff's present attorney because they wanted "good attorneys on both sides of the question", the record discloses that it was opposing counsel Conard that checked

out plaintiffs' attorney, and the *Cranston* opinion fails to note that the attorney initially recommended by Attorney Conard to act as plaintiffs' counsel had no experience in the specialized field of milk marketing litigation. Additionally, the record reflects that the prospective plaintiffs were not allowed to consult their present attorney for the purpose of instituting the *Cranston* suit until after opposing counsel Conard checked out Cranston's present attorney. The *Cranston* opinion fails to note that Attorney Conard was associated with petitioners' counsel in this suit and the *Blair* case on the side of the nearby producers and nearby differential, and that every attempt has been made in this suit to preclude the presentation of the non-nearby producers' case, including appearance in court on various matters with little or no notice to opposing counsel and attempts to prejudice the non-nearby producers by improper financial pressures – such as refusal to print relevant portions of the record and efforts to force non-nearby producers to bear an unfair part of the expenses of the nearby producers' appeal. In view of the fact that the CMPA is admittedly acting in the names of the individual nearby producers in both this case and the *Cranston* case, it is submitted that the contrasting treatment in the two cases does not support the statement in the *Cranston* opinion that the payment of expenses and attorney fees of opposing counsel in *Cranston* is attributable to the fact that the CMPA is a "democratic" organization. Additionally, Attorney Conard has vehemently opposed the entry of any unselected non-nearby producer or unapproved attorney into the *Cranston* case, and no non-nearby dairy farmer has been able to intervene therein even for the purpose of taking depositions or discovery.

The *Cranston* opinion also fails to note that at least 90 percent of the non-nearby dairy farmers who became aware of the factors permeating the *Cranston* suit requested its dismissal. The plaintiff Cranston admitted

that he had not advised any other producers of that suit, either prior or subsequent to its institution, and the opinion fails to indicate such fact or that Mr. Cranston sold his cows after the trial and retired from the dairy business. The *Cranston* opinion states that the CMPA decided to "aid" its members by "reimbursing such members for reasonable expenses and attorney fees", but all four of the individual plaintiffs testified that they had no liability for either expenses or attorney fees and reimbursement therefor can hardly exist under such circumstances. Moreover, a large number of cancelled checks from non-nearby producers to applicants' attorney evidenced that such "aid" was not only unnecessary but unwelcome under the undisclosed arrangement. Non-nearby dairy farmers who were unaware of even the pendency of the *Cranston* suit could hardly be receptive to such a financial arrangement that was not communicated to them.

The *Cranston* opinion (footnote 2) states that the court's Order of April 22, 1968, set forth that "the complete record of those proceedings *has been deposited* in the chambers of the United States District Judge, located in the Federa! Building, Albany, New York. The record *is* available for public inspection during normal business hours." The record had been continuously located outside of the Northern District of New York at New Haven, Connecticut, and applicants' attorney traveled from Washington, D.C., to Albany, N.Y., on May 2, 1968, to inspect said record in preparation for the hearings on collusion after Department of Justice attorneys refused applicants' counsel the courtesy of reviewing their record in Washington. He was informed, after persistent inquiry, that the record was not at Albany, N.Y., and that its whereabouts were unknown. He again traveled 800-miles round trip for said purpose and finally was able to look at the voluminous record for 25 minutes, the unavailability of an Ass't. U.S. Attorney to watch

counsel as he examined the record precluding any further review. In view of these facts, it is difficult to comprehend how a court order could state that a voluminous record was presently located at a particular location when it had not been sent to such designated place, and it is equally difficult to understand the statement in the *Cranston* opinion that all who desired to examine such record could do so and that no prejudice resulted from the delay in shipping the record to Albany, N.Y. In this connection, the applicants were never accorded the opportunity to even inspect the parties' briefs in *Cranston*, although the parties were allowed to respond to a brief submitted in *Cranston* by an applicant for intervention.

Although the *Cranston* opinion states that all aspects of the claim of collusion were explored and every interested person given an opportunity to be heard, the applicants for intervention who sought dismissal of the *Cranston* suit were not allowed to take depositions or discovery, and they could not examine any of the parties or counsel in *Cranston* without making the same their own witnesses. They were not allowed to ask any questions of a witness concerning the merits of the case, even to illustrate the inaccuracy of the testimony of such witness, and the court repeatedly interrupted applicants' counsel and actually threatened counsel with contempt when he sought to explain the nature of an objection in a quiet and respectful manner. The futility of proceeding further in the hearings was apparent to every non-nearby dairy farmer, and most of them decided that it was meaningless to even return to the courtroom. Both applicants and their counsel were at all times completely respectful and non-argumentative, but the collusion hearings were simply "an alternative" to the depositions and discovery that had been requested for five months in *Cranston* and resulted in inability to develop the facts in a normal manner.

The Notice of said hearing failed to advise dairy farmers of the matters alleged by applicants for intervention and was actually a show cause order that was worded in such a manner that it could only serve to dissuade any dairy farmer from challenging the *Cranston* suit. Such farmers had to take the stand subject to cross-examination but the attorneys were not even required to submit a signed statement to the Court, and no question was asked of Attorney Conard or any of the parties by the district court. The applicants' main witness testified for 14 pages of the record but was cross-examined for 54 pages of the record. The president of the CMPA, Louis Longo, who owns a large "nearby" farm in Connecticut, testified for 33 pages of the record for the parties, but the applicants' counsel was interrupted after 5 pages of cross-examination and asked how much longer he was going to take. The hearings on collusion did not adequately treat this subject, and the applicants advised that important witnesses were outside the jurisdiction of the court. The district court had also required the applicants to submit the names of all intended witnesses and its order provided that it would determine if their presence was necessary after objection thereto by the parties, the said Order further providing that the court would question the witnesses in the first instance. The hearings disclosed that two of the six individual plaintiffs did not even know that they had been listed as plaintiffs, and one such listed plaintiff was unable to identify the plaintiffs' counsel in *Cranston*.

Although the plaintiffs' counsel in *Cranston* presented no witnesses, other than the minimal testimony of the four plaintiffs, the plaintiffs did not file any motion for summary judgment or even a motion to hold that case in abeyance pending a decision on the *Allen* appeals. Copies of both motions and the *Blair* and *Allen* briefs were furnished to the *Cranston* plaintiffs.

The *Cranston* opinion refers to a "meeting between CMPA officials, plaintiffs and Attorney Weatherwax" that occurred on February 3, 1967, but it fails to note that Attorney Conard and Louis Longo, CMPA president who owns a large "nearby" farm, traveled from Hartford, Connecticut, to the home of Cranston at Troy, N.Y., on February 3, 1967, and transported the three prospective plaintiffs to Attorney Weatherwax's office for their first consultation concerning the institution of the *Cranston* suit.

The *Cranston* opinion refers primarily to the CMPA but the complaining dairy farmers in *Cranston* alleged that the suit was conceived and instigated by the same attorneys that represented the nearby interests in *Blair* and this case. They further alleged that the "trial" in *Cranston* was for the purpose of overcoming the admissions in *Blair* that the "market differential" was correctly defined in the Congressional Reports and could not formulate a basis for the issuance of the nearby farm location differential. The only witnesses who testified in *Cranston* in this regard were Attorney Reuben Hall, who was associated with Attorney Conard and petitioners' counsel in *Blair* and this case as counsel for the CMPA and NEMPA, personnel from the USDA, and the witness Kane. The latter's testimony rested upon a 1935 draft of proposed revisions to the Act that was never produced to substantiate his testimony because of the obvious inconsistency between his testimony and said draft. (App. C, pp. 12-21c). The testimony of the other witnesses that attempted to cast doubt on the Congressional definition of the market differential can only be viewed as fantastic, in that the defined market differential admittedly existed in the very area of the *Cranston* trial both prior and subsequent to federal regulation. (App. C, pp. 22-23c). In spite of this fact and the presence of the market differential in both the Connecticut and the Mass.-Rhode Island milk orders as a part

of the zone differential, 7 C.F.R. 1015.62, 1001.62, the *Cranston* opinion fails to recognize that the market differential is included in said orders, and the decision rests on the incredible testimony of such interested attorneys and governmental personnel who allegedly "knew of no differentials which would in any way fit the definition of market differentials contained in the reports." The trial in *Cranston* also replaced the administrative record testimony which indicated that the nearby differential did not exist prior to the 1937 federal regulation and was thus not "customarily applied" by handlers as required by the language of the Act pertaining to the market differential. (App. C, pp. 24-30c). In this connection, it is noted that Attorney Weatherwax filed a brief for 24 handlers or dealers in the 1956 N.Y.-N.J. administrative hearings that dealt solely with the market or direct-delivery differentials payable in the secondary markets of Upstate New York, but said brief was never introduced in the *Cranston* trial to rebut the testimony that the market or direct-delivery differential did not exist in such secondary markets.

Moreover, the government not only presented testimony by USDA personnel that was in direct contradiction to the admissions made in *Blair* but also failed to produce various relevant documentary evidence because the same would conflict with such testimony concerning legislative intent and other matters. The 1935 draft referrred to by the witnesses Kane and Hall is one example, and the memoranda of the AAA set forth in Appendix C, pp. 9-12c, is another example of an AAA statement concerning legislative intent that conflicts with the testimony in *Cranston*. The latter memoranda refer to Sec. 8c(5)(D) that provides for the only exception to the requirement of payment of a uniform price to all producers irrespective of the use of their particular milk. Petitioners have made reference to Circuit Judge Jerome Frank's interpretation of certain irrelevant parts

of the Act, but they have neglected to produce various memoranda from the government's files concerning AAA interpretation of the relevant portions of the Act, such as the following from a memorandum from Assistant Chief Abe Fortas, Marketing Agreement, Code & License Section, to AAA General Counsel Jerome Frank on October 31, 1934:

> "It should be noted that milk licenses contain a provision which allows new producers Class III price for milk during a probationary period of ninety (90) days. This provision, however, furnishes no precedent for the proposed exclusion of certain producers from a market. In the first place, the present provision does not exclude the producer but merely specifies that he shall be paid the Class III price. In the second place, the producer is certain that, regardless of any other circumstances, after he has operated for ninety (90) days, he will be able to market his milk upon the same terms as any other producer. * * *."

Numerous other examples could be given of such conflicts in the testimony in *Cranston* and the early interpretations of the Act by the AAA, and it is noted that the *Blair* brief admitted a construction of the Act that varies from the *Cranston* testimony. (App. C, pp. 14-15c). The *Cranston* plaintiffs have repeatedly delayed in prosecuting their appeal in the Second Circuit, thus preserving an alleged conflict of sorts, although the petitioners' counsel previously argued that this case and *Cranston* were completely different when intervention was sought in *Cranston* for the purpose of holding that suit in abeyance.

Respondents do not propose to treat in detail the various objectionable factors of the *Cranston* case in this brief, and the inaccuracy of the *Cranston* record and decision on the merits is illustrated in other briefs filed herein. However, the appendix hereto sets forth some

of the relevant testimony in *Cranston,* and it is respectfully maintained that said case is not only improperly cited herein as a basis for granting of a writ of certiorari but is not maintainable at all under this Court's decision in *Gardner v. Goodyear,* 131 U.S. Appendix ciii, because of the collusive aspects thereof and the private nature of the proceedings, irrespective of whether said case was truly contested in the district court. The respondents respectfully submit that the opposition may not select the plaintiffs, approve opposing counsel, authorize institution of the suite, and agree to pay all expenses and attorney fees of the opposition without being held to have such control over the suit as to make it merely collusive as a matter of law. The failure to advise other dairy farmers of its pendency until 15 months after its institution and after all proceedings have been concluded merely serves to emphasize the private nature of the proceedings and underscores the certainty of payment by the opposition.

CONCLUSION

The *Cranston* district court decision is not a proper basis for the granting of a writ of certiorari, and the petitions herein and in No. 1076 should be denied.

Respectfully submitted,

CHARLES P. RYAN,
EDWARD J. RYAN,
JOHN J. SIMARD,
Counsel for Respondents.

April, 1969

APPENDIX OF PORTIONS OF HEARINGS IN *CRANSTON v. FREEMAN*

May 15, May 27 and June 10, 1968

APPENDIX

Although the motion for a preliminary injunction in this case was strongly opposed by the government and the CMPA and NEMPA, applicants for intervention as defendants in the district court that were represented by Attorneys Conard, Hall, and ~~Respondents~~ Petitioners' counsel, the record in *Cranston* reflects that Attorney Conard consented to such injunction and escrow order in that case. The following is an excerpt from the Memorandum-Decision of Judge Foley of the U. S. District Court for the Northern District of New York in granting the motion for preliminary injunction in *Cranston*:

> "* * * Moneywise, a significant factor favoring the injunction is that the attorney for the intervening defendants, permitted by grant of formal motion to so intervene on March 2nd, unqualifiedly stated at the hearing on that date he would not have any objection to the signing of the preliminary injunction. Interestingly, it is these intervening defendants from whom the payments or credits will be withheld by the injunction order. Although the government earnestly argues distinguishability, I think there is enough similarity – at least upon the law and orders involved – with the *Blair* ruling adverse to the Secretary, from which certiorari was not sought, to satisfy the probable success requirement. * * * ."

Although the government and the aforesaid counsel for applicants for intervention strongly questioned the maintenance of this suit as a class action and insisted that 6,600 non-nearby producers located in three or four states were indispensible parties, it is noted that only the government opposed the maintenance of the *Cranston* suit as a class action and government counsel subsequently withdrew such objections only in the *Cranston* case:

> "THE COURT: Does the Government wish to be heard?

MR. KRAUSE: Your Honor, we do not intend to present any evidence on this subject, and we have no objection to the maintenance of the class action, either on behalf of the plaintiffs or on behalf of the defendant-interveners. * * * ."

THE COURT: Well, as far as the Order, and I frankly do think we are at the point where the Court should comply with the rule and enter an Order –

MR. KRAUSE: As I say, we have no objection to that." (R. 1164; T. 299-301).

In respect to notification of other dairy farmers concerning the *Cranston* suit, the plaintiff Cranston testified as follows on May 27, 1968, concerning the institution of that suit on February 9, 1967:

"Q. What other producers did you actually talk to *before* you instituted this case, concerning the institution of this case? A. I don't recall that I talked with any others than I have mentioned regarding the institution of the case. * * * (other two plaintiffs)

Q. Now, *after* the institution of this suit, what producers did you then contact and advise of the pendency of this suit? A. Mr. Ottman, Mr. Phillips and Mr. Mesick.

* * * *

Q. And Mr. Ottman, Mr. Phillips and Mr. Mesick are in the 23-cents zone, which is different from the zone that the initial three plaintiffs were in; are they not? A. This is correct.

Q. And they were subsequently added as plaintiffs to the case by an amended complaint? A. Yes, sir."

The individual plaintiff Mesick testified as follows on May 27, 1968, in the *Cranston* collusion proceeding:

"Q. Can you tell me whether you had knowledge of your being a plaintiff in this particular action? A. Not until the other day.

Q. Now, your testimony is that you did not know, until the other day, that you were a plaintiff in this particular action? A. That is correct.

Q. And can you identify Mr. John P. Weatherwax for me, please? (plaintiffs' attorney) A. I could not, other than since I came into this courtroom I realized where Mr. Weatherwax is sitting.

Q. And your name is, however, listed as an individual plaintiff in this action, representing a class of other dairy farmers? is that correct? A. Well, apparently.

* * * *

Q. In other words, you discussed this with Mr. Ottman, who is also listed as a plaintiff in this case? A. Yes.

Q. And he was also unaware of this fact? A. This is correct.

* * * *

Q. In other words, you never authorized your name to be affixed to any of these pleadings as a plaintiff; is that correct? A. No; I certainly did not.

* * * *

Q. Had you ever met Mr. Weatherwax or did you know him before this day? A. To the best of my knowledge, no."

The plaintiffs' attorney in *Cranston* testified as follows concerning the foregoing testimony of Mr. Mesick:

"Q. Now, have you ever spoken to either Mr. Mesick or Mr. Ottman concerning this action? A. Personally?

Q. Yes. A. No."

The transcript of the trial itself discloses the following at pages 118-119 concerning the non-appearance of Ottman and Mesick at the trial:

"MR. WEATHERWAX: The Court please, I had anticipated named plaintiffs Roy Ottman and George Mesick, Jr., would be here to testify today, but both have illnesses in their homes and were unable to be here. So I have just verified that fact, so I will not be able to produce their testimony today, and I will not produce it at any time, for that matter, as I feel perhaps that the testimony of the other named plaintiffs will probably be sufficient for the purposes for which their testimony was offered.

THE COURT: That is Ottman and Mesick. Those are the two plaintiffs you mentioned?

MR. WEATHERWAX: Yes. * * * ".

The plaintiff Phillips in the *Cranston* case maintained that he had contacted plaintiffs Ottman and Mesick but he appeared to contradict himself during the hearings on collusion and inadequacy of representation:

"Q. Now, when was the first occasion that you met with the other plaintiffs concerning this case? A. As a group, I think prior to the fall trial. I had talked to Mr. Cranston on the phone about it, but I hadn't attended any meetings."

* * * *

"Q. Now, did you – when was it that you first discussed the litigation with Mr. Mesick? A. Oh,

probably a year ago. I couldn't begin to say the date, but I would say about a year ago.

Q. Well, now, how far before the trial in October of 1967 had you discussed it with Mr. Mesick? A. Well, long enough to get his approval and inform Mr. Cranston that they were willing to have their names used.

Q. Well, now, I didn't ask you about any other individual. I was asking about Mr. Mesick. *Have you ever had any meeting with Mr. Mesick and Mr. Ottman, together, and yourself?* A. No, I have not.

Q. And do you have any financial contract or understanding of any nature with Mr. Weatherwax, your attorney, concerning the expenses and the fees of this proceeding? A. No, I do not.

Q. Did you have any conversation with Mr. Mesick or Mr. Ottman on this subject? A. *I don't know.* We might have, generally, talked about it, because there is always costs involved in such things, but nothing definite.

Q. Now, what do you mean 'costs involved in such things'? Wouldn't this be a logical subject that would be immediately brought up? A. Well, yes. *As I say, it was a subject that was brought up,* but I don't know that we arrived at any conclusion.

Q. Are you saying that Mr. Mesick or Mr. Ottman would enter into a situation of this nature without knowing anything about the financial arrangements? A. Well, as I got involved in it, we were asked to participate as the intermediate group, and I think we all jointly concluded that Mr. Cranston and Mr. Weatherwax were handling the case and we would lend our assistance because of our location.

Q. Now, when you say 'we', did somebody ask you and Mr. Ottman and Mr. Mesick in a group?
A. Well, I was asked individually, and I think the others were, also.

Q. But you don't know that for a fact; do you?
A. *Well, I never asked them.*"

The record in the *Cranston* case discloses the following testimony by the plaintiff Cranston on the question of his fitness to represent the class plaintiffs:

"Q. Now, you feel very strongly, Mr. Cranston, about the nearby differential of the Connecticut Milk Order? A. What do you mean 'feel very strongly'?

Q. Against it. A. Against it, yes.

Q. And yet, you didn't notify anybody about the litigation, other than Mr. Ottman, Mr. Phillips, and Mr. Mesick? A. No.

Q. And you feel that you can adequately and fairly represent the plaintiffs' class in this suit under the circumstances? A. Well, I believe that was a ruling in this Court.

MR. WEATHERWAX: Now, Harold, don't go into that. He just asked you a simple question. Now, answer the question as best you can.

THE WITNESS: Yes.

MR. WEATHERWAX: Okay. That takes care of that.

BY MR. RYAN:

Q. Now, isn't it a fact, Mr. Cranston, that you are not even a milk producer at this time?
A. This is true." (T. 270-71).

The witness Seremet, CMPA manager for 26 years, testified as follows concerning the plaintiff Cranston during the collusion hearings:

> "Q. Do you know whether or not he was regarded, in his locality, as a spokesman *against* the nearby differentials? A. He had initiated some action, previously, with regard to the nearby differentials.
>
> Q. Can you tell us approximately when Mr. Cranston had initiated previous action? A. There was a petition signed by he and others with regard to nearby differential *expansion* in the Federal Order hearings, but I can't remember the dates."

Witness Alexander Marbot, a non-nearby producer, testified as follows during the *Cranston* collusion hearings:

> "Q. Now, have you ever had any conversation with any individual concerning the nearby differential of the Connecticut Milk Marketing Order? A. Yes, with Ted Blakely and a man by the name of Frank Bragg. That was a long while.
>
> Q. Now, will you identify those individuals? A. Well, Frank Bragg is the field man, and I don't know what Blakely is. I believe he is a trouble shooter of some sort, but I just don't know.
>
> Q. With whom? A. Beg pardon?
>
> Q. With what organization? A. With C.M.P.A.
>
> Q. All right. Now, when did this conversation occur? A. I believe it was January the 21st, the first time they approached me to sue for the differential, and to sue in Connecticut, that they would break the differentials but hold the Federal

order in Connecticut, and they approached me three times on this.

Q. Now, when you say 'break', they told you that they would 'break the differentials', what do you mean by that? A. I asked them what they meant by that, and *they said I would get 46 cents a hundred more for my milk.*

Q. If you brought this case? A. To court, and, after the third time, I told them I wanted to see my lawyer and talk it over with him before I would say yes or no. And then they thought they might be back that day or the next day, and I haven't seen them since. I have seen Bragg, as field man, and Blakely I haven't seen since, and, later, I heard Cranston and the other boys were opening a suit.

Q. Now, I want you to state this again if you would. Now, you are stating that these CMPA personnel or officials asked you to bring this case in the State of Connecticut and that it would result in the breaking of the differentials, that you would receive 46 cents more for your milk; is that correct? A. That's right."

* * * *

Under cross-examination by Mr. Weatherwax, the witness testified (T. 157) that Mr. Blakely had stated:

"A. * * * 'Yes, Marbot, it won't cost you one penny. We will pay the attorney that we appoint to you. If he loses, we pay him. If he wins, it will come out of the escrow account. It won't cost you one penny,' is what they told me, but, when I wanted to see my lawyer, that was the end of it."

The witness Seremet also testified as follows concerning the institution of the *Cranston* suit on February 9, 1967:

"Q. Now, did you, at any time, talk to Harold Cranston, either on the telephone or in person, concerning the institution of this action? A. Yes.

Q. And could you tell me when that was? A. Sometime the latter part of January.

Q. Well, would you be a little more specific as to the date? A. If I recollect, it would be around the 27th of January.

Q. And was that in person or by telephone? A. By telephone, sir.

* * * *

Q. In January of 1967, when you telephoned Mr. Cranston, what was the subject of your conversation at that time? A. As I recall it, it would concern itself with the nearby differential that was a result of the *Blair* decision.

* * * *

Q. And how would the *Blair* case enter into your contacting these particular producers? A. As I recall, the *Blair* case ruled out the nearby differentials in the New York Order. There was an action taken in the Boston, the Massachusetts–Rhode Island Order, on the nearby differentials, and it occurred to us that action in the Connecticut Order might be well worth taking * * * ."

"Q. Now, did you ask Mr. Cranston if he would institute a suit at that time? A. Asked him if he would be interested in instituting a suit, he and others." (T. 173; see also 167-168).

* * * *

Q. Now, you recommended an attorney, at that time, for Mr. Cranston to consult? A. Yes. We had – the association or I had a name of an

attorney in Albany by the name of Brearton, that was recommended as a potential attorney to handle the case.

Q. Now, who recommended Mr. Brearton? A. Mr. Conard.

Q. Mr. Conard; and is Mr. Conard counsel for your association? A. Yes."

* * * *

"Q. Now, when did Mr. Conard recommend to you Mr. Brearton, prior to your making the telephone call to Mr. Cranston? A. It would be prior to the call; how soon prior to that, I really can't recall, at this point.

Q. Well, what were – where was that – where did that conversation take place? A. (No Response)

* * * *

Q. And did Mr. Cranston accept the offer of Mr. Brearton's services? A. Of what?

Q. Did Mr. Cranston accept your offer of Mr. Brearton's services, as the prospective Plaintiff's attorney? A. I don't recall that he accepted. He suggested another attorney.

Q. And what was your response when he suggested another attorney? A. That we would like to check on his reputation and see what kind of an attorney he was, if he was capable.

Q. And did you subsequently do that? A. Yes.

Q. And how soon after your telephone call with Mr. Cranston was that done? A. I don't recall, at this point.

Q. Did Mr. Cranston identify the attorney that he desired to have represent him? A. Yes.

Q. And who was that? A. Weatherwax."

* * * *

"Q. Now, has Mr. Brearton ever handled any milk case or milk litigation, to your knowledge? A. No, I do not know.

Q. But you testified you were desirous of furnishing a competent attorney? A. Yes, sir."

* * * *

"Q. Well, you have indicated that you told Mr. Cranston that you wanted to check out Mr. Weatherwax to see whether he was competent and so forth. Now, how long after that was Mr. Cranston told that it was okay to proceed with a suit and to contact Mr. Weatherwax? In other words, was this in a matter of a few days or weeks? A. It would have been in a matter of a few days."

* * * *

"Q. Mr. Seremet, other than yourself and Mr. Conard, I believe you testified Mr. Longo – were there any other individuals that were aware of your telephone call to Mr. Cranston, in the association? A. I don't recall.

Q. You don't recall? A. No.

Q. In other words, was there any special meeting called for this purpose, or was this an individual thing on the part of these persons? "

* * * *

"A. It has been a board policy to defend the nearby differentials and the Connecticut price, and this is an action in line with that policy.

Q. That wasn't my question, Mr. Seremet. Was there any meeting that preceded your telephone call to Mr. Cranston? A. *I know of no meeting*, other than the district meetings that we had been holding at that time of the year in all of our districts.

Q. Those district meetings are concerned with many matters, are they not? A. Correct.

Q. Now, what I am asking is, was there any specific meeting that preceded your telephone call to Mr. Cranston? A. *I don't recall any specific meeting, sir.*

Q. Are you stating this was individual action, by yourself?

MR. GOLDBLOOM: Objection, Your Honor.

THE COURT: Sustained.

BY MR. RYAN:

Q. Do you know of any formal meeting that was called with respect to the institution of this action by Mr. Cranston?

MR. GOLDBLOOM: I object.

THE COURT: Sustained. You have asked that about three different ways."

* * * *

"Q. Now, did you indicate anything concerning payment of expenses of the lawsuit? A. Yes, we discussed the problem.

Q. In what specific manner? A. In this area, that the nearby producers were going to be supplied with counsel to defend their position, or we would assume the expenses of that, and we would be willing – we, the association, would be willing to help in supplying the attorneys for the distant producers.

Q. And you would pay the fees of those two attorneys? A. Well, I don't know if that was mentioned as fees. Certainly, if distant producers won the case, that the escrow monies would probably take care of the expenses of the attorneys.

Q. Now, how do you know that to be a fact? A. I don't.

Q. In other words, if the attorney for the distant producers lost the case, he would be compensated by the association? A. Reasonable expenses would probably be compensated.

Q. And that includes an attorney's fee? A. I would think so, part of it." (T. 174-75).

* * * *

"Q. Well, the *Allen* decision was on June 15 of 1967. Now, did the Association attempt to intervene in that case? A. In the *Allen* case?

Q. Yes. A. Yes, we did, sir.

Q. And who was your attorney at that time? A. Mr. Reuben Hall and Mr. Conard.

Q. And did you have local counsel in Washington at that time? A. Probably through Mr. Hollman.

Q. Of Klasgbrunn & Hanes; Mr. Lawrence Hollman? A. I really don't know, at this point. It was Mr. Hall that the contact was made with, and through Mr. Conard.

Q. You did not, at that time, seek to obtain an attorney in the District of Columbia, yourself; is that correct? A. No.

Q. Now, prior to the *Blair* decision, had any producers ever indicated an interest in bringing any legal action to challenge the nearby differential of the Connecticut Order? A. I don't know about legal action. There certainly were producers who had asked to have Federal order changes made, to change the –

Q. Were there not many objections by distant producers to the differential? A. There were some objections; yes, sir.

Q. At that time, did you offer to provide an attorney or to attempt to institute any suit in behalf of those producers, prior to the *Blair* or *Allen* decisions? A. This was in connection with Federal orders. I don't know of any other legal action that was taken.

Q. No, I realize that, but, prior to the *Blair* decision and the *Allen* decision, did you ever attempt to accommodate your distant members with respect to institution of any legal action, to challenge the nearby differential of the Connecticut Order? A. No."

* * * *

"Q. You stated that your distant members did evidence opposition to the differential prior to the Blair case. A. There were some distant producers that wanted to be included in the nearby zones, yes.

Q. And you – did you, at that time, take any action to provide them with an attorney or expenses or anything to contest the particular differential at that time? A. I don't recall that we had."

* * * *

"Q. And didn't you feel that these producers that you desired were competent to take their own legal steps? A. I didn't question whether they would desire it.

Q. But you did not wait to see whether they would do so, is that correct, after the *Blair* decision? A. There was a period of time where we waited, yes."

The witness Seremet testified as follows under examination by CMPA counsel:

"Q. Now, where – Mr. Seremet, whether Mr. Cranston chose Mr. Weatherwax for his lawyer or any other member of the bar, did you agree, by words or inference, to pay Mr. Weatherwax or any lawyer, any sum of money whatsoever? A. I told Mr. Cranston that we would help in the expenses – a reasonable amount in the expense of the defense of their position."

* * * *

"Q. All right. Now, I am going to ask my question again. Did you, at any time, by words or inference, say or suggest that you would pay any money to Mr. Weatherwax or any other member of the bar? A. I am not positive.

Q. *I am only talking about the conversation with Mr. Cranston.* Did you, sir, say or suggest that you would pay any money to Mr. Weatherwax or any member of the bar? A. I don't recall that; no, sir.

Q. So you believe that you did not say it? A. I did not."

The plaintiff Cranston, a CMPA member like the other two original plaintiffs testified as follows at the collusion hearings:

BY MR. RYAN:

"Q. Now, what was the balance of the conversation, Mr. Cranston? A. Well, he asked if I had a lawyer. I said I did – we did.

Q. Now, who is 'we'? A. Mr. Carlson, Mr. French, with whom I had discussed this.

Q. And you had discussed it with them when? A. On different occasions.

Q. Well now – A. Over the past several years, none of us have been happy with this.

Q. I realize that, Mr. Cranston, but you have now testified that you told – if my recollection is correct, that you told Mr. Seremet that 'We had a lawyer.' A. Yes.

* * * *

Q. When did yourself, Mr. Carlson and Mr. French obtain a lawyer? A. I can't remember the exact date.

Q. Well, was it prior or subsequent to the time of Mr. Seremet's telephone call, concerning which you are now testifying? A. As I stated before I have talked with John (Weatherwax) because he is a neighbor –

Q. Yes. A. – Mr. Weatherwax, on many occasions, about the discrepancies that exist in the payments. We were agreed that it was a ridiculous situation.

MR. RYAN: Your Honor, the witness is not being responsive to the question at all.

THE COURT: I believe he is. Mr. Ryan's remark, construed as a motion to strike, is denied.

BY MR. RYAN:

Q. When, Mr. Cranston, did you, Mr. Carlson and Mr. French obtain the services of a lawyer; was it prior or subsequent to this telephone call? A. It was subsequent."

* * * *

"Q. Now, when did you first go to Mr. Weatherwax for the purpose of instituting this litigation? A. I can't remember the date.

Q. Now, how much time elapsed from the time that you, Mr. Carlson and Mr. French consulted Mr. Weatherwax and the time that this suit was filed, approximately? A. I can't remember that exactly. I am sorry, but I didn't make a record of any of this stuff.

Q. Well, could you tell me – A. I didn't think it was important at the time.

Q. Well, could you tell me whether it was a matter of days, weeks, months, or do you have any approximate estimate? A. A week, more or less, maybe.

Q. Pardon me? A. A week, more or less, maybe. I don't know exactly.

Q. And did you all go to Mr. Weatherwax's office to consult him, or what were the circumstances? A. If you mean Mr. Carlson, Mr. French and myself, yes, we did.

Q. And how did you go: together by automobile, one automobile, or separately, or what? A. I believe there were two carloads of us – two cars of us.

Q. And was anybody with you, at that time, other than yourself, Mr. Carlson and Mr. French? A. Yes.

Q. Could you state who they were, please? A. Mr. Longo.

Q. And who is Mr. Longo? A. He is the President of the CMPA.

Q. And was there anybody else with you? A. I believe Frank Bragg.

Q. And who is Mr. Frank Bragg? A. He is a fieldman with the CMPA.

Q. And was there anybody else with you? A. I think Ted Blakely was there.

Q. And who is Mr. Blakely? A. Well, I don't know what his exact position is. He works for the CMPA.

Q. And was there anybody else there? A. No, not in Mr. Weatherwax's office.

Q. No, that went with you to Mr. Weatherwax's office. Did not, in fact, Mr. Conard and another attorney go with you? A. Mr. Conard never went to Mr. Weatherwax's office with us.

Q. Did he come to your home? A. He came to my home, yes.

Q. In the company of the other individuals? A. That is correct.

Q. And did he go into Troy with you? A. He rode down to Troy with us, yes."

* * * *

"Q. And during your conversation with Mr. Seremet, your telephonic conversation that you testified to, was anything else discussed, at that time, concerning payment of fees or the expenses – the expenses or fees of the case? A. I believe Mr. Seremet explained that.

* * * *

"Q. Well, now, I am asking the question, what are the financial arrangements in the event that the plaintiffs do not prevail in this litigation? A. There is no written agreement that I know of.

Q. Well – excuse me. A. We expect to win the case, but, in the event we don't, I suppose we

will be submitted a bill by Mr. Weatherwax, *which we will promptly resubmit to the CMPA* and hope that they come through on their word. That is all I know."

* * * *

The plaintiff Cranston testified as follows under examination by his own attorney:

BY MR. WEATHERWAX:

"Q. And as a – and then, the question came up that, in the event that the suit went against the plaintiffs – finally went against the plaintiffs that only in that event would the CMPA take care of the minority; is that not it?

MR. CRANSTON: This is substantially correct."

The record reflects the following testimony by the plaintiff French when examined by his own attorney:

BY MR. WEATHERWAX:

"Q. Do you recall meeting at Mr. Cranston's home on February 3rd, 1967, *for the purpose of discussing the bringing of this action?* A. The first part of February. I don't know whether it was the 3rd or not.

Q. Do you remember, at that time, some gentlemen from Connecticut came to Mr. Cranston's home? A. Yes.

Q. And do you remember, later on, you people coming to my office? A. Yes.

Q. Now, do you see Mr. Conard, the lawyer, the gentleman sitting in the third from the end – this end. Did he call, with some other CMPA members, at Mr. Cranston's home on that day? A. Yes."

* * * *

On cross-examination plaintiff French testified as follows in respect to the meeting of February 3, 1967 (351-52):

"Q. Mr. French, on February 3, 1967, you attended a meeting at Mr. Cranston's home? A. We met at Mr. Cranston's home, yes.

Q. Did you actually have a meeting on that date at his home? A. Well, we met there and talked for awhile, while we were waiting to go down to Mr. Weatherwax's office.

Q. But, as a meeting as such, was that actually a meeting, or was it a gathering point? A. It was – I would say it was a gathering point.

Q. Pardon me, sir? A. I would say it was a gathering point.

Q. Yes. Now, prior to that time, had you ever attended any meeting at Mr. Cranston's home concerning the nearby differentials or the institution of this action? A. No; I didn't at his home.

Q. Had you attended any meeting or conference at Mr. Weatherwax's office prior to the date of February 3, 1967? A. No.

Q. Are you personally obligated in any way, concerning any of the financial aspects of this case, as far as expenses or attorney fees are concerned, sir? A. No."

* * * *

"Q. Now, did you attend the trial, sir? A. Just the first day.

Q. And have you ever read any of the pleadings that were filed? A. No, I didn't." (T. 354).

The plaintiff Phillips testified as follows during the *Cranston* collusion hearings:

"Q. And do you have any financial contract or understanding of any nature with Mr. Weatherwax, your attorney, concerning the expenses and fees of this proceeding? A. No, I do not."

* * * *

"Q. Now, have you ever been in the office of Mr. Weatherwax, your attorney, other than on February 3rd, 1967? A. I think I mentioned, awhile ago, that I wasn't in there on February 3rd.

Q. Yes, you did. I am very sorry, sir. Have you ever been in Mr. Weatherwax's office? A. No, I have not.

Q. Have you ever received any of the pleadings that have been filed in this action? A. I read the summary.

Q. What are you referring to when you say 'summary', sir? A. Of the hearing.

Q. Do you mean after the trial? A. Yes.

Q. Had you ever read anything prior to the trial? A. No."

* * * *

Q. And you attended the trial, you say, for one day. Was that your testimony, sir? A. I did attend the trial for one day.

"Q. Yes, and how many days did the trial last? A. Well, I heard them mention it here. I was here one day, and then I had to go to Syracuse. When I got back, it was over.

Q. And how long were you in Syracuse?
A. Two days.

Q. And you attended the trial but one day, but you wanted Mr. Mesick and Mr. Ottman to attend the trial; is that correct? A. Yes."

The plaintiff Carlson testified that he met with the others at Cranston's home on February 3, 1967, before proceeding to Mr. Weatherwax's office, and he also testified as follows when examined by applicants' attorney:

> "Q. Sir, do you have any agreement with your attorney, Mr. Weatherwax, concerning payment of his fee or the expenses – A. No, sir.
>
> Q. – for this action? A. No, sir."

The following is a portion of the testimony of Louis Longo, CMPA President and owner of a 360-acre "nearby" farm in Connecticut:

> "Q. Yes. Now, did you, at that time, meet with any distant producers or with any attorney that represented distant producers in that litigation? A. As far as the *Allen* litigation and the *Blair*?
>
> Q. Yes. A. I don't recall any meetings held specifically for that purpose, no.
>
> Q. But did you take any steps to assist your distant or non-nearby members in respect to presenting a position in that litigation, either *Blair* or *Allen*? A. Did we take any steps to assist?
>
> Q. Yes, your non-nearby or distant producers in putting forth a position in that litigation? A. First – well, first we had no – I don't follow this question of assisting them.
>
> Q. You have already testified that the Association filed a brief amicus curiae in the *Blair* case – A. That is right.
>
> Q. – that they attempted to intervene in the *Allen* case, in both instances, in behalf of nearby producers and continuation of the differentials.

A. May I say it has been entirely our feeling in defending the nearby differential that we were assisting our distant producers.

Q. That is not my question. Did you, in fact, take no action to assist distant and – A. It was our feeling that we were assisting the distant producers.

Q. You still haven't responded to my question. * * * Did you, in fact, authorize any attorney to take any steps, in either *Blair* or *Allen*, to represent the position that these current plaintiffs espouse in this action – in the *Blair* and *Allen* litigation.
A. Here again, no, not directly.

Q. And you have testified that there were objections, previously, to this nearby differential by producers – as you call them, up-country producers. Did you take any steps, at that time, to assist those producers? A. Yes. We based the objections on the fact that the producers were not acquainted with what constituted provisions for orderly marketing as far as the ordinary –

Q. I am not interested in your opinion of orderly marketing. A. It isn't my opinion.

Q. Did you take any steps that would constitute a challenge to this differential prior to the filing of this action? A. No."

* * * *

"Q. Now, do you feel that you have to pursue the question of the ability of any of your members to bring a legal action and to consult an attorney? A. Well, it isn't a matter of the individual member, so much as the entire membership, itself. I think that the Association would pursue any matter in the same – with the same effect and in the same manner."

* * * *

"Q. Did you ever come to my office, Mr. Longo? A. No, I have never been to your office.

Q. Did you ever attempt to contact me in any manner, whatsoever? A. No.

Q. Did any of your attorneys, prior to institution of either the *Blair* or *Allen* cases? A. No, none that I know of.

Q. Now, what other dairy farmers, other than the three that we have named, actually took part in any meeting or evidenced any specific requests for any legal action in this area? (Witness previously testified Cranston and others threatened action at meetings) A. Well, I don't know their names specifically. There were a number of dairy farmers."

* * * *

"Q. And you own a dairy farm in the State of Connecticut, do you not? A. That's right.

Q. And you would be affected by the elimination of the differential; would you not? A. No more than any other producer in our organization, distant or far.

Q. Well, you would be affected; would you not? A. By the fact of disorderly marketing that would be created.

Q. That is not my question. You have been making speeches here. You would be affected financially, adversely, by the elimination? A. Yes. I would be affected in the same proportion as all other individuals."

Witness Kenneth Herrington testified as follows as to plaintiff Carlson during the collusion hearings:

"* * * Then I asked – I went to visit one of them, a Mr. Carlson, because I – this was after the trial

had taken place. I visited Mr. Carlson and asked him what he thought of it or he came and asked to get involved, or what happened, and he told me the field man from CMPA, a Mr. Bragg, had asked him to be a plaintiff in the case, and I asked him if he was bearing any of the expenses, and he said, 'No, Mr. Bragg, the field man, said we didn't have to worry about any of the expenses, that CMPA was bearing the expenses of any lawyer fees', and I said, 'Well,' – then, he said, 'Well, what made me mad at the CMPA is that they joined the side of the Government after they came to us and asked us to have the case', and I said – at this time, I said, 'Well, don't you feel something is wrong, they offered to pay the expenses of your lawyer, then they are on the other side', and he said, 'Well, it certainly doesn't look right,' but he said, 'I am not too happy with CMPA for doing this'."

The witness testified as follows under cross-examination by Mr. Weatherwax:

"Q. No, I said dismissed. Why do you believe it should be dismissed? A. Because of the way that it all started; the way that it was solicited; the way that Mr. Cranston had talked to me, told me, anyway, that it was brought up by CMPA, the fees were to pay the lawyers who were being paid by CMPA. He seems to have lost all control himself."

Another non-nearby producer, Paul Schmidt, stated as follows concerning his understanding that the CMPA was representing non-nearby producers who desired to eliminate the nearby differential:

"Your Honor, I am not acquainted with Court procedures, and I can't hear too good, so, if I step out of line, I need some guidelines. My name is Paul Schmidt. I am a CMPA member. I am not for or

against anything. I would like more information. I was under the impression CMPA was representing us outside producers, and the only notice I had to appear was what I read in the CMPA Bulletin. I received no formal notice, but, lately, I heard the CMPA is representing the nearby producers, so, without any disrespect, I would like to know where I stand and if I am represented, to make a long story short." (T. 50)

On this same subject, an affidavit filed in *Cranston* related the following conversation with plaintiff Cranston prior to the hearings on collusion and inadequacy of representation:*

---

* The farmers questioning the inadequacy of representation and collusion in *Cranston* were not allowed to take depositions or discovery, and, in fact, were enjoined by Attorney Conard from taking such depositions, including his own. They could not examine such parties and counsel without making the same their own witnesses, the opposing counsel then cross-examining his own client by leading questions to establish favorable information. Applicants were not allowed to ask any questions concerning the merits, and the record of the previous trial was unavailable when their counsel made two separate 800-mile round trips to inspect the record in order to prepare for the collusion hearings. The record was available for inspection after persistent inquiry for only 20 minutes on the second trip, and applicants' counsel was informed that he could not look at it any longer because of the unavailability of a government attorney to watch as counsel examined the record. No non-nearby farmer was able to intervene in *Cranston,* and a motion for disqualification of the presiding judge (Timbers, J.) was denied on the ground, among others, that the movants were merely applicants for intervention and their application untimely, although most applicants were unaware of the pendency of the suit until advised of same on April 24, 1968, 14 months after filing of the complaint. Relief in the form of mandamus was also requested by three applicants in the Second Circuit but the Applications were denied as not being a substitute for appeal. Appeals are pending in that court but will not be at issue until June 1969 because of delay of the parties in the main suit.

"MR. RYAN: If that case had been brought down here, there wouldn't have been any problem that I could see for the court here has ruled twice against the differential –

MR. CRANSTON: Well, that's why they didn't want it brought down there. They wanted it tried up here.

MR. RYAN: Well, that's why I was trying to see to what extent they were involved in bringing it up there because –

MR. CRANSTON: They brought it because they knew someone was going to bring it. They wanted to be able to control it. By bringing it first, why, they could. And they could say where it was going to be tried – ".

* * * *

MR. RYAN: The other side isn't really supposed to be involved, and it casts an unwholesome atmosphere over the litigation, the courts feel, when that's so, you see.

MR. CRANSTON: Well, that's right. That's right. And I felt all along they were playing with fire but they were desperate.

MR. RYAN: Well, that's what I mean. You see, they lost two cases and that's their last shot. And they are desperate, and when you're desperate you take desperate measures.

MR. CRANSTON: That's true, and that's what they did."

APPENDIX B

The following Response filed in the court below illustrates the contrasting treatment in this case and the *Cranston* suit:

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

FREDERICK T. ZUBER, ET AL., *Appellants,*	)	
v.	)	
RUSSELL ALLEN, ET AL., *Appellees.*	)	No. 21, 141

RESPONSE TO APPELLANTS' OPPOSITION TO APPELLEES' BILL OF COSTS

The appellees respectfully say as follows in response to the appellants' Response (Opposition) to the appellees' bill of costs:

1. The appellees regret the necessity for this Response to an unnecessary Opposition to the appellees' bill of costs. They believe that counsel should attempt to resolve such matters in good faith, and they are of the respectful opinion that minutiae of this nature should not burden the Court, the Clerk, or themselves.

2. The appellees note that appellants were denied intervention by the district court and that this Court denied their motion for summary reversal of such denial of intervention. The appellants were only allowed to enter this case for the purpose of taking an appeal, in that it did not appear that the defendant Freeman was going to appeal the lower court's judgment. Under such circumstances, it would appear that appellants take the

record as they find it, particularly when they were given repeated opportunities to bring any defenses, objections, or other matters to the attention of the district court as *amicus curiae* in the case. Additionally, defendant Freeman never really objected below to any of the material to which these appellants object, nor did appellant *Freeman* object to the inclusion of such material into the Joint Appendix that he utilized in No. 21,308, consolidated herewith, *without contributing anything to the cost thereof.* Under these circumstances, it is respectfully submitted that neither appellant has standing or ground for opposing the appellees bill of costs. If these appellants have any quarrel, it is properly with the appellant *Freeman* and not with the appellees.

3. The appellees believe that it is particularly indefensible for these appellants to burden the appellees, the Clerk, and the Court with a proposal for the apportionment of costs of the appendix that is patently improper and unbecoming of counsel, in that appellants state as follows in paragraph (e) on pages 3 and 4 of their Opposition:

> "(e) If the costs of printing the 100 pages is *assumed* to be roughly proportionate to the total cost of printing the Joint Appendix, then Appellees should bear in any event the cost of printing the 100 pages in the amount of $985.60 (100/323 x $3,183.47 = $985.60). The taxing of the *remaining* costs of printing the Joint Appendix should await disposition by the Supreme Court of Appellants' petition for certiorari."

It is clear that appellants seek to evade printing costs by means of an improper assumption and through the above inventive "computation". The 100 pages to which the appellants refer (p. 223-323) is almost all straight printing and virtually devoid of tabular and like

material that was extensively designated by the appellants. (*Pages 199-206 of the appendix is a good example*). Appellants' printer charges $6.90 per page, but the appellants seek to charge appellees $9.86 per page and to force the appellees to bear the cost of covers, tabular material, etc., that is the responsibility of appellants. This proposal is deemed unworthy of the time of appellees, the Clerk, and the Court, and it bears great resemblance to the tactic of appellant Freeman in No. 21,308 wherein he delayed his appeal and utilized the joint appendix filed herein.

4. The letters on file disclose that appellees refused to print cross-examination with the direct testimony of witnesses in the joint appendix and insisted that such direct testimony and cross-examination be printed in separate appendices. After appellees brought this to the attention of the Court, the appellants then agreed to print such matter in logical sequence and to pay for the printing of the administrative records. They subsequently reneged on this promise after the printing was completed in order to avoid payment therefore, and the reason given for such disavowal was so patently inaccurate that it cast a further adverse reflection on appellants. This resulted in appellants' printer billing the appellees for material that the appellants had agreed to print at their expense.

5. Additionally, the printing of most of the 100 pages to which the appellants refer was rendered necessary in order to prevent misstatements to this Court by both appellants, and an examination of the appendix evidences this obvious fact. For instance, pages 236-244 set out major admissions contained in the Secretary's brief filed in the *Blair* case, including references to the milk order provision involved in this case. Such brief, filed as an exhibit below, also acknowledges that the Secretary had always interpreted or regarded a "market" differential as being identical with that defined in the Congressional

reports that were quoted by the Secretary in said brief, although both appellants disaffirmed such "long-standing contemporaneous construction" of the provision of the Act in this case.

Page 263 sets forth a "Designation" of the pertinent pages of the promulgation hearing record relating to the nearby differential. Appellants cited many matters in this Court that they refused to bring before the lower court through a brief *amicus curiae*, and the said designation of the pages of the administrative record was made to preclude the appellants from claiming in this Court that they had no real opportunity to file such brief below because of lack of the administrative record designation. Pages 273-74 of the appendix sets forth a letter to appellants' counsel advising that appellees consent to the filing of such a brief, and page 272 sets forth a letter in which appellees inquired as to whether appellant Freeman regarded any other administrative hearing record as necessary in the district court for decision of the case. (Both appellants later maintained in this Court that all of the necessary hearing records were not before the district court.).

The said letter also referred to the filing of a part of the Economic Brief of the USDA in the district court, and the 1937 brief related to the Government's conception of proper equalization and marketwide pooling of milk. This relevant material was accepted without objection, and it is included in the appendix at pages 318-23 thereof.

The summaries of the early administrative hearing records are entirely factual, rather than argumentative, and no objection was ever made to their filing in the district court. Moreover, their accuracy was underscored by the fact that the defendant's attorneys refused to file such early administrative records after being served with such summaries *and after the certification of such administrative records by the Secretary.* This latter fact is shown by the affidavit on page 306 of the Appendix that the administrative records were certified and delivered to government counsel by the Office of the Hearing Clerk, USDA. The said 100

pages of the Appendix also lists an *Opposition* to a motion (pp. 244-62) that evidences the inconsistency of the defendant's position in seeking to hold the proceedings in abeyance after he had advised months before that he was ready for final hearing. The matters therein were directly relevant to the very arguments made by both appellants concerning "primary jurisdiction", administrative remedies, etc., and the defendant's motion to which such Opposition relates is also set forth on pages 48-50 of the Joint Appendix – the appellants not objecting to this designation or others in the other part of the Appendix at this time. The memoranda or points and authorities to which appellants object is found in two paragraphs on pages 263-64 of the Appendix, consisting of excerpts from the *defendant's* points and authorities and which sets forth relevant factual data rather than argument. In view of the fact that the appellants were contesting the basis for the lower court's action, the appellees designated their Reply to the defendant's Opposition to a proposed Order granting summary judgment. The only other matter contained in pages 221-323 of the Appendix is the *defendant's* Opposition to the motion for preliminary injunction, the plaintiffs' Motion for Summary Judgment and Statement of Material Facts as to Which There Is No Genuine Issue, and the plaintiffs' points and authorities supporting the aforesaid motion. Such points and authorities cover but three pages of the appendix, and the appellees are willing to sustain the cost of this printing for the reason that such material was furnished to the printer in error. It pertains to the *Blair* case, and this fact is evident from a reading of such material and the unnatural manner in which it ends.

It should be noted that the record certified by the appellant *Freeman* contained numerous briefs or memoranda filed at the administrative hearings, and both appellants and the Court refer to such matter. The necessity and relevancy of all of the material printed at pages

221-323 of the appendix is apparent from a reading of the briefs of both appellants, in that virtually all of the matters designated by appellees are referred to in such briefs. (The early Boston milk orders, the entry of summary judgment in the lower court on the basis of *Blair*, the entry of the preliminary injunction and orders regarding escrow of the differential payments, and other matters are all referred to in appellants' briefs. Not one factual error was pointed out at any time in respect to the summaries of the administrative records relating to the nearby differential, and the appellants' complaint is that such summaries precluded an inaccurate presentation of the contents of such administrative records and resulted in the appellant Freeman's decision not to file such certified record under those circumstances. Appellants then cited briefs in other cases in a totally inaccurate manner in an attempt to establish their contentions that could no longer be presented through the administrative records that appellant Freeman certified but did not file.). The appellees respectfully submit that the relevant criterion in respect to the printing of any material in the appendix is whether it is necessary or helpful to a correct determination of the appeal, and both appellants fail to mention this factor for obvious reasons.

6. The appellees respectfully say that the appellants are totally in error in requesting that costs not be taxed against them until disposition of the intended application for certiorari and Rule 39(d), F.R. App. Proc., states as follows:

> "The clerk *shall* prepare and certify an itemized statement of costs taxed in the court of appeals *for insertion* in the mandate."

Whether the mandate is actually stayed is a separate question, and the possible application for a writ of certiorari is not ground for qualification of the Rule or

for delay in the taxing of costs. The Rules are statutory in nature and unlike the local court rules where discretion is often utilized in applying the same.

The appellees again say that they regret that the Court and the Clerk, as well as themselves, are unnecessarily burdened with this type of matter, particularly after the Court's exhaustive treatment of the appeal and its attempt to effectuate an equitable disposition thereof that would preclude additional litigation.

Wherefore, appellees respectfully request that they be accorded their costs through immediate taxation of the same against the appellants and in conformity with the amounts that they were forced to incur for the expenses of the appellants' appeals.

Respectfully,

/s/ Charles P. Ryan

Charles P. Ryan
Attorney for Appellees
400 Prudential Bldg.
Washington 5, D.C. 20005

A true copy:
Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.

By: /s/ Maria L. Harrison, Deputy Clerk

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JUN 27 1969

JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~821~~ 25

FREDERICK T. ZUBER, ET AL., *Petitioners,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

No. ~~1070~~ 52

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE, *Petitioner,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONERS FREDERICK T. ZUBER, ET AL.

LAWRENCE D. HOLLMAN
CARLYLE C. RING, JR.
KALER, WORSLEY, DANIEL & HOLLMAN
710 Ring Building
Washington, D. C. 20036
Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 861

FREDERICK T. ZUBER, ET AL., *Petitioners,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

No. 1076

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE, *Petitioner,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONERS FREDERICK T. ZUBER, ET AL.

OPINION BELOW

The opinion of the court of appeals (R. 187 *et seq.*) is reported at 402 F.2d 660. The findings and conclusions of the district court and its order granting summary judgment (R. 120, 121) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1968 (R. 216). The petition for a writ of certiorari in No. 861 was filed December 20, 1968. The petition for a writ of certiorari in No. 1076 was filed February 20, 1969. Both petitions were granted on April 7, 1969 and the cases were consolidated. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the farm location differential provisions of the federal milk marketing order for the Massachusetts-Rhode Island area are authorized by the Agricultural Marketing Agreement Act of 1937?

2. Whether those farm location differential provisions are supported by substantial evidence?

3. Whether, if the farm location differential provisions are not sustained, the case must be remanded to enable the Secretary of Agriculture either to review or elucidate further the premises of the differential provisions, or to determine if the order without the differential provisions effectuates the policy of the Act or to modify the order so as to effectuate that policy?

4. If the farm location differential provisions are deemed invalid, whether the sums representing the differential which have been and are being escrowed should be paid to those producers who have been receiving and relying on them for over thirty years?

STATUTE AND REGULATION INVOLVED

Section 8c(5) of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 247, as amended, 7 U.S.C. (Supp. III) 608c(5) provides in pertinent part as set forth below. Additional portions of the Agricultural Marketing Agreement Act of 1937 deemed pertinent here are set out at pages 1a-12a of Appendix A to this brief. Pertinent portions of the Massachusetts-Rhode Island 1964 Milk Marketing Order, 7 C.F.R. 1001.70 and 1001.72, are also set out at pages 13a-15a of Appendix B hereto.

"(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of

orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year."

STATEMENT

Petitioners Zuber, et al. (hereinafter sometimes referred to as the "nearby farmers") are seven dairy farmers who have produced and sold their milk to handlers who have marketed milk in the Massachusetts-

Rhode Island milk marketing area[1] under the federal order involved in this proceeding (R. 346, App. 13a). They and some 2,000 other nearby milk farmers whose milk is also sold under the order operate farms located in close proximity to the principal milk consumption centers. For over four decades, they have consistently received "farm location differential" minimum price adjustments, commonly known as "nearby differential" adjustments, reflecting certain inherent economic values associated with their milk (R. 265-9, 277, 278, 280, 283-5, 287, 627-39).[2] These adjustments were first provided by handlers (*i.e.*, dealers) under free market conditions or under collective bargaining agreements negotiated by farmer cooperatives.[3] They were carefully preserved under the first federal milk licenses issued under the 1933 Agricultural Adjustment Act, 48 Stat. 31, and were consistently maintained for the last 30 years under all federal milk orders for New England issued pursuant to the Agricultural Marketing Agreement Act of 1937 ("the Act"), 50 Stat. 246.

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[1] In 1967, subsequent to the commencement of the proceedings below, the marketing area subject to the federal order was expanded and is now designated as the Massachusetts-Rhode Island-New Hampshire marketing area. 32 Fed. Reg. 14502 (1967).

[2] As it did in the 1937 Boston milk order, the nearby differential provision of the current order represents a 46¢ adjustment in favor of producers with farms located near the market's hub (now most of the milk farmers in Massachusetts, all of those in Rhode Island, and those in portions of Connecticut, Vermont and New Hampshire), and a 23¢ adjustment in favor of producers with farms located at an intermediate distance (now milk farmers in portions of Maine, Massachusetts, New Hampshire and Vermont). See App. B., p. 13a.

[3] J. Cassels, A Study of Fluid Milk Prices 161-62 (Harvard Economic Studies, Vol. LIV, Harvard University Press 1937). (Lib. Ref. HD9282 U4C3 1934).

Respondents, originally five and later increased to 168 Vermont dairy farmers (hereinafter sometimes referred to as the "distant farmers"), operate dairy farms distant from the market's hub but sell to handlers who market under the same federal milk marketing order. They and some 6600 other dairy farmers similarly situated receive a slightly lower minimum blend price as a result of the nearby differential adjustment. This is due to the fact that their distance from the milk market's core and the greater unevenness of their production do not contribute the values to the market as a whole of such factors as reliability, accessibility and seasonality associated with the production of nearby producers. 32 Fed. Reg. 9919 (1967). The present action against the Secretary of Agriculture (Petitioner in No. 1076) by these distant farmers, approximately 30 years after the nearby differential adjustment was first incorporated in the regulatory scheme, challenges the validity of that adjustment as contained in the Secretary's milk marketing order, 7 C.F.R. 1001.72.

The declared purpose of the '37 Act, as well as the 1933 AAA which preceded it, is to establish and maintain orderly marketing, raise producer prices and assure an adequate supply of milk to the consumer (§§ 1 and 2 of the Act). In articulating these purposes, Congress was seeking to restore the market equilibrium preceding the depression. It chose to do so by reinforcing the efforts of the agricultural cooperatives and compelling adherence to these efforts by handlers and distributors. These economic middlemen, by setting one group of farmers against another prior to regulation, had fostered destructive and feverish competition among producers while maintaining their own

profit margins. In the case of milk, the Act authorized the Secretary, in partnership with the producers, to employ two methods of blending the proceeds of the sales of milk and distributing them among producers. These methods were borrowed from cooperatives over the preceding decade and were known as individual handler pools and market-wide pools. In the New England milk markets, market-wide pooling was and is currently the selected means.

Mechanically, the marketing order fixes a "blended" or average minimum price for the entire market, based on sales by all regulated handlers of milk for premium price Class I fluid use and for the lower price Class II use in manufactured products. An equalization pool termed the "producer settlement fund" is operated by an agent of the Secretary (the market administrator) to administer the pool which is funded entirely by the handlers. Handlers make payments to or withdrawals from the pool depending on the extent to which the use value of their milk exceeds or falls short of the blended price. Each producer selling to a handler regulated by the order receives the blended price subject to adjustments for differentials for the grade or quality of the milk delivered, the location at which delivery is made and for "volume, market and production differentials customarily applied by the handlers" subject to the order.[4] Acting pursuant to his authority to make these adjustments, the Secretary has since 1936 consistently incorporated a market differential adjustment based on

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[4] These mechanics are described in *H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588, 593-94 (1939) and in *Green Valley Creamery, Inc.* v. *United States*, 108 F.2d 342 (1st Cir. 1939) [hereinafter cited as *"Hood"* and *"Green Valley"* respectively].

farm location in his marketing orders first for Boston and thereafter for all other New England orders. These orders, except for the Connecticut order, were ultimately merged into a single Massachusetts-Rhode Island order in 1964. 29 Fed. Reg. 11205 (1964); 32 Fed. Reg. 9919 (1967).

The procedures for adoption of the regulatory scheme as well as the scheme itself are unique.[5] The Secretary develops the marketing order only after a full hearing and issues it only if he finds that it, and all of its terms and conditions, will tend to effectuate the Act's policy of establishing and maintaining orderly marketing conditions.[6] That alone, however, does not result in effective regulation. At least two-thirds of the dairy farmers in the marketing area, acting individually or through their cooperatives, must affirmatively approve the order.[7] Thus, even though the Secretary favors regulation, the farmers are free to opt for a free and unregulated market or to reject an order simply because a portion of it is disfavored.

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[5] The agricultural marketing order form of regulation has been described by experts as follows:

> "What has here been created is a truly unique marketing institution, neither quite free nor fully controlled but heavily 'conditioned' by both private and public mechanisms and policies."

REPORT TO THE SECRETARY OF AGRICULTURE BY THE FEDERAL MILK ORDER STUDY COMMITTEE 6, 10 (1962) [hereinafter cited as "MILK ORDER STUDY (1962)"].

[6] Sec. 8c(4).

[7] Sec. 8c(9) of the Act. While the Act allows in addition for approval of an order by a majority in volume of the handlers in the market, this approval, unlike that for farmers' approval, may be waived by the Secretary.

The 1964 Massachusetts-Rhode Island order in fact was approved by a vote of 89.3 percent of the 9,542 distant and nearby producers whose milk was sold to handlers marketing in the area and who were thereby eligible to participate in the referendum.[8] Two-thirds of these farmers were ineligible for the nearby differential.[9]

A. The Genesis of Milk Marketing Regulation

The legislative development and the regulatory and judicial proceedings leading to review by this Court and the pertinent facts of this litigation are not readily capsulized, for what is involved is "an industry of labyrinthean [sic] complexity"[10] and an integral, historical progression of legislation and regulation extending over a 40-year span. At the heart of the controversy is milk, a bulky and highly perishable commodity. It is consumed in two primary forms—as a fluid for drinking and cooking or as a manufactured product, with the water component largely eliminated, for cheese, butter, ice cream and the like. Because the transportation of fluid milk, 90 percent of which is water, is expensive, a market's fluid milk requirements are most economically obtained from producers adjacent to the metropolitan areas, and milk produced

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[8] 29 Fed. Reg. 12237 (1964).

[9] A similar and overwhelming imprimatur characterized the farmer vote on each of the predecessors of the Massachusetts-Rhode Island order, *e.g.*, Order No. 4 issued February 7, 1936—over 75%; Amended Order No. 4, issued July 30, 1937—over 70%; Amended Boston Order 1941—12,281 for, 61 against; and Amended Boston Order 1951—over 70%.

[10] *Blair* v. *Freeman*, 370 F. 2d 229 at 239 (D.C. Cir. 1966) [hereinafter cited as *"Blair"*].

by more distant farmers in excess of such requirements is processed into manufactured dairy products.[11]

Assuming a free market with a balanced milk supply, the milkshed would logically develop with the area adjacent to the market providing fluid milk supply,[12] an intermediate area to meet fluctuating fluid milk requirements with the balance devoted to manufactured products at close-by plants, and a still more distant area providing milk for manufactured products.[13]

A reasonable spread between the price of milk for fluid use and that for manufactured use, in a market with a balanced supply, assures relative stability in

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[11] MILK ORDER STUDY (1962) *supra* note 5. This Report was prepared at the Secretary's request by 18 prominent milk economists and milk marketing specialists. At p. 24, the Report states:

> "In addition, we are concerned with maintaining as high a degree of efficiency as possible in the organization of the milkshed. This can only be achieved where the fluid milk requirements are obtained from areas immediately adjacent to the market, so that surpluses will be processed into the more concentrated manufactured dairy products in the outlying areas of the milkshed, thus minimizing total transportation costs."

[12] See J. D. BLACK, THE DAIRY INDUSTRY AND THE AAA 217, 219 (Brookings Institute, 1935). At page 219 Professor Black comments:

> "Obviously a price policy which underpays the near-in producer and overpays the outlying producer has the effect of thinning out production near the market and hence of spreading out the milkshed, *when concentration of production near the market is highly to be desired from all points of view.*" (Emphasis added.)

[13] *Id.* at 212-14. As a rule, fluid milksheds require approximately 20 percent suplus production to meet supply-demand flustuation, *Nebbia* v. *New York*, 291 U.S. 502, 517 (1934); N. Brooks, *The Pricing of Milk*, 26 GEO. WASH. L. REV. 181 (1958).

both price and production. However, as the gap between the price of milk for fluid use and the price for manufactured use increases, or a surplus develops in fluid milk supply, the economic leverage available to milk handlers increases. With this leverage, handlers are able cheaply to buy distant milk previously used in manufacturing, absorb transportation costs and sell for fluid use at higher profit margins.[14] As milk prices decrease, the dairy farmer is forced to increase production in order to maintain his income. The expanding surplus which results further depresses milk prices. Since milk is highly perishable, the dairy farmers are largely at the mercy of the handlers.

In order to combat unfair tactics of the handlers and better to regulate supply, farmers by the 1920's had organized cooperatives collectively to negotiate contracts with handlers.[15] The collective economic power to withhold supply from a recalcitrant dealer was often sufficient to bring about an agreement.[16]

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[14] As one leading milk expert has observed:

> ". . . the dealers cannot afford to buy outside milk regularly because of the longer haul involved; but they can buy it long enough to worst the near-in producers who ordinarily have no other outlet."

J. D. BLACK, *supra* note 12, at p. 211.

[15] *Report of the Federal Trade Commission on Distribution and Sale of Milk and Milk Products, Boston, Baltimore, Cincinnati, St. Louis,* H. R. Doc. No. 501, 74th Cong., 2d Sess. 18-28 (1936) [hereinafter cited as "FTC Report, H.R. Doc. 501"]. See also with respect to the Boston market, RELATIVE PRICES TO PRODUCERS UNDER SELECTED TYPES OF MILK POOLS, 46-52, 123 Bulletin No. 25, Farm Credit Administration (1938) [hereinafter cited as "SELECTED TYPES OF MILK POOLS (FCA Pub. 1938)"]. (Lib. Ref. HG2051 U5A574 No. 25).

[16] FTC Report, H.R. Doc. 501, *supra* note 15, at 20.

Congress encouraged this cooperative solution to avoid fluctuation in dairy farmers' income, Capper-Volstead Cooperative Marketing Act, February 18, 1922, 42 Stat. 388, 7 U.S.C. §§ 291 and 292.

Cooperatives devised methods equitably to apportion milk receipts among their producers.[17] A principal method relied on was a blending concept based on classification of milk into two or more major classes (*e.g.*, fluid and manufactured), frequently coupled with base-rating plans and other adjustments in larger, more settled eastern markets, which in part were designed to reward more even nearby producers for the extra economic values which their milk contributed to the markets.[18] In the Boston market, this consistently involved a price premium to the nearby farmers.[19]

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[17] SELECTED TYPES OF MILK POOLS at 46-52 (FCA Pub. 1938) *supra* note 15.

[18] J. D. BLACK, *supra* note 12, at 196-97; SELECTED TYPES OF MILK POOLS (FCA Pub. 1938) at 41-52.

[19] *Cranston* v. *Freeman*, 290 F. Supp. 785 (N.D.N.Y.), appeal docketed Nos. 32,793-99, 2d Cir., October 28, 1968 [hereinafter cited as "Cranston"]. At p. 814, the *Cranston* Court found:

> "Prior to 1933, cooperative associations, as a part of their voluntary methods of pricing milk to producers, gave preferential treatment to nearby producers. This practice also was reflected in the licenses issued under the Agricultural Adjustment Act of 1933. The practice of giving preferential price treatment to producers whose farms were located nearby the market was carried over in some orders issued following the 1935 amendments."

See also p. 800.

The efforts of the cooperative worked well in Boston until approximately 1930.[20] Thereafter, reduction in demand resulting from the depression [21] and a precipitous drop in manufactured milk prices [22] disrupted the market's stability. The handlers were largely responsible; their profit margins generally remained high.[23] A surplus in supply and a widening price spread between fluid and manufactured milk enabled handlers to depress the price of milk for all farmers by setting one group off against the other. Cooperatives, with voluntary memberships, were unable to control the situation. To overcome this crisis, Congress enacted the 1933 AAA to enforce by federal license the terms of the collective bargaining agreements earlier entered into by the cooperatives and by compelling the handlers to abide by those terms.

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[20] FTC Report, H.R. Doc. 501, *supra* note 15, at 16: "The milk-price situation in the Boston market is reported to have been fairly stable up to 1929-30." See also J.D. BLACK, *supra* note 12, at 85: "Until 1930 the milk producer associations had been pretty well satisfied with the progress they were making under the Capper-Volstead Co-Operative Marketing Act."

[21] FTC Report, H.R. Doc. 501, *supra* note 15, at 15.

[22] J. D. BLACK, *supra* note 12, at 72; 110-11; 118; 120-24; 230-32.

[23] See report of speech by Secretary Wallace on January 31, 1934; J. D. BLACK, *supra* note 12, at 129. See also SCHLESINGER, THE COMING OF THE NEW DEAL (1958) stating at p. 76:

> ". . . milk presented a particular area of tension . . . . No commodity was more essential to the nation's health; but in few fields was distribution more chaotic, or the middlemen's cut larger, or the middlemen themselves a more mixed lot . . . ."

B. The Evolution of the Statutory Authority

The 1933 AAA vested the Secretary of Agriculture with broad and flexible powers to issue marketing agreements and licenses regulating agricultural commodity markets.[24] Shortly after enactment, the Secretary applied these powers to a number of fluid milk markets in various sections of the country. His objective throughout was to reinforce the previous efforts of cooperatives "by assuring the cooperation of . . . handlers . . . in programs designed to increase the farm price of commodities," [25] tailoring his agreements and licenses to the economic problems of the particular commodity in a given area.

The Secretary's first federal license for Boston under the AAA became effective on November 3, 1933. It regulated milk marketing in the area and included a preferential base for nearby farmers, maintaining the approximate 46¢ differential in excess of transportation and handling cost savings which previously had been paid to these same farmers. While the preferential base was expressed in terms of milk deliveries to plants located near the market's hub (R. 193), ". . . only producers whose farms were nearby the city could deliver to the city plants because of the delivery methods then in existence. . . . The result was that the license in effect provided for a differential to producers with nearby farms." [26]

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[24] Act of May 12, 1933, 48 Stat. 31.

[25] S. Rep. No. 548, 74th Cong., 1st Sess. 3 (1935).

[26] *Cranston*, 290 F.Supp. at 800. See also THE BOSTON MILK LICENSE, A HANDBOOK FOR PRODUCERS, issued August 1, 1934 by the Federal (Boston) Milk Market Administrator.

As a result of substantial enforcement problems,[27] the first Boston license was terminated on February 1, 1934, and a second Boston license became effective on March 16, 1934. Under this license nearby farmers' preferential bases were continued under an authorization to the market administrator to determine the base for each individual farmer.[28] With the problems of license enforcement continuing and litigation rampant, representatives from leading cooperatives and officials of the Department of Agriculture worked independently and together during 1934 and 1935 to fashion new statutory language designed to protect the existing regulatory scheme embodied in the licenses from the widespread judicial attacks then extant. At the same time, members of Congress introduced a succession of bills to continue the licensing program and to preserve the techniques developed originally by the cooperatives before the AAA to achieve some degree of market stability.[29] The decision by this Court on May 27, 1935 in *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, added new urgency to the need for legislative change while strongly suggesting that pending legislative proposals were susceptible to

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[27] See J. D. BLACK, *supra* note 12, at 134-39; F. F. LINENGER, DAIRY PRODUCTS UNDER THE AGRICULTURAL ADJUSTMENT ACT 45-53 (The Brookings Institute, 1934).

[28] *Cranston,* 290 F.Supp. at 800.

[29] See, *e.g.*, S. 1807, H.R. 5585, H.R. 7088, H.R. 7713 and H.R. 8052, 74th Cong., 1st Sess. (1935). H.R. Rep. No. 952, May 15, 1935, of the House Agriculture Committee favorably reporting H.R. 8052 points up, at p. 2, the Committee's determination to reinforce the collective bargaining arrangements which the farm cooperatives earlier had reached with the dealers and distributors in order to raise producer prices.

the same infirmities as the National Industrial Recovery Act which *Schechter* had condemned. Within a matter of a few days, H.R. 8052 was redrafted to incorporate certain of the language which cooperative representatives and Agriculture Department officials had jointly devised[30] and was introduced on June 5, 1935.

Dissatisfaction with the language of this new bill centered on the fear that it did not clearly authorize the Secretary to reflect the variances and differing pricing practices of each market in his regulations. At the prompting of spokesmen for the cooperatives, as well as AAA officials, the House Agriculture Committee added to the bill language which has been carried over in identical form to § 8c(5)(B)(ii) of the Agricultural Marketing Agreement Act of 1937 and is at the focal point of this litigation. That language authorized the Secretary in paying uniform milk prices to producers from an equalization pool created with handler receipts to make adjustments for, among other purposes, "volume, market and production differentials customarily applied by the handlers subject to such order." The language was added on June 14, 1935, and was incorporated into a new bill—H.R. 8492 which was presented to the House on the same date. On the following day, June 15, 1935, the Committee report was issued, after overnight drafting. It purported to ascribe explanations of the generic terms "volume," "production" and "market" differentials

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[30] As noted by Justice Frankfurter in his dissenting opinion in *Stark* v. *Wickard*, 321 U.S. 288, 315 (1944), the legislation was "devised by those who know the needs of the industry and drafted by legislative specialists . . . ."

"customarily applied," [31] although these explanations were merely illustrative.[32] See App. C to this brief, p. 16a.

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[31] H.R. Rep. No. 1241, 74th Cong., 1st Sess. 9-10, App. 24a; see also S. Rep. No. 1011, 74th Cong., 1st Sess. 8 (1935) for virtually identical language.

[32] The court in *Cranston*, following a full evidentiary hearing, confirmed the non-exclusive, illustrative nature of the language of the Committee Report explanations, stating:

"At the trial, witnesses thoroughly familiar with milk marketing both prior to and after the enactment of the 1933 Act testified that these definitions not only excluded differentials in use under the licensing programs but that at least one of the definitions failed to describe any differential then in existence. Richard D. Aplin, who was Assistant Market Administrator under the first federal milk license for the Boston market beginning in 1933 and who is now Market Administrator under the Massachusetts-Rhode Island Order, testified that a volume differential as defined in the reports was paid only by the Dairymen's League Cooperative in New York in the late 1920's and early 1930's, but that a differential for large volume producers was common practice. Mr. Aplin further stated that he knew of no differential that fell within the definition of production differentials as described in the reports although here again he knew of differentials in existence which could be called production differentials, as for example, payments for maintaining evenness of production throughout the year. With respect to market differentials, Mr. Aplin testified that, while the definition given might apply to higher payments made at city plants, such payments, contrary to the reports, were made only in primary markets and not in secondary ones. He himself believed that the farm location differentials, which he stated customarily were paid in New England, were really market differentials.

"Donald Hammerberg, Market Administrator under the Connecticut Order, essentially corroborated Mr. Aplin's testimony, although he was not familiar with the volume differential paid by the Dairymen's League and knew of no differentials which would fit the definition of market differentials described in the reports." *Cranston*, 290 F.Supp. at 800.

The Committee reports also explained the major purposes of the amendments which the bill was to make to the AAA. In addition to overcoming the problems posed by *Schechter* and supplementing the existing Act to provide a more effective regulatory program, two other basic tenets of the Congressional design were to recognize local production and marketing differences previously in force and to follow both the methods employed by cooperatives prior to enactment of the AAA and the licensing programs of that Act.[33]

The Congressional floor debates on the amendments pointed up the Congressional intent to preserve the economic mechanisms which had been developed and used by the cooperative associations prior to any federal regulation.[34] On the Senate floor, specific attention was directed to the manner in which the regulatory scheme would permit nearby dairy farmers to be compensated for their milk so as to reflect their higher production costs and the historically higher prices, over and above transportation costs, which they had received. In response to an inquiry from Senator Copeland of New York, Senator Murphy, the Senate floor manager of the bill, specifically referred to the availability of the "volume, market and production differentials" language of the bill as providing the necessary authority in the Secretary to compensate the nearby farmers, in accordance with past business practices.[35]

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[33] H.R. Rep. No. 1241 at 1, 7, 9; App. 16a, 19a, 23a; S. Rep. No. 1011, at 1, 3, 9; and S. Comm. Print, CONSTITUTIONALITY OF THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED BY THE BILL H.R. 8492, 74th Cong., 1st Sess. 3 (1935).

[34] See, *e.g.*, remarks by Representative Plumley of Vermont, 79 Cong Rec. 9602-04, 74th Cong., 1st Sess. (1935).

[35] The colloquy between Senators Copeland and Murphy, after issuance of the Committee Reports, appears at 79 Cong. Rec. 11139-40 (1935), and is set forth at p. 49 *infra*.

Shortly after passage of the 1935 amendments, the Secretary, in 1936, promulgated Greater Boston Order No. 4 (R. 223). In that order, he retained the base-rating system. To compensate farmers nearby the market who previously had received a preferential base under the license, he provided that those whose farms were located within 40 miles of the State House in Boston and who delivered to plants within the same area would receive a higher price for their base milk than that paid to those distant farmers whose farms were located outside a 40-mile radius but who delivered to a plant within the 40-mile area (R. 231).[36] This was a differential which, in effect, was based solely on the location of a producer's farm since those farmers within a 40-mile radius delivered to city plants.[37] This provision of the 1936 order is the direct predecessor of the farm location differential of the milk marketing order which is at issue here.

This Boston order shortly was suspended as a result of the holding by a district court in Massachusetts that the AAA was unconstitutional.[38] As a consequence of this and other judicial decisions, Congress, on June 3, 1937, reenacted the marketing agreement portions of the amended AAA in a separate statute, the Agricultural Marketing Agreement Act of 1937. Congressional committee reports manifested specific awareness

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[36] Distant producers were entitled to receive an additional 21¢ if they delivered to a plant within the 40-mile radius (R. 232). Where this 21¢ differential was added to the distant producer's blend price, he then would have received approximately 46¢ less than the comparable nearby producer. See FTC Report, H.R. Doc. 501, *supra* note 15, at 183.

[37] *Cranston*, 290 F. Supp. at 800-01 and 814.

[38] *United States* v. *David Buttrick Co.*, 15 F.Supp. 655 (D. Mass. 1936), *rev'd*, 91 F.2d 66 (1st Cir. 1937).

of the New England milk marketing situation and reemphasized the intent to "supplement" cooperative efforts of producers.[39] Neither these reports nor the legislative debates suggested any infirmities in the 1936 Boston order provision for a price differential adjustment to nearby farmers. Congress did, however, take affirmative action to provide in the Act that provisions of past marketing orders were "expressly ratified, legalized, and confirmed."[40]

C. The Regulatory Scheme Up-to-Date

Following passage of the 1937 Act, on June 3, 1937, the 1936 Boston order was reinstated, effective July 1, 1937. It eliminated base-rating entirely and simply provided a differential adjustment to nearby farmers of 46¢ to those with farms located within 40 miles of the State House in Boston and 23¢ to those with farms located between 40 and 80 miles from the State House (R. 255). Consistent with the earlier base-rating preference to nearby farmers which allotted them a Class I price for their base milk, the adjustment was limited so as not to exceed the same Class I price. Virtually the same differential adjustment provision has remained in effect or been inserted in all subsequent orders regulating the Boston and related milk markets of New England.

The 1937 Boston order, as well as a parallel New York milk order, shortly became the subject of substantial litigation in which both the constitutionality of the 1937 Act and the validity of certain differentials

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[39] See, *e.g.*, H.R. Rep. No. 468, 75th Cong., 1st Sess. 1-2 (1937), App. 31a.

[40] Section 4 of the Act, 50 Stat. 249.

were challenged.[41] Not only was the constitutionality of the Act upheld, but the farm location differential provisions of the New York and Boston orders were explicitly approved by this Court and by the Court of Appeals for the First Circuit respectively,[42] the latter after the presentation of extensive evidence in a hearing before a Master.

Over the ensuing quarter century, the Secretary extended milk marketing regulation to other New England markets; to the Worcester and Springfield, Massachusetts markets in 1949, and to the Southeastern New England market (Rhode Island, Fall River and New Bedford, Massachusetts) in 1958. While in the hearings preceding each of the marketing orders for these areas, the nearby differential was both defended and opposed, it was adopted by the Secretary in the same form as in the Boston order and was overwhelmingly approved by the farmers.[43] In 1964, these various subsidiary orders were consolidated with the Boston order into the single Massachusetts-Rhode Island order. Despite the contentions of representatives of the distant farmers that the nearby differential be reduced or eliminated and the urgings of nearby farmer groups that it be increased, the Secretary rejected both proposals. Noting that higher values beyond those reflecting transportation costs customarily were attached to nearby milk and that historically

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[41] *Hood*, 307 U.S. 588; *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939) [hereinafter cited as *"Rock Royal"*].

[42] *Rock Royal*, 307 U.S. at 567; *Green Valley*, 108 F. 2d 342.

[43] 14 Fed. Reg. 7085, 7097 (1949); 23 Fed. Reg. 8225 (1958). In 1951, the Secretary also had held hearings on changes in the Boston order and concluded once again that the nearby differential adjustment should be preserved. 16 Fed. Reg. 9250, 9255 (1951).

these had been reflected in his marketing orders, he affirmatively found that the nearby differential should be retained at then present levels (R. 350-1).[44] At the same time, he responded to a request for deferral of the issue, on the grounds that opponents wished to submit a study of the economic and legal aspects of the differential, by suggesting that a study may be made at any time and that review would be available when it was shown that further hearing would be appropriate. Approval by the vast preponderance of farmers in the market followed and the order became effective.

In 1966, amendments were proposed to the order, among them one to delete or reduce the differential.[45] The respondents here did not choose to participate in those proceedings, and the proceedings were still pending at the time litigation below commenced.

D. The Proceedings Below

On December 27, 1966, just over one month following a decision by the Court of Appeals for the District of Columbia Circuit in *Blair*[46] striking down the farm location differential in the New York-New Jersey milk marketing order, respondents, distant farmers, initiated the present action against the Secretary of Agriculture in the district court below, challenging the validity of the farm location differential in the Massachusetts-Rhode Island milk marketing order (R. 17). That court rejected the Secretary's request to hold the

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[44] 29 Fed. Reg. 11213, 12237 (1964).

[45] 31 Fed. Reg. 7520, 8242 (1966).

[46] 370 F.2d 229 (D.C.Cir. 1966). No petition for certiorari was filed in the *Blair* case.

district court litigation in abeyance or to dismiss it pending an administrative determination in the proceedings before the Secretary (R. 107).

At the outset of the litigation, on January 16, 1967, the distant farmers obtained a preliminary injunction which required escrowing of the nearby differential amounts (R. 62).[47] On the same date, the lower court rejected the requested intervention on the side of the Secretary of various dairy cooperatives whose members were in part nearby farmers (R. 61). As a result of the escrow, the over 2000 nearby farmers in the market ceased receiving the amount of the nearby differential adjustments which had been paid them for over four decades. In view of their direct economic stake in the escrow fund and in the outcome of the litigation, individual dairy farmer members of this nearby group moved on February 24, 1967, to intervene as party defendants on behalf of themselves and the entire nearby class (R. 84). The distant farmers opposed that intervention and, on March 21, 1967, the court entered an order denying it (R. 119). An appeal from the intervention denial was promptly filed and was pending when the district court entered summary judgment against the Secretary.[48]

Also on February 24, 1967, the distant farmers moved for summary judgment (R. 72). Thereafter,

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[47] The escrow was later modified by consent to release to the nearby farmers that portion of the funds which would accrue to nearby farmers under any theory of the case (R. 109).

[48] After filing their appeal, the nearby farmers moved for summary reversal which was denied by the Court of Appeals for the District of Columbia Circuit on May 5, 1967, some two weeks before the district court's hearing on the summary judgment pleading. See *Zuber* v. *Allen*, 387 F.2d 862 (D.C.Cir. 1967).

on March 20, 1967, the Government filed certain selective excerpts from the Secretary's administrative records. On May 24, 1967, by memorandum decision, the district court granted summary judgment against the Secretary, relying wholly on the *Blair* decision of the court of appeals (R. 120).[49]

In aid of their then pending appeal on intervention, the nearby farmers immediately sought to continue the escrow arrangement. While rejecting this request, the court of appeals offered those farmers the option, by mooting their appeal on intervention, to appeal from the merits of the district court's judgment and to seek a preservation of the *status quo* from the district court which had denied that relief to the Secretary, *Zuber* v. *Allen*, 387 F.2d 862 (D.C. Cir. 1967). The nearby farmers elected this option to intervene for the limited purpose of prosecuting an appeal, thereby enabling them to preserve the *status quo* by obtaining from the district court a continuation of the escrowed differential adjustments which otherwise would have been paid out in full to the distant farmers (R. 131, 132, 163, 165). The Secretary subsequently perfected an appeal which was heard and decided together with that of the nearby farmers (R. 165). During the pendency of those appeals, the Secretary issued a recommended decision on the proposals pending before him in the administrative proceedings and, while noting the decision of the district court, concluded that the differential should be continued on the basis of the record, reliance by the nearby farmers over the years on the

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[49] Counsel for the distant farmers submitted a proposed order, which, over vigorous objection by the Government, was entered in unmodified form on June 15, 1967 (R. 121). One such objection by the Government was that the proposed order incorporated no stay or preservation of the *status quo*.

differential in formulating their business decisions and the Secretary's continued belief in the differential's validity.[50]

On September 23, 1968, the court of appeals affirmed the judgment of the district court primarily upon the authority of its opinion in *Blair*. It held that the differential conflicted with the provision of Section 8c(5)(B) of the Act for the payment of uniform prices to producers "irrespective of the uses made of such milk by the individual handler" and that the differential did not constitute one of the adjustments to uniform prices specifically authorized under Section 8c(5)(B)(ii) of the Act. The court noted that its interpretation of the Act conflicted, in language at least, with the interpretation of the First Circuit in *Green Valley*[51] and with a decision of the District Court for the Northern District of New York which, less than two months earlier following an eight day trial in which extensive evidence regarding legislative and administrative history of the Act was heard, had sustained a substantially identical differential in the federal milk marketing order for Connecticut.[52]

To date, approximately seven million dollars of net nearby differential adjustments have been escrowed.[53]

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[50] 32 Fed. Reg. 9918-19 (1967).

[51] 108 F.2d 342.

[52] *Cranston*, 290 F.Supp. 785.

[53] Under the court of appeals' decision which modified the district court judgment, the great bulk of the escrow fund, representing all amounts accrued after the entry of final judgment by the district court on June 15, 1967 would be distributed to the distant farmers; the significant but relatively smaller balance of amounts accruing before final judgment by the district court would be remitted to the nearby farmers (R. 215).

Accretions to the escrow fund occur at a monthly rate of approximately $250,000. By order dated December 2, 1968 the court of appeals stayed its mandate and continued the escrow arrangement until disposition by this Court. (R. 222)

SUMMARY OF ARGUMENT

The court below, unversed in the "vastly complex regulation of milk marketing" (R. 214, n. 45) and having before it a truncated record compiled in summary proceedings before the district court, has upset an administrative provision of the Secretary of Agriculture which has been consistently applied since 1935 and which has been an integral and vital component of the Massachusetts-Rhode Island milk marketing order matrix since that date. In reaching this result, the lower court not only blithely dismissed compelling precedents of the First Circuit sitting at the hub of the market, in *Green Valley*, and of this Court in *Rock Royal*, both of which authorized the regulatory arrangement condemned below, but also engaged in crucial factual findings which were explicitly contravened in detail by a federal district court decision in *Cranston*, formulated on a full trial record less than two months earlier.

The essence of the conflict here is the interpretation of § 8c(5) of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 247, as amended, 7 U.S.C. (Supp. III) 608c(5) and whether or not under that section the Secretary is authorized to provide in the order for a "nearby differential" as one of the "market differentials . . . customarily applied." The legislative and administrative history of the Act confirms the significance of the words' plain meaning. The Act's

progenitors, the 1935 amendments to the AAA and the 1933 AAA itself, did not attempt to revolutionize milk marketing. They sought instead to reinforce past efforts of cooperatives, which had until 1930 been relatively successful in achieving milk market stability, by assuring cooperation from milk handlers or dealers through a unique regulatory partnership between the Secretary and affected dairy farmers. Congress was explicit in its intent that the Secretary "follow" the methods employed by dairy cooperatives in their collective bargaining agreements with handlers for the pooling of market receipts and their equitable apportionment among farmers. H.R. Rep. 1241, 74th Cong., 1st Sess. 9 (1935).

Congress chose apt words to effect its purposes. The 1933 AAA had given the Secretary broad and flexible powers. While the 1935 *Schechter* case necessitated that Congress be more precise, the legislative drafters in early June 1935 purposefully selected terms of breadth in describing the scope of the Secretary's authority to frame milk orders. Section 8c(5) of the Act enables the Secretary to use "one or more" terms set out thereafter, including the employment of two different but permissible pooling mechanisms providing for "uniform" prices payable to farmers "subject in either case . . ." not only to price variations for "volume, market and production" differentials customarily applied but also for "grade and quality" adjustments, another general category, and "a further adjustment, equitably to apportion the total value of the milk purchased . . . among producers . . . ." Congress specifically directed the Secretary in § 8c(11)(C) to frame his orders by "such different terms, applicable to different . . . marketing areas, as the Secretary finds

necessary [so as] to give due recognition to the differences in production and marketing . . . in such areas."

The words of the Act themselves include no hint of any intent to force the Secretary to abandon prior techniques employed in earlier cooperative arrangements and in the Secretary's federal licenses issued under the AAA prior to 1935. Nor do those words suggest an intent to standardize milk order provisions for all markets by reference to specific and limited illustrations of differentials contained in hastily drafted committee reports, for such a reading is contrary to the broad language and the congressional mandate of § 8c(11)(C). Moreover, the words cannot fairly be read, as has the lower court, to exalt "uniform prices . . . irrespective of uses" to such heights that variations for adjustments, thereafter expressly authorized in the very same sentence of the statute as a means equitably to divide receipts among farmers, are interdicted.

Following passage of the 1935 amendments, the Secretary, whose representatives had actively participated in their drafting, chose to continue a nearby differential adjustment in the 1936 Boston order, similar both to that at issue here and to those variations which had been extant in the free market and under earlier federal regulation. With formal knowledge of the differential and particularly mindful of the New England milk market, Congress reenacted the 1935 amendments in 1937, ratifying, legalizing and confirming the provisions of milk orders then in effect.

For over 30 years, the Secretary consistently employed nearby differential adjustments in New Eng-

land orders to effectuate the declared policy of the Act, acting with the knowledge that this Court and the First Circuit Court of Appeals had explicitly sanctioned these adjustments. Moreover, producers who must vote the order in as a substantive precondition to its effectiveness have uniformly done so in overwhelming numbers even though the majority of such producers did not receive the nearby differential. Congress has implicitly approved these administrative and judicial constructions of the Secretary's statutory authority to include such a nearby differential in his New England orders, for it has taken no action to change these constructions while considering amendments to the Act on various occasions.

Even on the basis of the abbreviated and summary record before the district court, the nearby differential is substantiated by evidence showing that it has been effective in achieving the declared statutory objectives of orderly marketing, reasonable farmer prices and adequate supply. It has compensated nearby farmers for their characteristically more even production, which has benefited the entire market by reducing price-depressing surpluses, and for the greater reliability and accessibility of their milk, assuring a steady milk supply for consumers at reasonable prices. The continuation of the differential has also reflected awareness of the higher production costs of nearby farmers and of their substantial farm investments in reliance on it. In short, the maintenance of the differential has, in the Secretary's view and on the basis of the record, supported sound and orderly development in the Massachusetts-Rhode Island milk market.

The district court below peremptorily ruled invalid the key nearby differential provision which in substan-

tially similar form had appeared in federal regulations before 1937 and in virtually identical form in the 1937 Boston milk order and in all successive New England milk orders. It did so by ignoring disputed factual and legal questions of great significance and complexity, including customary trade practices, congressional purpose and intent as set forth in the legislative history, whether the nearby adjustments were arbitrary and discriminatory in their practical application and where the equities lay as between the nearby and distant farmers in the escrow fund, now totalling over $7 million. Rejecting intervention of the nearby farmers whose stake in the case was direct and immediate, and upon a truncated record, the district court hastened to summary judgment, unmindful of the intricacies of the regulation that its judicial fiat might unsettle. This case simply was not ripe for summary judgment.

Moreover, whatever deficiency, if any, may have existed in the Secretary's rationale or acts, Congress has left the labyrinth of milk marketing regulation to the Secretary. Whether or not crucial adjustments and modifications in the milk order by judicial decree will so emasculate the order that it can no longer effectuate the declared policy of the Act must rest with the Secretary in partnership with all affected farmers who, by a two-thirds majority, have approved the order in question including the nearby differential for over 30 years. If the Secretary lacked authority in any way, settled principles of administrative law require that he be afforded an opportunity to remold the situation. Only in this manner will he be able to reflect the economic values contributed to the market by the nearby farmers without severe disruptions and dislocations to the detriment not only of such farmers but to consum-

ers and to the market itself. *Addison* v. *Holly Hills Fruit Products,* 322 U.S. 607 (1944); *Securities and Exchange Commission* v. *Chenery Corp.,* 332 U.S. 794 (1947).

Regardless of the outcome of this case, the nearby farmers who have relied upon the nearby differential for over 30 years equitably are entitled to receive the entire escrow fund. The payment of any portion of the fund to distant producers would simply be a windfall, for they have never planned or relied upon it, have always in the past voted favorably for orders which included it, and have benefited from the higher blend prices and the more stable marketing conditions which are associated primarily with the production of nearby milk.

ARGUMENT

I. THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 AUTHORIZES INCLUSION OF A NEARBY DIFFERENTIAL IN THE MILK MARKETING ORDER FOR THE MASSACHUSETTS-RHODE ISLAND AREA.

From 1939 to the present, three different federal courts in four different cases, and this Court in one case, have interpreted the Act with respect to the nearby differential. Three courts, with the benefit of a full evidentiary hearing, found the Act authorized the differential.[54] One court, on summary judgment records in two cases, found the differential was not authorized under the Act.[55] In both these latter two cases, nearby farmers did not participate before the district court in compiling even these limited records, although in the

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[54] *Rock Royal, Green Valley* and *Cranston* cases, *supra* notes 42, 4 and 19.

[55] *Blair* and *Zuber* cases, *supra* note 10, and p. 1 (R. 187).

Zuber case now before this Court they strenuously sought to become party defendants before that court.[56]

In all these cases, but particularly in those decided most recently, the courts have placed extensive reliance on the Act's complete and detailed legislative history, whether developed fully in an evidentiary trial as in *Cranston* or in a narrow and confined context through briefs on appeal, as in both *Blair* and *Zuber*. In all these decisions, the courts have derived comfort from their analysis of this legislative history in setting forth their conflicting views of the Act's purposes and of the meaning of the statutory words. While that history is of major importance and must be closely examined, it does not supplant at the outset careful analysis of the language of the Act itself. As this Court has stated:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning." (Footnote omitted.) *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534 at 543 (1940).

A. The Words of the Act Themselves Persuasively Confirm the Secretary's Authorized Use of a Nearby Differential Adjustment.

The declared purposes of the Act are "to establish and maintain . . . orderly marketing conditions" (1) in order to assure "as the prices to farmers, parity

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[56] While various grounds have been and will be advanced for distinguishing the opinions of one court from another, a common thread runs through all of them. That thread is the meaning of the Act itself. See *Cranston*, 290 F. Supp. at 790-94; *Zuber*, 402 F.2d at 663; *Blair*, 370 F.2d at 237.

prices . . ." and (2) "as will provide, in the interests of producers and consumers, an orderly flow of the supply . . . [of an agricultural commodity] to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." § 2 of Act, App. 1a-2a. These purposes provide the point of origin in interpreting the complex and detailed statutory scheme.

To implement these purposes in the case of milk, Congress prescribed various mechanisms in Section 8c (5) of the Act. The key words of the particular mechanism which is pertinent here are those of Section 8c (5)(B)(ii) which provide:

> "[1] for the payment to all producers . . . of uniform prices for all milk . . . delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; [2] subject . . . only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order . . . ." (Bracketed numbering added.) (App. 4a-5a)

While these words are at the focal point of this controversy, they cannot be viewed alone but must be read in light of, and together with, the remaining words of the Act in order to assure the Act's internal compatibility in establishing a consistent and clear regulatory pattern and in fulfilling the overall statutory and congressional purposes.

1. "Uniform prices . . . irrespective of the uses made of such milk by the individual handler."

The court below, without benefit of an evidentiary record and bound by its earlier decision in *Blair* based upon an even more limited record, has interpreted clause 1 to require a pervasive price uniformity among dairy farmers so that even a specifically authorized

differential adjustment in clause 2 must fall if it may in any way be construed as relating to "sales advantages for fluid use" (R. 207) or reflecting "any reliance whatsoever upon the prohibited factor of fluid use patterns" (R. 192). This construction is not, however, what the words of the Act say.

Under Section 8c(5)(B)(ii), as in Section 8c(5)(B)(i) providing a mechanism for individual handler pools, "uniform prices" are part of the story but not the statutory goal, for the words of the Act do not end there. They specifically provide for adjustments to the uniform prices, whether in a market-wide or an individual handler pool, thereby effecting equitable pricing. Moreover, the suggestion that market-wide uniformity of price without variations related to use is a congressional objective does not comport with the authorization under Section 8c(5)(B)(i) for individual handler pools which, when selected by the Secretary with the approval of the dairy farmers, permits different prices to each group of farmers depending on the handler to which they deliver even though the handlers under the order are necessarily selling in the same market. The overall objectives and the plain words of the Act themselves speak of "parity prices" or "minimum prices." "[U]niform prices" are but a mechanical first step to this end.

This Court's decision in *Rock Royal* recognized that it is not strict price equality which the statute seeks but rather equitable pricing among dairy farmers. In *Rock Royal*, the constitutionality of the Act was challenged on the grounds, among others, that the pooling arrangements would constitute a deprivation of property and if carried to their logical conclusion "would

mean that the wages of the employed would be shared with the unemployed; the highly paid, with the underpaid, and the receipts of the able, the fortunate and the diligent, with the incompetent, the unlucky and the drone." 307 U.S. at 572. This Court responded by stating that: "No such exaggerated equalization of wealth and opportunity is proposed," 307 U.S. at 572, having just previously noted in its opinion that the Act specifically provided for "differentials for quality, location or other usual market variations." 307 U.S. at 571. In short, what the Act required, in this Court's view, was "a fair division among producers of the fluid milk market," 307 U.S. at 550, not an equal division.

The lower court, while recognizing the Act's provision for adjustments, was so imbued with price uniformity as a statutory goal that it construed the statute to interdict any adjustment which reflected, in its own words, "any reliance whatsoever upon the prohibited factor of fluid use patterns." (R. 192). Presumably, the court was reading the language "uniform prices . . . , irrespective of the uses made of such milk by the individual handler" as the basis for such an interdiction. Such a reading, however, not only overlooks, but reads out of the Act the remaining statutory provisions. Section 8c(5)(B)(ii) specifically permits adjustments for "(b) the grade or quality of the milk delivered." Both grade and quality are closely related to sales advantage for fluid use, for manufactured milk products, in general, require no special grade or quality features. Today, many federal milk orders include a quality differential adjustment for butterfat (a "butterfat differential") which is paid solely because the butterfat

enhances the value of milk for fluid use.[57] Like "market differentials," "grade and quality" adjustments are specifically authorized. Clearly neither is prohibited because they are related in some fashion to fluid use.

Section 8c(5)(B)(ii)(d) of the Act has been construed to authorize base-rating[58] as an adjustment to "uniform prices." To the extent the nearby differential relates to fluid milk use, so too does base-rating which, under the Boston milk license issued pursuant to the AAA of 1933, was the means used, in conjunction with a nearby price variation, to give effect to the historically higher prices and inherent economic values attaching to the milk of nearby producers (R. 193). Even certain of the location differentials under Section 8c(5)(B)(ii)(c) which are presently relied upon by the Secretary in milk orders throughout the country reflect a reliance upon fluid milk patterns and not a recognition of "differences in transportation costs only" which the lower court found to be the sole authorized purpose of such differentials (R. 209).[59] More-

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[57] In the Greater Boston order in 1951, for example, the Secretary adopted a butterfat differential stating:

> "According to the findings of the study, the proposed factor would reflect more accurately the actual value of butterfat in terms of its use as fluid cream. Since the butterfat differential has been related historically to its fluid cream value, the proposed factor should be adopted." 16 Fed. Reg. 9255 (1951).

[58] For a detailed explanation of base-rating, see SELECTED TYPES OF MILK POOLS 63-67 (FCA Pub. 1938) *supra* note 15.

[59] The Secretary's use of location differentials are not so narrowly confined and have sometimes been premised on the need to assure an adequate supply of fluid milk for plants in the marketing area and to provide for better fluid milk price alignments between orders. See, *e.g.* 29 Fed Reg. 15130 (1964) regarding a location

over, at least one form of "production" differential authorized under Section 8c(5)(B)(ii)(a) of the Act as an adjustment to "uniform prices" involves direct consideration of the potential use of the milk of specific producers. Thus, the explanation in the Committe Reports in respect of the 1935 Act, on which the lower court so heavily relies (R. 208-9), characterize a production differential as one paid to a producer "to compensate him for keeping his farm and milk qualified for a city [fluid] market even though his milk may actually be going into manufactured use."[60] It would be anomalous indeed if, as the lower court's view would require, an adjustment were barred to a nearby farmer because of the potential and actual fluid use of his milk but permitted to a more distant farmer because his milk was being kept qualified for potential or actual fluid use. The result would be to reward the distant farmer for keeping his milk available for fluid use regardless of actual use while penalizing the nearby farmer with a lower price for the same milk availability and a greater likelihood of actual fluid use.[61]

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differential in the St. Louis milk marketing order which currently is under handler attack in litigation pending before the United States District Court for the Eastern District of Missouri. *Sunny Hill Farms Dairy Co.* v. *Freeman*, No. S 67 C 19.

[60] H.R. Rep. No. 1241 at 10, App. 24a; S. Rep. No. 1011, 74th Cong., 1st Sess. 10 (1935).

[61] The lower court's opinion explicitly rejected "availability" as a justification for an authorized adjustment from uniform prices. Thus, the court stated (R. 195):

> "The reason for this 'economic position' [that of the nearby producers] was, as the Secretary recognized, 'availability *for Class I* use.' We are unable to distinguish this factor from the consideration of historical fluid use patterns condemned in *Blair*."

While not entirely clear from its opinion, the lower court in both this case below and in *Blair* appears to derive its interpretation of strict price uniformity from the clause in Section 8c(5)(B)(ii) which calls for "uniform prices" for milk *"irrespective of the uses made of such milk by the individual handler. . . ."* The significance of this clause in the statutory scheme is evident from the fact that no comparable language appears in Section 8c(5)(B)(i) describing the individual handler pool. Both that pool and the market-wide pool work in the same manner. For both, "uniform prices" is only a starting point and, "in either case" the same statutory differential adjustments are authorized. Accordingly, if the court below has premised its rationale on the "irrespective of use" language of the Act, the absence of that verbiage with respect to an individual handler pool would dictate that no such strict price uniformity is required for producers covered under such a pool. Neither the Act itself nor its legislative history suggests any such distinction between a handler pool and a market-wide pool. Clearly, the Act does not contemplate that the authorized differentials from "uniform prices" in the case of one pool are different than for the other since the differential language applies to both.

"Irrespective" is not a word, as the lower court would have it, of prohibition (R. 191, 192, 203) or condemnation (R. 191, 192).[62] In fact, the phrase has largely a descriptive purpose, in serving to point up the contrast between the Secretary's authority to institute an individual handler pool under Section 8c(5)

[62] WEBSTER'S NEW INTERNATIONAL DICTIONARY (2nd Ed. 1951) defines "irrespective of" as follows: "Regardless of; without respect or regard to; independent of; as *irrespective of* differences."

(B)(i) and his authority for a market-wide pool under Section 8c(5)(B)(ii). In light of the differing shares of the fluid use market obtained by the various handlers in a market, an individual handler pool operates to provide each group of producers supplying an individual handler with a uniform minimum price, subject to authorized adjustments, different from other groups of producers supplying other handlers. A market-wide pool, on the other hand, operates to provide a uniform minimum price, subject to authorized adjustments, to all producers "irrespective of" the use classes in which the individual handler's milk is sold. To illustrate the mechanics of the market-wide pool, on a particular day one dairy farmer may deliver all his milk to a handler using 80 percent of all the milk he receives for fluid use. His neighbor may deliver to a handler using only 20 percent of all the milk he receives for fluid use. Both farmers may be nearby or distant producers, but assuming equal quality and other factors, both farmers would receive the same price despite the fact that a much larger portion of the first farmer's milk would be channeled into the more valuable fluid use. In this sense, the "irrespective of use" clause accurately characterizes the market-wide pool concept.

In addition to stressing this contrast between the individual handler and the market-wide pool, the "irrespective of use" clause serves a second function. It explicitly lodges positive authority in the Secretary, in instituting market-wide pools in regulated markets, to ignore the fluid utilization levels of the individual handlers which in both regulated individual handler pools and in unregulated markets would largely determine the milk prices paid to producers. At the time of the 1935 AAA amendments, this authority was of

a controversial nature. For the first time, it empowered the Secretary to provide for the transfer of the sales proceeds obtained from one handler's sales of milk in the market to the benefit of producers who had never supplied that handler, whose milk may have been sold at an entirely different place and to different customers and who had supplied another handler. In short, the Secretary was enabled to deprive high fluid use handlers of the significant competitive advantage which, before regulation, they had possessed over their lower fluid use competitors in obtaining milk supplies.[63]

2. "Market differentials . . . customarily applied."

In keeping with its goals of orderly marketing conditions, parity prices and an orderly flow of supply to market in order to avoid unreasonable fluctuations in supply and price, the Act provides certain adjustments to the uniform prices in either individual handler or market-wide pools. One of these adjustments is for "market . . . differentials . . . customarily applied." In these words lie the true nub of this controversy because adjustments for market differentials customarily applied are explicitly authorized. It is the market differential language on which the Secretary has relied for his authorization of the nearby differential in the

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[63] Before regulation, this competitive advantage of the handlers had been used to set one group of farmers against another in obtaining supplies at cheap prices, thereby reducing the cost of supplies to the handler and enlarging his profit margin. With the drop in demand for fluid milk during the depression, unscrupulous handlers, effectively using this power, fostered an understandable scramble by dairy farmers to meet the resulting cut-throat competition. See pp. 10-12, *supra*.

Massachusetts-Rhode Island order,[64] 32 Fed. Reg. 9919 (July 6, 1967), and his reliance has withstood close judicial scrutiny.[65]

These market differential adjustments are what the words connote. They are adjustments or variations in price associated with the marketing of milk. The Act also requires that, in the context of federal regulation, they must be shown to have been "customarily applied by the handlers subject to such order" before insertion in a regulatory order. Thus, not any and all market price variations are to be countenanced but only those which can be shown to have been customarily paid by handlers. This requirement of customary application is one which must be determined factually at the time the adjustment and the order of which it is a part are

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[64] While the Secretary in administrative proceedings over the years has not always articulated with clarity the specific statutory basis on which he has relied in promulgating the nearby differential, it clearly was done in defense of the differential in *Green Valley* and in the Secretary's recommended decision culminating from the administrative proceedings pending at the outset of the litigation below. 32 Fed. Reg. 9919 (1967). See also the Secretary's Final Decision regarding his first promulgation of the Connecticut milk marketing order and its nearby differential provision in which he referred to the fact that "market differentials of this type have been adopted in the nearby regulated markets." 24 Fed. Reg. 1049, 1063 (1959). *Cranston*, 290 F.Supp. at 795.

[65] *Green Valley*, 108 F.2d 342; see *Cranston*, 290 F.Supp. 785. In *Green Valley*, Judge Magruder concluded as to the same differentials in the predecessor Boston order (at p. 346):

> ". . . the differentials can readily be sustained under Section 8c(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called 'location differentials' in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market."

first promulgated. The Secretary has consistently made that determination, *i.e.*, in his 1964 order:

> "The differentials were adopted to reflect in the pricing structure of the order's historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of the milk produced in the more distant areas of the milkshed." [66]

The court below, because of its determination that no statutory differential may be "related to sales advantage for fluid use" (R. 207), accorded the "market differential" language of the Act only negligible attention. It concluded that the nearby differential did not fit the explanation of that differential set forth in the hastily drafted Committee Report[67] accompanying the

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[66] 29 Fed. Reg. 11213 (1964). While the lower court's opinion is at best obscure in analysis of the customary application of the nearby differential, the question is essentially one of substantial evidence. If the plaintiffs below had standing to challenge the Secretary's findings as lacking in substantial evidence, and if the lower court had concluded that such substantial evidence was not present or that the findings of the Secretary were not adequate on this point, then, under well established administrative law principles, remand would have been the proper course and not the summary abolishment of the differential. *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607 (1944) [hereinafter cited as *"Addison"*]; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947).

[67] In support of this conclusion, the lower court relied solely on *dictum* in its earlier *Blair* decision in which the Government had been the prevailing party in abbreviated summary judgment proceedings before the district court and in which no nearby farmers participated as parties to the litigation. There, too, the lower court had limited its analysis to the language of one narrow segment of the Committee Reports. Moreover, as the *Blair* Court noted, the Government defended the differential there on other statutory grounds than those relied upon by the Secretary here, 370 F.2d at 238, n. 37.

1935 amendments to the AAA and therefore must fall (R. 209). The statutory language, however, is not so precise. It provides for "volume, market, and production differentials customarily applied by the handlers subject to such order." These generic terms are undefined in the Act. Yet, had Congress intended sharply to circumscribe them, as the lower court suggests, it need only have set forth the illustrative but terse Committee Report explanations in the Act itself. That it did not do so could only have been conscious and intentional, as the district court in *Cranston* found after careful analysis.[68]

Other portions of the Act make clear that Congress did not intend to so restrict the authorized differentials.[69] In Section 8c(11)(C), Congress directed the Secretary to reflect in his orders "such different terms, applicable to different . . . marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing . . . in such areas." Use of "volume, market and production differentials customarily applied" was a signal means to this end. It would not have been so if the restrictive

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[68] *Cranston,* 290 F.Supp. at 799.

[69] The statutory language of Sec. 8(c)(5)(B) selected by Congress to express its purpose and intent is broad and generic throughout. The provisions begin by affording the Secretary discretion to include "*one or more* of the . . . terms and conditions" set out thereinafter, and describe two different pooling mechanisms for payment of uniform prices to producers "subject, in either case, . . ." not only to the broad "volume, market and production" differentials, but also to "grade and quality" differentials, another general category, and to "a further adjustment, *equitably to apportion* the total value of the milk purchased . . . among producers . . ." —an unspecific but yet sensible authority to permit the Secretary to do equity. Collectively, the generalized nature of the authorized adjustments enables the Secretary to be both realistic and responsive to the peculiar needs and economic considerations of a particular market in formulating his orders. (Emphasis added.)

explanations in the Committee Reports had been imported into the statute, for these explanations excluded many differentials then in use and in at least one instance were not even meaningful.[70] Indeed, this Court appears to have rejected the lower court's narrow and restrictive interpretation of "market differentials" in the Act.[71] Section 4 of the 1937 Act likewise refutes the lower court's "market differentials" gloss, for it reaffirmed the Secretary's power to maintain any provisions of marketing orders then extant. The nearby differential of the Boston marketing order was such a provision, as Congress was aware at the time of the 1937 enactment.[72]

To recapitulate, under the Act the term "market differentials . . . customarily applied" is undefined. The words of the Act themselves afford no basis for suggesting that it is a term of art capable of precise definition. When read in tandem with other provisions of the Act and against the background of existing prece-

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[70] *Cranston,* 290 F.Supp. at 798-99.

[71] In *Brannan* v. *Stark*, 342 U.S. 451 at 466 (1952), this Court, in rejecting as unauthorized under the Act certain payments to producer associations, referred approvingly to another differential challenged in *Green Valley* but which the First Circuit had found to be a "market differential" under its view of that term. This Court said:

> "Many provisions for payments to cooperatives appearing in other orders have been of a kind specifically authorized by the statute. Thus, the provision of the first Boston Milk Order for a price differential as between cooperative milk and non-cooperative milk was upheld in Green Valley Creamery v. United States, as a 'market differential' authorized by § 8(c)(5)(A)(1)." (Footnote omitted.)

[72] See FTC Report, H.R. Doc. 501 at 183-4. See also n. 86 at p. 51, *infra* for a full discussion of the relevant portion of this Report.

dents, the term "is sufficiently broad and indefinite when used in connection with marketing orders to encompass many types of differential," [73] provided such differentials are "customarily applied" and comport reasonably with the declared policy and the other terms of the Act. Where, as here, the statutory term "market differential . . . customarily applied" is reasonably capable of the interpretation which the Secretary has placed upon it to encompass the nearby differential, that interpretation should be sustained even though a different conclusion might also have been reasonably defended if the issue had arisen otherwise. *Unemployment Compensation Commission of Alaska* v. *Aragon,* 329 U.S. 143, 153 (1946); *Securities and Exchange Commission* v. *Talley Industries, Inc.,* 399 F.2d 396, 403 (2d Cir. 1968), *cert. denied,* 393 U.S. 1015 (1969).

B. The Congressional Purposes of the Act as Reflected in Its Historical Background and Legislative History Underscore Congress' Intent To Authorize a Nearby Differential Adjustment in the Massachusetts-Rhode Island Milk Marketing Order.

The formal legislative history of the Agricultural Marketing Agreement Act of 1937 and of its statutory progenitors demonstrates a consistent congressional philosophy to "follow" and "reinforce" the efforts of the dairy cooperative which antedated regulation and to give the Secretary wide discretion in devising regional milk plans to achieve that end.

Federal regulation began with the 1933 AAA and the congressional statement that it was intended by the Act to grant broad and flexible powers to the Secretary for the purpose,[74] as later explained by Congress, of

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[73] *Cranston,* 290 F. Supp. at 797.

[74] H. R. Rep. No. 6, 73 Cong., 1st Sess. 3 (1933).

"reinforcing the operations of cooperative marketing associations" and "to support cooperatives with the power of the Federal Government." [75]

As earlier noted herein (pp. 12-13, *supra*), farmer cooperatives in the dairy industry had engaged in self-regulatory practices for a lengthy and largely successful period until the early 30's. These practices had included collective bargaining agreements with handlers in order to promote price stability and equitably to apportion sales proceeds among producer members. In light of the economic conditions precipitated by the depression and the efforts of handlers to preserve their full profit margins, Congress deemed it essential to strengthen the cooperatives' efforts to assure "the cooperation of processors and distributors [handlers] in the programs." [76] The operations of the cooperatives, in the case of milk, historically had involved preferential treatment in the form of price differentials to nearby farmers to reward them for the extra economic values which their milk contributed to the market.[77] These price differentials were retained by the Secretary in the two Boston milk licenses he issued under the 1933 Act (R. 193). The mechanical form of the differentials varied from the nearby differential involved here, but the substantive effect was the same

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[75] S. Rep. No. 548, 74th Cong., 1st Sess. 3 (1935).

[76] *Id.* at 3 and H.R. Rep. 1241, 74th Cong., 1st Sess. 7 (1935), App. 19a. Congress also had in mind in providing federal regulation that state regulation could not be fully effective in regulating the prices of milk or other commodities because in the larger markets such regulation could not extend over state boundaries to enter the current of interstate commerce. *Cf. Baldwin* v. *Seelig*, 294 U.S. 511 (1935).

[77] *Cranston*, 290 F.Supp. 785 at 814. See p. 5, *supra*.

both as to approximate amount and as to those farmers who were entitled to receive it.[78]

The 1935 amendments to the 1933 AAA are the source for the current statutory language and set forth the milk regulatory program in force today. The legislative history of the 1935 amendments reflects a consistency of congressional purpose. The amendments were described as a "supplement" to the 1933 Act provisions in order to enhance their effectiveness and to meet the problems engendered by the *Schechter* case. They were not intended to change but simply "to implement and spell out in more detail and with greater freedom from ambiguity the powers which were provided for in the original act."[79] Again, it was stressed that "[t]hese terms follow the methods employed" by cooperatives, as well as the provisions of the licenses previously issued by the Secretary.[80]

Thus, the House Committee report emphasized:

> "The operations of cooperative marketing associations will be reinforced by the new sections of the bill dealing with these matters and these provisions will assure the cooperation of processors and dis-

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[78] The lower court's opinion emphasized that one of these early nearby license differentials, as well as the nearby differential in the first Boston milk order, promulgated in 1936, referred solely or in part to delivery location of plants (R. 193, 204). On the strength of this point, the court later suggested that the pre-1937 nearby differentials were of a different type since "none seems to have been based on farm location alone." The court's speculation in this regard is, however, inexorably belied by the record evidence in *Cranston* (at p. 801) and by the *Cranston* court's explicit finding of fact that these early nearby differentials were in effect based on farm location alone (at p. 814).

[79] H. R. Rep. No. 1241, 74th Cong., 1st Sess. 7 (1935), App. 20a.

[80] *Id.* at 9, App. 23a.

> tributors in programs intended to raise farm prices." [81]

Continuation of the methods of the cooperatives was particularly stressed in the Committee Reports' explanatory comments on the differential adjustments of Section 8c(5) of the present Act:

> "Subsection (5) of the proposed section 8c states specifically the terms which may be included in orders relating to milk and its products. These terms follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present Section 8(3) of the Agricultural Adjustment Act." [82]

Against the background of the use by cooperatives before 1933 of price differential adjustments to dairy producers with nearby farms and the retention of those differentials in the two Boston milk licenses, it must be assumed that the draftsmen of the 1935 legislation knew the practices under the federal licenses and the cooperative methods that preceded them and intended that such practices be retained.[83]

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[81] *Id.* at 7, App. 19a.

[82] *Id.* at 9, App. 23a.

[83] *Cranston*, 290 F.Supp. at 799. The *Cranston* court opinion in its discussion on this point at pp. 800-1 refers in detail to and places substantial reliance upon a pamphlet entitled THE BOSTON MILK LICENSE issued August 1, 1934 by the then milk market administrator in Boston. While not a part of the record before the court below, the nearby farmer petitioners urged its pertinency on brief to that court, pointing out that if they had been granted intervention before the district court, they would have introduced it in evidence. Brief of Appellants, Zuber, et al., to the U. S. Court of Appeals in No. 21,141 (August 15, 1967), p. 24, n. 27.

The debates that followed issuance of the Committee Reports on the 1935 amendments further evidence a congressional intent and understanding that nearby differentials based on farm location were contemplated as within the Secretary's powers. In a colloquy on the Senate floor, Senator Copeland of New York closely questioned Senator Murphy, the floor manager of the bill, stating his concern regarding the equalization provisions of the amendments under what is now Section 8c(5)(B). Senator Copeland said:

> "... The provisions of the equalization which we are now discussing provide that a producer who is producing his milk on farms near to cities would receive the same price for his product as a farmer who produces his milk, say, 40 or 50 miles away from the same community."

Senator Murphy replied that Senator Copeland was generally correct.

> "Mr. Murphy. If they were embrased [sic] in the same marketing area, that would be true. Let us keep in mind what the situation is. There is a deficiency of consumer demand. There is a surplus of milk. The price is greatly depressed, and has been for 5 years. The only way in which one can determine how each one of the producers included in the plan provided here shall bear his share of the cost of effecting a higher price is to divide the milk by classification uses."

Senator Copeland, however, was not satisfied with that general answer.

> "Mr. Copeland. I do not think the Senator has quite stated all the conditions. He does not take into consideration the difference in the cost of production. Taxes and values of property near the city are very much higher than in the case of prop-

erty farther away from the city. The transportation differential does not compensate for the difference in cost, as I see it."

Senator Murphy's response then demonstrated that differentials, such as the nearby differential, were both contemplated and intended:

"Mr. Murphy. If the Senator will refer to page 12, line 13, he will see that there is this qualification:

'Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order—'

They adopt the present practice of business—

'(2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.' " (Emphasis added.)[84]

This legislative history of the 1935 amendments, contained in the Committee Reports and legislative debates, does not stand alone in confirming the Secretary's authority to provide for a nearby differential as a "market differential . . . customarily applied" in milk orders for the Boston and related New England markets. As earlier noted at p. 43, *supra,* Section 8c(11)(C) of the present statute, enacted as one part of the 1935 amendments, itself reflects a forceful congressional purpose at the time that the Secretary recognize and continue the individual market variances then extant in order to meet the discrete economic circumstances of each market. The nearby differential of the Boston milk licenses was one such variance.

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[84] 79 Cong. Rec. 11140 (1935).

Following the enactment of the 1935 amendments to the AAA, the Secretary promulgated the first Boston milk order, retaining a nearby differential adjustment for those farmers who were located within 40 miles of Boston (R. 223, 231).[85] Contrary to the clearly erroneous factual assumptions of the court below, that this differential was "attributable in large part to transportation and handling advantages" (R. 194-5) and "was never one payable over and above the transportation differential available to distant producers who delivered to a nearby zone" (R. 204), the converse of these assumptions is the fact. The differential in the first Boston order and thereafter has always been payable over and above any transportation differential payable to distant producers delivering in the nearby zone. Moreover, the nearby differential has never been attributable in any part to transportation and handling advantages which have always been compensated independently.[86]

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[85] See p. 19, *supra* and *Cranston*, 290 F.Supp. at 800-01, 814.

[86] See FTC Report, H.R. Doc. 501, 75th Cong., 1st Sess. 183-84 (1936), App. 27a-30a, which sets forth for the 1936 Boston milk order the varying blend prices, including country station and transportation cost differentials, paid to farmers in different zones during a representative period. Nearby farmers during that period received a price of $3.30 or 44.1¢ in excess of the price of $2.859 including handling and transportation costs, received by the distant farmers delivering to city plants. This 44.1¢ adjustment was the nearby differential for that particular representative week. Included in the price to the distant farmers was the country station differential of 21¢ (reflecting a saving in country station handling costs) as well as the saving in transportation costs which was deducted and reflected in the blend prices of other distant farmers not delivering to the city plants within a 40-mile radius of Boston. Hence, the lower court's conclusion quoted in the text that the 1936 nearby differential was never one payable over and above the transportation differential payable to distant producers

Reenactment in the 1937 Act of the identical marketing agreement provisions of the 1935 amendments strongly suggests congressional approval of the marketing orders previously issued and of their provisions which, in the instance of the Boston order, included the nearby differential. As one court has observed in connection specifically with the 1937 reenactment, "much is to be said for a contention that Congress intended to adopt the intervening administrative interpretation." *Queensboro Farm Products Inc.* v. *Wickard,* 137 F.2d 969, 977 (2d Cir. 1943).

Again, as in the legislative history relating to its progenitors, Congress stressed with respect to the 1937 Act that the Secretary's marketing programs had "proven to be valuable supplements to the cooperative efforts of producers, particularly in the case of fruits, vegetables, and milk." [87] Congress did more, however, for, having clearly in mind the desperate situation in the New England milk market as a result of judicial decisions holding the amended AAA unconstitutional,[88] it explicitly provided in section 4 of the 1937 Act, 50 Stat. 249, that the marketing agreements and the provi-

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delivering to a nearby zone is patently erroneous. Likewise, its conclusion that the 1936 nearby differential was attributable to transportation and handling costs is plainly in error, for the 1936 nearby differential was in excess of such costs. These two factual misconceptions comprised a substantial predicate for the lower court's pivotal surmise that "it does not appear that a farm location differential of the kind now under attack ever appeared in a greater Boston license or order before 1937" (R. 204).

[87] H. R. Rep. No. 468, 75th Cong., 1st Sess. 1-2 (1937), App. 31a-32a.

[88] "As a consequence of these decisions, doubt has been cast on the validity of all agreements and orders, and producers of milk, particularly in New England, are now suffering from a seriously demoralized price situation." *Id.* at 2, App. 32a.

sions thereof which had been issued by the Secretary under the 1933 AAA as amended were "ratified, legalized, and confirmed."[89] This was clearly more than merely an implicit approval of the nearby differential provision. That this provision was not merely a congressional attempt to avoid technical abatements, as the court below has opined (R. 204), is established by the complete language of the pertinent House Committee Report. See *Cranston,* 290 F.Supp. at 801-3.

C. Consistent Judicial and Administrative Interpretations of the Act Over 30 Years Expressly Approving the Secretary's Continuing Use of a Nearby Differential Adjustment in Milk Marketing Orders Reinforces the Adjustment's Validity and Its Compatibility With Congressional Intent.

Shortly after passage of the 1937 Act, a nearby differential was twice confirmed as lying within the Secretary's statutory authority, by this Court and by the First Circuit Court of Appeals.[90] For 30 years thereafter, Congress has acquiesced in these judicial reaffirmations of the Act's intent to afford the Secretary such discretionary power. On many occasions, amendments to the Act were considered by Congress affecting

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[89] "Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed." 50 Stat. 249.

By contrast, section 38 of the 1935 amendments, which appears to have dealt with the problem of technical abatement alone, was far more restrictive in its language and did not ratify, legalize or confirm the provisions of existing regulations, 49 Stat. 750.

[90] *Rock Royal,* 307 U.S. 533; *Green Valley,* 108 F.2d 342.

milk order provisions.[91] If Congress had believed that its intent and that of the Act had been frustrated by the courts or by the Secretary, it had ample opportunities to correct the situation. Its silence, while actively considering other changes in the statutory scheme, speaks unequivocally of congressional approval of the consistent judicial and administrative interpretations of the Act regarding the nearby differential.

In *Rock Royal,* this Court expressly affirmed the validity in the New York milk order of a nearby differential based on farm location. This Court held:

> "C. *Nearby Differentials.* Provision is made by the Order for special differentials of 20 cents on milk from certain counties located most favorably to the marketing area. This is to enable handlers to pay the producers at these plants. The five cent difference is absorbed by the handlers. The Act authorizes such an arrangement. § 8c(5)(A)." (Footnotes omitted.) 307 U.S. at 567.

Rock Royal specifically argued on brief to this Court (Br. of Rock Royal, Oct. Term 1938, No. 771, p. 55) that such a differential was a preference unauthorized by the statute and prohibited by the language of Section 8c(5)(B)(ii) of the Act "irrespective of the uses made of such milk by the individual handler," precisely the statutory language on which the lower court here bases its concept of congressional prohibition. The government on brief (Br. of U.S., Oct. Term 1938, No.

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[91] *E.g.*, Act of January 25, 1940, 54 Stat. 17 and November 3, 1965, 79 Stat. 1187 and November 8, 1965, 79 Stat. 1270; and in connection with the agricultural marketing order provisions generally; February 10, 1942, 56 Stat. 85; August 1, 1947, 61 Stat. 707, 710; July 3, 1948, 62 Stat. 1258; June 29, 1949, 63 Stat. 282; August 28, 1954, 68 Stat. 907; August 8, 1961, 75 Stat. 304, 305; September 27, 1962, 76 Stat. 632.

771, pp. 60-61) argued "milk of producers in these counties is readily available for use in the fluid market and producers in these counties have always enjoyed an almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages," plainly admitting that the "sales advantage for fluid use" condemned by the ruling below was a factor upon which the differential depended.

The district court in *Rock Royal* found the differential to be "preferential payments made to producers *living* in 18 counties . . . . The producers in those counties received 20 cents per cwt. in addition to the locational differentials, which returned them a higher price for their milk *because they are located nearer New York*" (emphasis added), 26 F.Supp. 534 at 554. The parties took no exception to this district court finding. The preference was based in fact upon location of the farm for the reason discussed by the government brief (Br. of U.S., Oct. Term 1938, No. 771, p. 60) to this Court in *Rock Royal*—a range of mountains made delivery to the plants feasible only for farmers residing in the 18 counties. The validity of the nearby differential was thus posed to this Court as a preference based upon farm location. On that basis, this Court held it to be a differential authorized by the Act.[92]

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[92] The lower court's footnoted attempt to distinguish *Rock Royal* (R. 211, n. 40.1) is superficial and unfounded. To say that *Rock Royal* only involved handlers and therefore a different provision of the statute is a misleading over-simplification. *Rock Royal* itself was a producer's cooperative, the membership of which consisted entirely of producers. It was, as this Court stated, considered as a handler for the purposes of payment for milk under the Act but one of its main complaints was that its members were differentiated against under § 8c(5)(B)(ii) of the Act. This Court held such differentiation to be authorized. Moreover, inasmuch as Subsection (A) provides for the *same* uniform prices subject to the *same*

In *Green Valley*, the First Circuit Court of Appeals, sitting in the hub of the marketing area, approved a substantially identical differential to the one involved here, contained in the 1937 Boston milk marketing order (the predecessor to the Massachusetts-Rhode Island order), as an authorized customary market differential under the Act.[93]

The *Green Valley* court noted that the factors relied upon in support of the differential were "greater accessibility to the market," "greater dependability," "a more uniform level of production throughout the year," "similar differentials" in the Boston market for many years, and the fact that the nearby producers were "also potential dealers." Judge Magruder concluded:

> ". . . the differentials can readily be sustained under Section 8c(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called 'location differentials' in the Order, and so

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adjustments as set out in identical language in Subsection (B) applying to producers, this Court's holding that Subsection (A) "authorizes such an arrangement" is virtually conclusive that Subsection (B) authorizes the same arrangement.

The court below also distinguished *Rock Royal* on the grounds that the differential there depended upon plant, and not farm location (R. 211, n. 40.1). However, as noted in the text, both the district court and the parties treated the differential as what it, in fact, was—an adjustment based entirely on the location of producers' farms. In sum, the view of the court below that any differential based on farm location must fall is irreconcilable with the holding of this Court in *Rock Royal* that a differential which in fact was based on farm location was valid.

[93] In 1937, the Secretary had amended the Boston order to eliminate base-rating and preserved the nearby differential, in the form in which it exists today, by providing for a 46¢ adjustment per hundredweight for farmers located in the nearby zone and a 23¢ adjustment for those in an intermediate zone (R. 255).

> they are; but they are also customary market differentials based upon the location of farms nearby the market." 108 F.2d at 346.

The court below struck down the same nearby differential in the successor order, the Massachusetts-Rhode Island order, citing as the basis for holding the differential invalid the very advantages and factors relating to nearby milk that the *Green Valley* court relied upon as justifications for the differential.

Significantly, the *Green Valley* court had a complete evidentiary record relating to the operation of the milk industry in the area and to the legislative history of the Act to aid it in comprehending the intricate complex of milk marketing regulation. The court below had no such evidentiary record before it that would have placed it in an appropriate position properly to challenge the expertise of the Secretary and his Department acquired over 30 years of regulation and as participants in the drafting of the 1935 and the 1937 Acts.[94]

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[94] The court below dismissed the *Green Valley* decision on three grounds, each of which is insubstantial. First, it characterized the *Green Valley* court's approval of the differential as *dictum*, but this hardly squares with the First Circuit's opinion, *cf. United States* v. *Title Insurance and Trust Co.*, 265 U.S. 472, 485-86 (1924), and, in any event, cannot detract from the strength of that court's reasoning. Second, it argued that the defendants in *Green Valley* were solely handlers and not distant producers, but the arguments advanced by those defendants are substantially the same as those which the distant farmers advanced below. Third, it stated that *Green Valley* involved only one of the milk orders later consolidated into the 1964 Massachusetts-Rhode Island order involved here, but that conclusion tends to exalt form over substance. The analysis by the court below in its opinion demonstrates that the Boston order was a crucial segment of the record before it. Moreover, as the government advised the court below on brief, the Boston order was the dominant component of the consolidated 1964 order, accounting for 7,692 or about 75% of the 10,302 farmers covered by the four New England orders merged in 1964.

Following the decisions in *Rock Royal* and *Green Valley,* the Secretary consistently continued to employ the nearby differential in identical form not only in the Boston milk order but, as federal milk regulation was extended, in orders for other closely related New England markets and for markets eleswhere in the country.[95] Thus, as pointed out earlier herein (p. 20), the differential was incorporated in milk orders for each of the three New England markets (Worcester, Springfield and Southeastern New England) when orders for these smaller markets were first promulgated in 1949 and 1958 (R. 331, 336, 340). Notwithstanding this widespread use by the Secretary of the differential, Congress did not interfere even though it clearly knew of the differential's existence and extensive use.[96]

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[95] For example, in the Connecticut order at issue in *Cranston* the differential, 7 C.F.R. 1015.72, has been maintained since the order was first promulgated in 1959. 24 Fed. Reg. 1049 (1959). In the New York-New Jersey market, the differential, 7 C.F.R. 1002.71 (1966), in the form in which it existed at the time ruled invalid in *Blair,* 370 F.2d 229, was incorporated in the federal order in 1957. The differential also has appeared in the Chicago milk marketing order. 30 Fed. Reg. 4241, 4248 (1965).

[96] See, *e.g.,* the following testimony before a congressional subcommittee of John B. Carroll on behalf of United Producer-Distributors of America, Syracuse, New York in *Hearings before Subcommittee on Dairy and Poultry, House Committee on Agriculture, Dairymen's Class I Base Plan,* 89th Cong., 1st Sess. 143 (1965):

> "Congress when it was faced with the problem of milk marketing regulation in 1935 provided for a nearby farm differential. That means that the farmer who is identically similar in terms of theoretical concept to the farmer but differs from him in terms of location where his farm is in terms of the center of the marketing area, it was recognized by Congress at that time that there was a different cost pattern and cost structure for that producer compared to the producer in the further extreme.
>
> "Taxes, for example, might be higher. In addition to that, the producer in the nearby area had had a preferential market

Reenactment without alteration of the 1935 AAA amendments in the 1937 Act, after those amendments had been construed by the Secretary in the 1935-37 period to permit a nearby differential, indicates strongly that Congress impliedly intended adoption of that administrative construction. *Hartley* v. *Commissioner,* 295 U.S. 216, 220 (1935); *Old Mission Portland Cement Co.* v. *Helvering,* 293 U.S. 289, 293-94 (1934). The Secretary's contemporaneous construction of the Act and of its statutory progenitors to authorize the differential, coupled with his consistent and land-standing interpretation over three decades, entitle his interpretations to great weight. *Red Lion Broadcasting Co., Inc.* v. *FCC,* .... U.S. ...., 37 U.S.L.W. 4509, 4513 (June 10, 1969) ("And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction .... Thirty years of consistent administrative construction left undisturbed by Congress until 1959 ... reinforce the natural conclusion that ... the Act authorized the Commission ..."); see also *United States* v. *American Trucking Association, Inc.,* 310 U.S. 534, 549 (1940); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *Lewes Dairy, Inc.* v. *Freeman,* 401 F.2d 308,

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position. His milk was closer. It was easier to inspect. It was easier to obtain. It was cheaper in some instances. And that has capitalized itself into the cost structure of that producer.

"And if Congress had brought down this so-called paper equal regulation on top of that dissimilar cost structure, it would do an inexorable and unnecessary injustice. And so we provide for the nearby farm differential."

320 (3d Cir. 1968), *cert. denied,* 394 U.S. 929 (1969). The weight to be accorded the Secretary's interpretations of the Act should be even more controlling where, as here, his representatives were largely instrumental in its drafting. *Morrison Milling Co.* v. *Freeman,* 365 F.2d 525, 529 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1024 (1967).

In connection with the present Act and its milk marketing order provisions, certain guidelines for statutory construction set forth by Judge Jerome Frank, former general counsel of the AAA, are peculiarly apt:

> ". . . Considering the complexities of administration of such an Act, and the plain intention of Congress to give the Secretary wide discretion in devising regional milk plans (and the classifications incident thereto), the courts must be slow to intrude on his exercise of that discretion, if for no other reason than that, being inadequately staffed, they are incompetent to undertake the task of constructing and supervising milk marketing programs. The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts. If ever there was a place for that doctrine, it is, as to milk, in connection with the administration of this Act because of its background and legislative history." *Queensboro Farm Products Inc.* v. *Wickard,* 137 F.2d 969, 980 (2d Cir. 1943) (footnotes omitted).

II. THE NEARBY DIFFERENTIAL EMPLOYED IN THE MASSACHUSETTS-RHODE ISLAND ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE DEMONSTRATING THE VALUE ENHANCING QUALITIES CONTRIBUTED BY NEARBY PRODUCERS TO THE MARKET.

The court below did not in explicit language reach the issue of substantial evidence as supporting the Secretary's use of the nearby differential adjustment in the Massachusetts-Rhode Island order.[97] Its opinion, however, is at best blurred in this regard. It did examine selected portions of such evidence and of the Secretary's findings which relied on the entire "record" but placed the findings and evidence in an artificial and narrow context to support its determination that the differential was unauthorized under the Act because of a relation to sales advantage for fluid use (R. 207). The lower court's analysis of the evidence in the limited confines which it structured cannot mask the two-fold error in its approach and thus in its ultimate conclusion.

First, the "record" to which the court adverted in its opinion as the basis for its extensive examination was but a sampling of the administrative records on which the various pre-1964 New England marketing orders relied.[98] The district court, while aware that

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[97] The distant farmers, in initiating this action before the district court, alleged a lack of substantial evidence in their complaint as one basis for relief (R. 23).

[98] While the court below placed substantial reliance on a supposedly complete "record," no such record was ever before the district court (in which the nearby producers were not parties) or, accordingly, before the court below, which was limited in its review by the record created by the parties before the district court. The regrettable absence of a full record before either of the lower courts not only has led to erroneous factual surmises and assumptions by the court below which were pivotal to its

what was before it were merely excerpts from these administrative records, expressed no interest in analyzing that record and predicated its judgment solely on the *Blair* decision below.[99] In approaching

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ultimate conclusion (see n. 86, p. 51 herein), but has resulted in sharp disputes between the parties, first before the lower court and now before this Court, as to precisely what constitutes the record here. A principal factor in this dispute revolves around certain "summaries" of pertinent administrative hearing records which were prepared solely by respondents and filed with the district court (R. 661-705). Petitioners contend, as set forth in the Appendix, that these "summaries" are not part of the record here, because, as a simple reading of them demonstrates, they are tools of advocacy which were designed by respondents to buttress their arguments and are both highly inaccurate and incomplete. In short, they are supplemental briefs and, like memoranda of points and authorities before the district court, are not part of the record there or on appeal. See Rule 9 of the rules of the district court below. To overcome dispute on this matter, petitioners had sought to furnish this Court with the best evidence of these administrative hearings, *i.e.*, certified copies of the original records, but this approach was rejected by respondents. Petitioners regret that the district court did not have before it this best evidence and recognize that respondents may have felt handicapped as a result. Yet, as the district court docket entries reflect (R. 1-16), respondents never hesitated to seek orders from the district court when to their advantage and could well have done so as to these administrative records rather than to submit summaries of them and affidavits as to a failure to provide these records to the district court. In any event, petitioners, nearby producers, having been refused the right to intervene before the district court, should not be prejudiced by a deficiency for which they could bear no responsibility.

[99] As the court below apparently recognized, the extensive findings of fact and conclusions of law incorporated in the district court's order on summary judgment (R. 121) were entitled to little if any weight on appeal. That order was prepared solely by respondent's counsel after the district court's decision (R. 120) and was mechanically adopted without any change whatsoever, *ex post facto*. Such a district court practice has been sharply and widely condemned. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 at 656-57 (1964); *Holbrook* v. *Institutional Insurance Co. of America*, 369 F.2d 236 at 242 (7th Cir. 1966).

the "record" in this limited manner, both the district court and the court below ignored the issue of the standing of distant *producers* to attack the nearby differential on grounds that it was unsupported by substantial evidence. Yet, since the terms of the marketing order "are largely matters of administrative discretion as to which there is no justiciable right," *Stark* v. *Wickard,* 321 U.S. 288, 310 (1944), and since producers as such are not regulated under the Act, §8c(13)(B), their standing to seek judicial review appears clearly confined to the single issue of whether a provision under attack is within or without the Secretary's delegated powers.[100]

Indeed, the process adopted by Congress is one of unique partnership which rests responsibility not with the Secretary alone or on the exclusive foundation of the hearing record but places substantial and vital reliance on dairy farmers and their cooperatives. This points up the undesirability of judicial interference. The words of 18 milk specialists describing this process in a 1962 report to the Secretary bear repetition.

> "What has here been created is a truly unique marketing institution, neither quite free nor fully controlled but heavily 'conditioned' by both private and public mechanisms and policies." [101]

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[100] An opportunity for judicial review of producers' complaints regarding a milk order was established in *Stark* v. *Wickard,* in which this Court limited such review "in law enforcement entrusted to . . . [the Secretary] only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers" 321 U.S. at 310. Subsequent decisions have illuminated the narrow limits of this opportunity, *e.g., Benson* v. *Schofield,* 236 F.2d 719 (D.C. Cir. 1956), *cert. denied,* 352 U.S. 976 (1957); *United Milk Producers of New Jersey* v. *Benson,* 225 F.2d 527, 529 (D.C. Cir. 1955); *Calhoun* v. *Freeman,* 316 F.2d 386 (D.C. Cir. 1963).

[101] MILK ORDER STUDY (1962), *supra* n. 5, at p. 6.

Under this scheme, orders may not be formulated by the Secretary unless due notice and opportunity for a hearing is provided at which affected farmers may appear and present evidence. Section 8c(3). Thereafter, orders may not be implemented unless two-thirds of the farmers (generally voting through cooperatives) approve the proposed order by referendum. Section 8c(9). An order must be terminated by the Secretary if 50 percent of the farmers favor its cancellation. Sec. 8c(16). The Secretary thus does not have a free hand. He must listen to the farmers and reflect their collective wishes, and he must do so by keeping close watch on the economic forces at play in the market.[102]

This Court has acknowledged and approved this process of regulation through private and public partnership.[103] In light of this unique regulatory process, this Court has limited judicial review of producers' protests, stating

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[102] For example more than 200 changes were made on 53 separate occasions in the regulatory provisions in the New York milk marketing order during the period from September 1938 through September 1949. 18 Fed. Reg. 6459 (1953).

[103] In *Rock Royal*, the Secretary's order was challenged in part on the basis that the cooperatives had actively participated in proposing, adopting and inducing milk producers and handlers to accept the order using their economic leverage. In sustaining the Secretary's order this Court noted:

> "If the power is in the Congress to put the order in effect, the manner of the demonstration of further approval is likewise under its control. These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful." 307 U.S. at 559-60.

"So long as the provisions of the Order are within the statutory authority of the Secretary . . . hearings and balloting furnish adequate opportunity for protest." *Stark* v. *Wickard,* 321 U.S. 288 at 307 (1944).

Second, the artificial manner in which the court below undertook its examination of the truncated record before it erroneously led it to the conclusions: (1) that any economic value attributable to the differential which may be interpreted, however tenuously, to reflect "any reliance whatsoever upon the prohibited factor of fluid use patterns" (R. 192) dooms the differential; and (2) that no legitimate factual grounds for the nearby differential in the Massachusetts-Rhode Island order exist, including those which the Secretary himself advanced in 1967 as justification for the differential. A closer and more accurate examination of the "record" evidences the fallacies of these conclusions and demonstrates that the Secretary's long standing use of the differential is supported by substantial evidence of record.[104]

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[104] In aid of effective regulation, the Secretary has authorized and published for public dissemination policy studies and collections of pertinent economic data on a continuing basis. These materials have been available to all parties in milk regulatory proceedings and are, of course, a component of the Secretary's expertise which is involved in all such proceedings. See, *e.g.,* MILK ORDER STUDY (1962), *supra* n. 5; PROBLEMS IN THE MILK PRICE REGULATION, July 1, 1949, filed as Exhibit 5 in the hearings on the Springfield order, Docket No. A0205 (which administrative record was not before the lower court); FEDERAL MILK ORDER MARKET STATISTICS published annually and with monthly supplements; PRODUCER DELIVERY PATTERNS IN NEW ENGLAND MILK MARKET, Marketing Research Report No. 672 (July 1964); BOSTON MILK MARKET STATISTICS, AUGUST 1937—DECEMBER 1947 (published October 1948); SELECTED TYPES OF MILK POOLS (FCA Pub. 1938) (based on New England orders), *supra* n. 15.

A. Economic Values Contributed by Nearby Farmers as Reflected in the Nearby Differential Provision Are Irrefutably Demonstrated by the Fact That Orders Containing Such Provisions Have Worked; the Differential Historically Has Been and Currently Is Employed in Federal Orders, in State Regulation and, in Effect, in Free and Unregulated Markets in Large Metropolitan Areas.

The Act's objectives are to establish and maintain orderly marketing conditions and to raise producer prices. § 2. Under the Massachusetts-Rhode Island order and its predecessors, each of which has included a nearby differential, market stability, reasonable price relationships with adjoining regulated and unregulated markets, and blend prices for all farmers that compare favorably with other markets have been achieved.[105] The order has created a stability and price structure that has limited erosion of the nearby source of supply while creating favorable conditions for more distant farmers to enter the market with increasing supplies each year (R. 322-4, 330, 351, 515, 521, 625).

The nearby differential has been customarily utilized in those large metropolitan milk markets where the milksheds have been large enough to include both nearby and more distant producers. Prior to the recent court challenges, between 40 and 50 percent of milk

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[105] See, *e.g.*, FEDERAL MILK ORDER MARKET STATISTICS ANNUAL SUMMARY for 1967 at p. 78. The elimination of the differential in the New York-New Jersey market as a result of *Blair* and the suspension and escrowing of the differential in the Massachusetts-Rhode Island market as a result of the lower courts' rulings, have in part compromised these statutory objectives at a time when national milk production had already begun a sharp and serious decline. Market instability and great uncertainty with respect to future production trends resulted and emergency price expedients became necessary. 33 Fed. Reg. 9502, 12849 (1968).

marketed under federal regulation was sold under orders with a nearby differential.[106]

Historically, the administrative record before this Court demonstrates that as early as 1920 in the Boston market, nearby farmers were paid a price premium in excess of the handling and transportation costs associated with more distant milk (R. 264, 277, 266-9, 280, 283-5, 287, 415-27, 631-3, 635). The continuing payment of this customary price premium or nearby differential in the Boston market until federal regulation was demonstrated in the *Cranston* case.[107] Under the 1933 Act licenses, these differentials were again maintained by provision for higher base ratings to nearby farmers. They were preserved in all federal orders for the Boston market until commencement of these proceedings below.[108]

The nearby differential has also been customarily applied in areas without market-wide pooling. In the Philadelphia market, for example, nearby producers in 1962 enjoyed a substantial price premium under a handler pool arrangement (R. 475, 522-3, 527-8, 622). A

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[106] Until 1966, the orders for Massachusetts-Rhode Island, Connecticut, New York and Chicago included a nearby differential adjustment.

[107] 290 F. Supp. at 814.

[108] While in the 1930's the differential represented a major part (from 20% to 35%) of the total milk price, today the 46¢ adjustment accounts for only about 7% of the blend price under the Massachusetts-Rhode Island order. This has resulted from the Secretary's maintenance of the 46¢ amount of the adjustment since 1937 despite increases in milk prices paid to producers over the years.

similar price premium has been paid to California nearby farmers under free market conditions.[109]

The State of Vermont under state milk regulation also provides a substantial price differential to nearby farmers evincing that state's conclusion that values of nearby supply and the interests of orderly marketing are promoted by the differential.[110]

B. Nearby Farmers Have Been and Currently Are More Even Producers, Thereby Serving To Reduce Milk Surplus and To Maintain Price Stability for the Entire Market.

Even production, also termed seasonality, provides substantial benefits to the market as a whole since it reduces surpluses which were a root cause of depressed prices to producers before regulation. While fluid milk demand is relatively steady throughout the year, uncontrolled production is naturally flush in the spring and low in the late fall and winter. The need to afford

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[109] In the hearing record for the Massachusetts-Rhode Island order (1963), at p. 2549, Dr. David Clarke, Professor of Agricultural Economics at the University of California, testified: "[I]t is a matter of fact that in the State of California producers located nearby Los Angeles distributing plants are able to obtain more favorable contracts and thus a higher Class I utilization than producers that are located in the central valley or any other place." This and other portions of the transcript in that record were not certified to the district court below.

[110] The Vermont nearby differential was described by the Secretary in his July 1, 1967 recommended decision for the Massachusetts-Rhode Island order, 32 Fed. Reg. 9904:

> "The price established by the Board [Vermont Milk Control Board] applies to all milk purchased without regard to use. This prince ranges from 40 cents over the Federal Order blend price in the 201-210-mile zone in northern Vermont to 85 cents over such price in the southern part of the State."

adequate plant facilities for manufacturing this seasonal bulge in surplus increases handler costs and must be charged back to all producers, passed on to consumers, or a combination of both. Flush milk production in the spring season depresses prices to all farmers in the regulated Massachusetts-Rhode Island market in two ways. The Secretary's marketing order includes a supply-demand factor that reduces Class I prices when supply is in excess. In addition, the spring surplus increases the amount of milk being manufactured and thus materially reduces the blend prices payable to all producers.

A farmer who regulates his production more evenly throughout the year assists in reducing the handlers' capital costs and supports Class I and blend prices by reducing surplus.[111] His efforts thus benefit not only himself but the *uneven* producers.

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[111] The contributions from more even production to the entire market, and a primary basis for compensating nearby producers for that value, were summarized at page 62 of SELECTED TYPES OF MILK POOLS (FCA Pub. 1938):

"The premise that an even milk supply warrants a higher return each pay period arises from the rather clear set of facts that, if the volume of market receipts as a whole were constant month after month it would be possible to utilize much more fully throughout the year all of the assembly and transportation facilities, and the processing facilities for surplus milk (2). It also would be possible for a smaller number of producers to supply the market throughout the year with an adequate volume of milk, and presumably the annual volume of surplus milk as well as its competitive effect upon fluid-milk prices in seasons of heavy production could be reduced. The marketing system could be much more efficient and the milkshed area smaller. A provision in the pool for differentiating between pool prices on the basis of seasonality because of these facts, presumes, however, that as seasonal variations in market receipts are decreased by a part of the producers

Historically, nearby producers have operated their farms to provide substantially more even production than have the distant farmers in the New England markets. This unchallenged characteristic of nearby farmers' production was true in the 1930's when regulation commenced (R. 257, 265, 270, 274-5, 276). It remained a fact in 1951 (R. 319-20, 329) and in 1963 (R. 640).[112]

Evenness has remained a strong characteristic of nearby New England milk producers. A published study by the Secretary of over 2,500 farms in the New England area for the years 1959-1962 shows nearbys as a class varied a maximum of 22 percentage points

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becoming more even shippers, these savings or these higher values begin to appear and can be secured for producers.

"It has been argued that producers whose milk shipments are relatively irregular in volume should be paid a pool price weighted more heavily by the lower surplus prices in the flush seasons since they are responsible to a large degree for the existence of the seasonal surplus. By the same reasoning, of course, the price to producers whose supply is regular in volume would be weighted more heavily by fluid-milk prices since the variations in their shipments more nearly coincide with the variations in the volume of fluid-milk sales in the market."

[112] A 1938 FCA government study graphically portrayed the results of a thorough and scientific analysis of 2,215 Boston market producers in 1938, representing 14% of the total producers in the market. On the basis of its analysis, that study concluded:

"There was a rather definite and close relationship between evenness and nearness to market among the producers. Of the 2,215 producers in the sample, 405 were in the 6 nearest zones in which any milk was received, and 448 were in the 6 most distant zones. Over 38 percent of the 'nearby' producers were 'even.' Only 10 percent of the distant producers were 'even.' Less than 3 percent of the nearby producers had a ratio of less than 30 percent, whereas almost 20 percent of the producers in the outer zones had a low-to-high ratio of less than 30 percent." SELECTED TYPES OF MILK POOLS (FCA Pub. 1938) at 6-7, see also the graph at p. 25.

between the high and low months of production while distant farmers as a group varied 39 percentage points.[113]

Against the background of his published studies and the evidence presented in administrative proceedings involving first the Boston market and later the Massachusett-Rhode Island market, the Secretary and his aides premised the nearby differential in significant part on the far greater evenness of production associated with the production of nearby farmers than with that of the distant farmers.

The lower court failed to grasp the economic importance of evenness of production and of its contribu-

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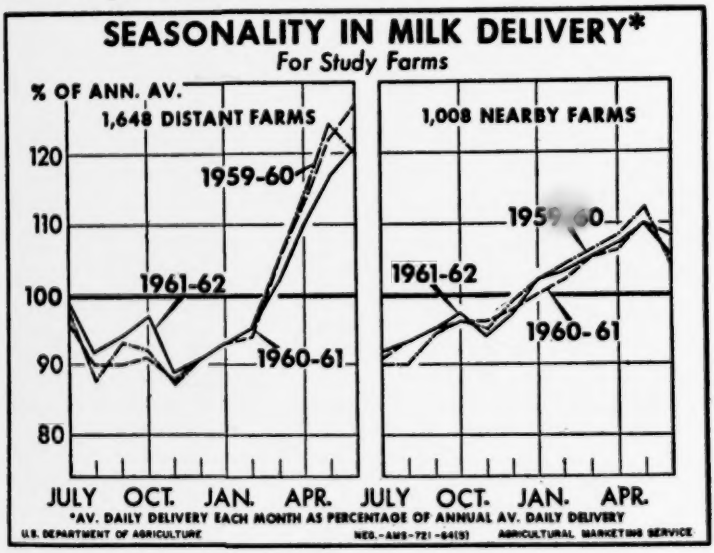
[113] PRODUCER DELIVERY PATTERNS IN THE NEW ENGLAND MILK MARKETS, Marketing Research Report 672 (July 1964), Table 42. Graphically, distant production fluctuated widely while nearbys controlled production within narrow limits:



tion not just to handlers but to the market as a whole, including both the distant and the nearby producers. (p. 68-9, *supra*). Instead, it seemingly applied a measure of what is peculiarly the Secretary's expertise by finding that historically "resort to seasonality" was only "in recognition of the fact that the nearby farmers' evenly produced milk had been sold primarily at Class I prices, *i.e.,* for fluid use" (R. 198).[114] The court below, however, appears to have retreated from this conclusion, for, later in its opinion, it returned to the matter again to re-explore whether evenness of production was proper support for the nearby differential (R. 208). While it again rejected even production as an economic underpinning for the differential, its words reflect some uncertainty:

> "Nor would evenness of production *appear* to support a differential based on farm location. While nearby production may as a general matter be more even, there have been wide individual variations in seasonality throughout the milkshed." (R. 208). (Emphasis added.)

The Secretary, however, has not advanced evenness of production as a basis for the differential because *all* nearby producers were more even on a uniform basis. Rather, his rationale has been that, nearby producers as a group were and are substantially more

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[114] The lower court quoted at some length from the Agriculture Department's 1937 Economic Brief to demonstrate that since not all nearby producers were even, assertions about seasonality were "somewhat undermined" (R. 197). The court neglected, however, to take note of the sentence immediately following that on which it relied. In that added sentence, the Department said: "Only in the nearby zones was there a preponderance of even producers so that, as a group, they showed even deliveries" (R. 274).

even than their distant counterparts.[115] The court below also seems to suggest that because, historically, the evenly produced milk of nearby farmers had been sold primarily at Class I or fluid prices (R. 198), evenness of production reflects too great a reliance on the prohibited factor of historic use values. By its very nature, evenness of production is directly related to the fluid use market.[116] The lower court's surmise that such an economic value can be sanctioned through an adjustment for base-rating under § 8c(5)(B)(d) of the Act is tantamount to the parallel conclusion that it is permitted recognition through an adjustment for a market differential customarily applied under § 8c (5)(B)(a) of the Act. The Secretary, however, is the only expert authority equipped to make a factual determination as to whether or not evenness of production, along with other economic factors associated with nearby milk production, should be reflected in a nearby differential.

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[115] The lower court also alluded to the Secretary's brief discussion of evenness of production in connection with the differential in the New York-New Jersey order struck down in *Blair*. In that decision, as the *Blair* court noted, 370 F.2d at 236, the Secretary, referring to considerable variations in seasonal production in the *New York-New Jersey* market, suggested that base-rating *might be* a more equitable means to compensate more even producers. The fact that the Secretary chose, presumably because of insufficient or different record evidence, not to rely on evenness of production to support the differential in the New York-New Jersey market is not controlling here. Nor does the Secretary's indication that base-rating *might* be preferable in the New York-New Jersey market lead to the conclusion, as the lower court here speculated, that base-rating appears the only sanctioned method by which to stimulate and compensate even production by farmers.

[116] "Manufactured dairy products can be carried over from day to day and for longer periods, so that a uniform supply of milk for such products is not so necessary." SELECTED TYPES OF MILK POOLS (FCA Pub. 1938), *supra* n. 15, at 43.

C. Nearby Producers Are More Reliable and Their Milk Is More Accessible, Assuring a More Steady Milk Supply to Consumers and the Market.

The Act's policy looks not only to producers and the milk prices they receive but to such orderly marketing conditions as will provide "in the interests of producers *and consumers, an orderly flow of the supply . . . to market . . .*" (emphasis added). § 2(4). In fulfillment of this objective, the Secretary must consider those statutory tools which will enable him to maintain a reliable and accessible supply of fluid milk to regulated metropolitan markets. He has done so here and has justified the nearby differential, in part, on these factors.

Distant farmers located on the fringe of the northeastern milksheds have mobility to shift their supplies to new markets if economically advantageous. The maintenance of nearby production for the Massachusetts-Rhode Island market thus more readily assures a reliable and accessible milk supply for that market at all times. The administrative record demonstrates that nearby supply is more reliable and accessible when high consumer demand or interruptions in the flow of more distant supply, as by accident or weather, occurs. (R. 552, 567-71, 582-83, 257, 260, 270).[117] The greater

[117] While a gradual increase in the use of bulk tank trucking has somewhat lessened the market's dependence on nearby milk to meet peak demand or emergencies, that dependence has not disappeared. The lower court's "guess" that widespread use of such trucking was present in the 1930's and that, as a result, nearby farmers, "for self protection," insisted on the differential at that time (R. 209, n. 36) is simply wrong on the facts and is totally devoid of support on the record. See 23 Fed. Reg. 8227 (1958) demonstrating that bulk tank trucking is of much more recent vintage. Ex. 7 to the Secretary's 1963 Massachusetts-Rhode Island hearings, not certified to the district court, shows that it was not until 1962 that more than half the farmers in the Boston market shipped in bulk.

reliability of nearby producers stems also from the fact that they are least likely to shift supply to other markets and are thus more responsive in tailoring their production and methods of operation to the requirements of the market. These are benefits to the market as a whole and particularly to the milk consumers.

The court below peremptorily dismissed these economic values of nearby milk production to the market on the principal grounds that they were largely of benefit to handlers and can be compensated only by them (R. 208). This is wrong on two counts. First, the benefits are primarily to the market and consumers, not to handlers. Second, as a result, in a regulated market, those handlers buying from nearby farmers cannot be expected to bear the cost of such benefits through a price premium while competitive handlers, protected by regulation, need only purchase their milk at the class prices required to be paid by all handlers under the order. It is precisely for this reason that the Act authorizes customary market differentials to enable those producers who had received the differentials in a free market to continue obtaining them despite regulation if the Secretary finds them justified.

D. The Nearby Differential Aids in Preserving a Reliable Source of Supply for Small, Independent Dealers

The Secretary has also supported the economic viability of the nearby differential in relation to the importance of nearby producers to independent dealers. The requirements of these small business distributors have frequently been too small to utilize tank truck loads of milk (R. 474, 491, 502, 532). Additionally, they normally have had no facilities to manufacture surplus milk. These small businessmen have been

forced to look to other sources including the more even nearby producers for their milk requirements (R. 519-20, 508). The nearby differential price adjustment has enabled a large segment of the nearby farmers to continue in operation despite the higher production costs they experience as a result of their proximity to large metropolitan centers. Abrupt termination of the differential would force many of these nearby producers out of business and, concomitantly, could contribute to the elimination of the small dealers who have relied in large part on nearby milk.

E. The Nearby Differential Reflects the High Production Costs of Nearby Producers and Recognizes the Substantial Investments Farmers Have Made in Reliance on the Differential

Production costs which are incurred by nearby farmers are substantially higher than costs incurred by producers located in more distant parts of the marketing area (R. 264, 289-92, 302).[118] While higher costs may not standing alone be sufficient to justify the nearby differential,[119] they are one of the number of economic factors which the Secretary must consider and has considered, on the basis of record evidence, in proposing or rejecting the nearby differential adjustment. That Congress intended this result in adopting the Act is clear from comments of the Senate floor

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[118] THE 1964 ELFAC DAIRY FARM BUSINESS ANALYSIS, of October 1968, published by the Extension Service of the University of Vermont, shows that the costs of nearby farmers in the Massachusetts-Rhode Island market remain substantially greater than those of distant Vermont farmers.

[119] *Cf. New York State Guernsey Breeders' Co-op* v. *Wickard*, 141 F.2d 805, 809-10 (2d Cir. 1944).

leader in the legislative debates. (See p. 49 herein which sets forth those comments.) Moreover, the Secretary's inclusion of the production costs of all the market's producers in the formula basis used in determining the order's Class I price shows that the minimum prices paid to all producers reflect such higher costs.

For more than 40 years, nearby farmers in the Massachusetts-Rhode Island market have received a nearby differential adjustment either in free markets or under federal licenses and orders. Their business decisions and capital investments have been predicated upon it. A price structure which includes the differential has become capitalized into their facility and land values, larger herds and more mechanized operations. These have required larger dollar investments in keeping with the prevailing trend in the dairy industry to economies of scale.[120]

The decision to make these investments by both nearby farmers and their banks was based upon the prevailing pattern of milk prices in orders including the farm location differential. The sudden termination of that price pattern, by judicial fiat, could deprive large numbers of dairy farmers of their substantial investment in dairying facilities, "bring about chaotic conditions in the market" and "so misalign the existing price structure, injure producers, and so seriously

[120] In the Boston market, for example, over 70% of the Massachusetts dairy cows in 1940 were in herds of 30 or less and even as late as 1955 over 50% were in herds of 30 cows or less. In 1960, however, 60% of Massachusetts dairy cows were on farms that had more than 30 cows. DEPARTMENT SERIES 1 BULLETIN, entitled *Large Dairy Farms in Massachusetts,* Massachusetts Department of Agriculture.

disturb long-standing marketing relationships that permanent injury to milk supply for the consumers in the area would result." [121]

F. The Nearby Differential in Other Economic Respects Supports a Sound and Orderly Development of the Milk Market

If the nearby differential were eliminated, prices to distant farmers would temporarily increase. More distant producers with increased supplies would then unnecessarily and uneconomically be attracted to the market. Within a short time this overbalance in supply would depress blend prices to the same level which distant producers receive when the differential is in effect. The result would be no net advantage whatsoever to any group of producers currently serving the market (R. 365-68, 377-79, 515-16, 518, 556). This artificial expansion of the milkshed could also create a severe misalignment with other marketing areas. By contrast, the present marketing order with the differential has served to maintain the local sources of milk supply, with only small reductions annually, while enabling increasing numbers of distant producers to participate in the market on the basis of an attractive blend price (R. 322-24, 330, 351, 515, 521, 625).

The ready entry into the market at favorable prices by distant producers is irrefutable evidence that there are no artificial trade barriers in this market. Indeed, the original five plaintiffs below all entered the Massachusets-Rhode Island milk market from other markets (R. 41), presumably, because the price was

[121] Affidavit of Herbert Forest, Director of the Dairy Division, U. S. Department of Agriculture, filed with the district court on January 9, 1967 (R. 52).

better. Moreover, the positive values of nearby production, discussed above, that are reflected in the differential, provide a sound basis for the pricing structure which accomplishes an equitable distribution of market proceeds between groups of producers based on reasonable approximations of contributions made by each group to the entire market. The differential is explicitly authorized by § 8c(5)(B)(ii)(a) of the Act and takes into account "local differences which may exist in production or marketing methods or conditions" [122] as the Secretary by congressional mandate is directed to do. § 8c(11)(C) of the Act. Thus, specifically authorized the nearby differential does not fall within the purview of § 8c(5)(G) in any event.[123] Indeed, were it otherwise, the resulting pricing arrangements without the differential would attract milk from distant areas not attracted in the absence of regulation and thus would tend artificially to limit nearby production. Compare *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76 (1962), in which this Court held that the Secretary could not prohibit unregulated handlers from selling milk in an area by exacting an artificial charge or tax on that milk. No impediment by tax or special charge is imposed by the differential, and milk through handlers supplied by distant producers does in fact freely enter the market.[124]

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[122] S. Rep. No. 1011, 74th Cong., 1st Sess. 9 (1935).

[123] *Cranston*, 290 F.Supp. at 803.

[124] Since the institution of milk orders, most manufactured milk handlers in New England have made at least a minimum amount of fluid milk sales for a minimum portion of the year sufficient to qualify themselves for regulation under the federal order so that their producers would be entitled to share in the regulated blend prices.

Elimination of the differential would have other adverse consequences for the market. Nearby farmers, deprived of the differential, could either be forced from business or some could become dealers themselves, enabling them to enjoy 100 percent fluid milk sales (R. 319, 386-87, 528, 560). Since the marketing order exempts producer-handlers from regulation, a reduction in fluid sales in the regulated market would occur. This would depress the blend price at the expense of all producers under the order. Nearby producers generally have rejected this option to become dealers in favor of participating in the market pool and receiving an adjustment in price to reflect the economic values which their milk production contributes to the market. Without this price adjustment of the nearby differential, the market as a whole would be the loser, and market stability would be seriously disrupted.

III. IF IT IS DETERMINED THAT FOR ANY REASON THE NEARBY DIFFERENTIAL OF THE MASSACHUSETTS-RHODE ISLAND ORDER CANNOT BE SUSTAINED, REMAND IS REQUIRED.

A. This Case Was Not Ripe for Summary Judgment Below

Despite the Secretary's firm opposition to a peremptory determination below (R. 107, 112), the district court granted summary judgment and did so solely on the basis of the Court of Appeals' ruling in *Blair* (R. 120).[125] The case, however, was not appropriate

[125] While petitioners disagree with the rationale of the *Blair* opinion, *Blair* involved a totally discrete administrative record, far different and very limited findings by the Secretary not present in his decision regarding the Massachusetts-Rhode Island or predecessor orders, and other peculiar factors not present here. Under the New York-New Jersey order, for example, "all farms in the entire state of New Jersey were to be treated as if in the most favorable (1-50 mile) zone" for purposes of the nearby differ-

for such summary relief. The Secretary had denied by his answer filed in the district court material factual allegations in the complaint. These denials had placed in issue questions of fact and law, including the existence of customary trade practices both before and after passage of the 1935 amendments to the AAA and of the 1937 Act, whether or not the nearby differential adjustment in the marketing area resulted in an unfair and improper burden upon commerce, whether that adjustment was arbitrary or discriminatory in its practical application and where the equities lay as between the nearby and distant farmers in the distribution of funds being escrowed and in the need for a remand to the Secretary to correct the situation if any infirmity were found to exist in the Secretary's action. Coupled with these difficult questions were complex matters of statutory construction, legislative intent and administrative practice, as reflected in legislative and administrative materials not fully before the district court and extending over a 30-year period.

While in reviewing the legality of the Secretary's administrative action, certain of these questions could

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ential. 370 F.2d at 237. Moreover, in *Blair*, the Secretary in the marketing order and before the courts, relied solely on his authority under Sec. 8c(5)(B)(ii)(c) authorizing differentials on the basis of locations of delivery to support the nearby differential. While the nearby differential was determined by the First Circuit in *Green Valley* to qualify as both a location and a customary market differential, the Secretary in the various New England orders has largely premised his authority on the latter statutory source. It is at least noteworthy, however, that currently, in the Massachusetts-Rhode Island market at least, almost all milk is delivered from farmers to handlers at the farm from which it then is shipped by the handlers in bulk tank trucks to handler plants. Thus, the First Circuit's conclusion in 1939 that the same nearby differentials at issue here were location differentials is equally true today since the location of milk delivery is the farm.

have been tested by review of the Secretary's findings and of the record which underlay them, that process of review could not have been properly or adequately pursued by the district court. The administrative record itself was never fully presented to the court. As the court was advised by affidavit, it had before it only selected "excerpts" which were "not, however, complete, nor fully illustrative of all of the evidence before the Secretary" (R. 118). Certain of these hearing records and public documents were available in their entirety only in the Archives. In general, they were "very voluminous and cover[ed] over 30 years in their scope" (R. 117). Moreover, at the time of the district court proceedings, the Secretary was engaged in rule-making proceedings involving the marketing order in which a proposal to delete the differential had been advanced.[126] Because of the pendency of such proceedings, the Secretary had requested that the court defer any ruling until the matter had been considered before him, the distant farmers below had exhausted their administrative remedies and the Secretary had a full opportunity to consider the matter in a framework which would have

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[126] See pp. 23-24, *supra*. The failure of the distant farmers to raise before the Secretary the legal and factual questions now asserted, coupled with the denial of any participation by the nearby farmers as parties with the right to present evidence in the district court proceedings below has deprived the nearbys in practical effect of their right to a hearing statutorily prescribed. (§ 8c(4)). As this Court stated in connection with another statute administered by the Secretary of Agriculture requiring a full hearing:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them" *Morgan* v. *United States*, 304 U.S. 1, 18 (1938).

enabled him to apply his expertise and the full range of his statutory powers (R. 107 and original record). The distant farmers opposed this request, and the court sustained them (R. 107).

Finally, by granting summary judgment, the district court acted without permitting the nearby farmers, who had received the differential for over 30 years and claimed the escrowed funds on the basis of their paramount equities, to participate as parties, either to present evidence or to advance their legal arguments despite their clear, acknowledged and unique interest in both the differential and in the escrow account.[127]

In a comparably complex case in which summary judgment was reversed and remanded, Justice Jackson, speaking for this Court, stated:

> "We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and

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[127] The nearby producers did not pursue their appeal on intervention since to have done so might have excluded them from participation on the merits before the District of Columbia Circuit. See pp. 26-27, *supra*. More vitally, it would have resulted in a distribution by the district court of all funds in the escrow account to the distant farmers since the Secretary's request to the district court to continue the escrow pending consideration of appeal had been rejected. Respondents, in acrimonious and intemperate correspondence, copies of which have been directed to the Clerk of this Court by them, have challenged the nearby farmers' right to refer to this denial of intervention. The nearby farmers, recognizing that their intervention appeal was vacated, do not contend here for reversal solely on the basis of the denial of their intervention but do submit that the denial was an egregious error which should be considered in the ultimate disposition of this case and in evaluating the propriety of summary judgment below.

simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.

"We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide." (Footnote omitted.) *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, at 256-57 (1948).[128]

The complex nature of the legal and factual issues involved before the district court and its failure to air them, the inadequacy of the record containing only selected excerpts and the failure of the district court to permit a full and meaningful hearing to the nearby farmers whose stake in the proceeding was self-evident resulted in a "treacherous record" indeed. It led the court below to draw crucial but erroneous inferences which are belied by the facts. *E.g.* footnotes 78, 86, 114 and 117, *supra.* The court in *Cranston,* by permitting a full airing through trial in which all interested parties participated, developed a far more

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[128] In his treatise, Professor Moore has similarly observed:

"But by its nature summary judgment is apt to be ill-adapted to cases of a complex nature or to those that involve constitutional or other large public issues, which often need the full exploration of trial." 6 MOORE, FEDERAL PRACTICE 2284 (2d Ed. 1966).

solid basis for its findings in what the District of Columbia Circuit in *Blair* conceded is "an industry of labyrinthean [sic] complexity."

B. If the Nearby Differential Is Not Sustainable on the Present Record, Settled Principles of Administrative Law Require Remand to the Secretary.

If this Court determines that a deficiency exists in the Secretary's rationale for the nearby differential of the Massachusetts-Rhode Island order or in the form of that differential, then the decisions of this Court require remand to the Secretary and not the summary interdiction of the differential imposed by the courts below. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947); *Addison* v. *Holly Hills Fruit Products*, 322 U.S. 607 (1944).

Even if the authority of the Secretary to provide for the nearby differential is in question, remand to the Secretary is the only appropriate disposition in view of the very unique and precise statutory and administrative scheme of government-producer partnership involved in this case. In determining upon the adoption of a milk marketing order, the Act requires the Secretary to find, after notice and hearing, that the order and "all of the terms and conditions thereof will tend to effectuate the [Act's] declared policy." Sec. 8c(4). Explicit approval by at least two-thirds of the affected farmers is equally essential before the order's effectuation. Sec. 8c(9). If the differential is simply stricken or terminated, as the lower court would have it, neither of these vital statutory safeguards would be met, and the order without the differential would be a nullity.

This Court has recognized that it is inappropriate to invade the expert province of an administrative

agency and indulge in speculation as to the agency's judgments where partial invalidity of an agency regulation is found to exist. In the *Addison* case, *supra,* where the lower court had struck a portion of an administrative officer's regulation but had not remanded to enable that officer to remold the situation, this Court reversed, stating:

> "We agree therefore with the Circuit Court of Appeals in holding invalid the limitations as to the number of employees within a defined area. But we cannot follow that Court in deleting this part of the administrative regulation and, by applying what remains of the definition, exempting Holly Hills' employees from the requirements of the Act. Since the provision as to the number of employees was not authorized, *the entire definition of which that limitation was a part must fall.* We can hardly assume that the Administrator would have defined 'area of production' merely by deleting the employee provision, had he known of its invalidity. *It would be the sheerest guesswork to believe that elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here insist upon its importance.* It is not for us to write a definition. That is the Administrator's duty.
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> * * *
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> "It is our view that the case should be remanded to the district court with instructions to hold it *until the Administrator, by making a valid determination of the area with all deliberate speed, acts within the authority given him by Congress.*" (Emphasis added.) 322 U.S. at 618-19.

This Court then acknowledged that an element of retroactivity would be present, but that any solution,

including that of the lower court, would have a retroactive effect.

> "The accommodation that we are making assumes, what we must assume, that the Administrator will retrospectively act as conscientiously within the bounds of the power given him by Congress as he would have done initially had he limited himself to his authority. To be sure this will be a retrospective judgment, and law should avoid retroactively as much as possible. But other possible dispositions likewise involve retroactivity, with the added mischief of producing a result contrary to the statutory design.
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> "Such an adaptation of court procedure to a remolding of the situation as nearly as may be to what it should have been initially is not unprecedented" at 620. See also *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17 (1952).

The situation here is a close parallel of that in *Addison.* The nearby differential provision is a key factor in the marketing order as its 30-year inclusion evidences. It not only is crucial to the nearby producers who have relied on it for far longer than a 30-year span but has been a fundamental and inextricably interwoven component of stable and orderly marketing in the Massachusetts-Rhode Island area. Before the district court, Mr. Herbert Forest, Director of the Dairy Division of the Department of Agriculture, attested to its importance. He stated that the differential's elimination "would bring about chaotic conditions in that market," and "so misalign the existing price structure, injure producers, and so seriously disturb long-standing marketing relationships

that permanent injury to milk supply for the consumers in the area would result" (R. 52). Without the differential, the Act's command that the Secretary's order "establish and maintain an orderly market" would be jeopardized. The Act's mandate for an equitable distribution among producers likewise would be irretrievably imperiled while a financial windfall would accrue to distant farmers who did not anticipate it in entering or in continuing to sell in the market. Finally, the farmers themselves would not have participated in their essential vote of approval even though over the years they have overwhelmingly voted in favor of the order with the differential included.

The court below, while acknowledging the viability of the *Addison* principle, nonetheless dismissed it here, relying in the main on a severability clause in the order (R. 212).[129] See 7 C.F.R. § 1001.96 (1968). As the lower court noted, the severability clause contemplates only that judicial invalidation "of some provisions would not upset the remainder" (R. 212), presumably recognizing that the invalidity of other key provisions would contaminate the entire order if closely interwoven with, and a material inducement for, the remaining provisions. The nearby differential provision is neither a secondary, minor provision of the order nor is it "discrete" from the overall pricing provisions

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[129] The lower court noted that the Secretary, unlike the nearby farmers, viewed the severability clause as of sufficient force to prevent vitiation of the order if the nearby differential provision were stricken (R. 212, n. 41). The Secretary's views here are at odds with those of the nearby farmers whose interests are much more directly tied to the Massachusetts-Rhode Island order alone and to their position and economic stake under it rather than to the sanctity of the Secretary's overall regulatory program.

of the order [130] and the Act's goal of an orderly and stable market. See pp. 65-68 herein. It is a key provision and one which goes to the heart of parity pricing and an equitable distribution of milk sales proceeds to all producers and particularly to the over 2,000 nearby farmers marketing under the order. The lower court went on to state that it found nothing to suggest that the differential's elimination would impair the Secretary's power and purpose in administering the regulatory scheme (R. 212). The Secretary, however, through his cognizant subordinates, had sharply indicated otherwise in affidavits and pleadings filed with the district court (R. 38, 43). It is the Secretary's intent in adopting the order and not the unsupported conclusions of the court below which should control as to the interdependence of the differential with other provisions of the order and the impairment of the Secretary's powers and purposes. *Cf. Carter* v. *Carter Coal Co.,* 298 U.S. 238, 313 (1936); *Allen* v. *City of Louisiana,* 103 U.S. 80, 84 (1881); *Fowler* v. *Gage,* 301 F.2d 775 (10th Cir. 1962).

As an additional premise for rejecting a remand to the Secretary in accordance with *Addison,*[131] the court

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[130] See, *e.g.,* the Secretary's decision regarding the 1964 order in which he stressed the intertwining of the various differentials by rejecting a reduction in the nearby differential since "an unwarranted decrease in returns to nearby producers would result" in light of his decision to reduce the zone differential by 7¢. 29 Fed. Reg. 11213-14 (1964).

[131] By footnote, the lower court also distinguished *Addison* on the grounds that the district court's injunction in this case would have no impact on rights arising from events occurring before the date of the court's judgment. This, however, is a bootstrap argument since the lower court then proceeded to modify the district court's judgment in order to conform. Moreover, the opinion of this Court in *Addison* suggests no such narrow interpretation be attached to its holding.

below speculated that the Secretary might not act responsibly, stating: "Since any discrimination attributable to farm location would appear to be invalid, there is no reason to afford him a chance to disburse them [differential payments] under a different name." (Footnote omitted). (R. 212-13). Such speculation not only is unfounded but also overlooks the other terms, "one or more" of which the Secretary could bring to bear under the Act in order to accord recognition to such inherent economic values of nearby milk production as evenness of production, accessibility, reliability and the like, as described at pp. 65-80 herein. Those powers include: a handler pool under sec. 8c(5)(B)(i) of the Act which would result in higher payments to farmers selling to handlers with high fluid use; a base-rating plan under sec. 8c(5)(B)(ii)(d) which would reward the more even producers, primarily those nearby the market, with higher prices; a redefining of the marketing area which could restrict the market limits and thus the affected handlers so as more nearly to coincide with earlier patterns under which nearby producers had received higher prices; application of other differentials, such as those for volume or production under sec. 8c(5)(B)(ii)(a), tailored to the increased values and costs of the production of nearby farmers; adjustment upward of existing differentials, particularly the zone differential, which could enhance the returns to nearby farmers; or elimination of federal regulation if the Secretary or the farmers who must sanction the order by vote concluded that, without the nearby differential, free market competition would be preferable.[132]

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[132] After years of federal regulation, Chicago farmers, by referendum vote in 1966, chose to revert to a free market in lieu of approving an amended order proposed by the Secretary. 31 Fed. Reg. 5368, 6195 (1966).

IV. REGARDLESS OF THE OUTCOME OF THIS CASE, THE NEARBY FARMERS WHO HAVE RECEIVED AND RELIED UPON THE DIFFERENTIAL FOR OVER 30 YEARS EQUITABLY ARE ENTITLED TO THE FULL ESCROW FUNDS.

The lower court modified the district court's order by determining that a significant but small portion of the escrow funds held in the court's custody should be distributed to the nearby farmers. The court, after alluding to certain of the equities militating against the distant farmers, stated:

> "In view of these factors, the nearby farmers could legitimately have expected to receive, and the distant farmers to pay, the differential until it has been held invalid, *after full opportunity for the presentation of views on both sides, by a court.* We think this is a fair view of the equities; and, since a preliminary injunction does not constitute a final judgment on the merits, appellant producers should receive the amounts escrowed between January 16 and June 15, 1967" (Emphasis added.) (R. 215).

While the court properly considered some of the equitable considerations that should govern the escrow distribution, it failed to give such factors adequate weight, and overlooked other pertinent and important equities.

First, no *full* opportunity for the presentation of views on *both* sides existed in the district court. The nearby farmers, who alone sustained a direct financial loss under the district court decree, were not heard or permitted to participate as parties before that court. They had no opportunity to present evidence, to participate in the creation of a record, or to present arguments founded on such a record in support of their cause.

Second, the court below failed to give appropriate consideration to the magnitude of the investments made by nearby farmers in reliance upon the differential for over 30 years and to the economic impact upon their operations if the differential is invalidated. Millions of dollars have been invested in facilities useful only in dairying. Without the differential or a comparable adjustment to compensate the nearby farmers for the added economic values they contribute to the market, they may well be forced from business or be compelled to serve as producer-dealers. In either event, severe instability will result in the Massachusetts-Rhode Island and neighboring markets.[133] The distant farmers, on the other hand, have not presented any substantial evidence before the Secretary in opposition to the nearby differential. Instead, they have enjoyed the benefits of blended uniform prices established under orders which consistently included the differential. Many have shifted their sales from other markets because of higher prices prevailing in the Massachusetts-Rhode Island milk marketing area (R. 41, 615, 625, 330). Distant farmers have not made their business decision, built their herds or developed their farms in contemplation of the economic windfall they

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[133] See pp. 74-80 herein. The lower court took note of these factors as they were developed in the 1964 hearings and in the Secretary's 1964 and 1967 decisions (R. 213, n. 45). It went on to cast them aside on the grounds that the sole remedy was for Congress to enlarge the Secretary's powers. This, however, is not the case. A remand to the Secretary would assure ample consideration of these complex economic matters and of their relevance to the distribution of the escrow funds, for the Secretary does indeed possess a "peculiarly informed" expertise (R. 213, n. 43), which should be brought to bear in the equitable distribution of those funds.

will receive if the nearby differential is ruled invalid by this Court.

Third, and perhaps most vital, the court below failed to accord recognition to the fact that the Secretary, acting clearly within his statutory authority, could have compensated nearby producers in at least some measure for the economic values of their nearby milk production and might well have done so, if from the outset he had been aware that the nearby differential was invalid.

In *United States* v. *Morgan,* 307 U.S. 183 (1939), this Court, confronted with a similar situation, instructed the lower court, in distributing funds from an escrow account maintained as the result of the invalidity of administrative agency proceedings, to be guided by equitable principles which could take into account a subsequent determination by the agency:

> "A proceeding is now pending before the Secretary in which, as we have seen, he is free to determine the reasonableness of the rates. His determination, if supported by evidence and made in a proceeding conducted in conformity with the statute and due process, will afford the appropriate basis for action in the district court in making distribution of the fund in its custody." At p. 198.

The possible application of this same principle to escrow funds involved in the complex regulation of milk marketing has specifically been noted by this Court. In *Lehigh Valley Cooperative Farmers, Inc.* v. *United States,* 370 U.S. 76 (1962), this Court, in holding the compensatory payment provision of the milk order there invalid, stated:

> "The Secretary of course remains free to protect, in any manner consistent with the provisions of the

> statute, the 'blend price' in this or any other marketing area against economic consequences resulting from the introduction of outside milk. We do not now decide whether or not any new regulation directed to that end could be made to apply retrospectively, or whether, if it could be validly so applied, the presently impounded funds could be resorted to pro tanto in its effectuation." At p. 99.

With his assortment of regulatory tools, the Secretary, as noted at p. 90 herein, may be able to reflect the inherent economic values of nearby milk production through "one or more" other authorized regulatory terms. Under such circumstances, he should be afforded the opportunity to do so and to resort to the escrow funds *pro tanto* in order to make full distribution to the nearby farmers rather than to those who have contributed no special economic values to the market and who for 30 years remained silent, and indeed, voted in, by virtue of their controlling numbers, milk marketing orders which have consistently included the nearby differential adjustment.

CONCLUSION

For the reasons stated, it is respectfully submitted that:

(1) The judgment of the court below should be reversed, the injunction vacated and the escrow fund distributed in full to the nearby farmers;

(2) If this Court should determine that for any reason the nearby differential provision of the order cannot be sustained on the basis of the record before it, the judgment of the court below should be reversed.

the injunction vacated and the case remanded with directions (a) that the Secretary of Agriculture consider the matter further in accordance with guidelines laid down by this Court or (b) that the district court provide a trial on the merits. In either event, the escrow fund and future nearby differential adjustments should be paid in full to the nearby farmers pending further determination by the Secretary or by the district court; or

(3) At a minimum, in the event of an affirmance by this Court, the escrow fund as of the date of this Court's judgment should be paid in full to the nearby farmers or disposed of in accordance with appropriate findings of the Secretary of Agriculture.

Respectfully submitted,

LAWRENCE D. HOLLMAN
CARLYLE C. RING, JR.
KALER, WORSLEY, DANIEL & HOLLMAN
710 Ring Building
Washington, D. C. 20036
Counsel for Petitioners

June 28, 1969

APPENDIX

APPENDIX A

Agricultural Marketing Agreement Act, 7 U.S.C. § 601 et seq. Sections 601, 602 in pertinent part, 608c(1), (3), (4), (5), (7), (9), (15), (16) (A), of Agricultural Marketing Agreement Act of 1937

§ 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. May 12, 1933, c. 25, Title I, § 1, 48 Stat. 31; June 3, 1937, c. 296, §§ 1, 2(a), 50 Stat. 246.

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above

the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of said sections. May 12, 1933, c. 25, Title I, § 2, 48 Stat. 32; Aug. 24, 1935, c. 641, §§ 1, 62, 49 Stat. 750, 782; June 3, 1937, c. 296, §§ 1, 2(b), 50 Stat. 246, 247; Aug. 1, 1947, c. 425, § 1, 61 Stat. 707; July 3, 1948, c. 827, Title III, § 302(a), 62 Stat. 1257; Aug. 28, 1954, c. 1041, Title IV, § 401(a), 68 Stat. 906; Aug. 8, 1961, Pub.L. 87-128, Title I, § 141(1), 75 Stat. 303.

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§ 608c. Orders regulating handling of commodity—Issuance by Secretary

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * * * * * * *

Notice and hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and issuance of order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

Milk and its products; terms and conditions of orders

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of

uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year. In the event a producer holding a base allocated under this clause (d) shall reduce his marketings, such reduction shall not adversely affect his history of production and marketing for the determination of future bases. Allocations to producers under this clause (d) may be transferable under an order on such terms and conditions as may be prescribed if the Secretary of Agriculture determines that transferability will be in the best interest of the public, existing producers, and prospective new producers. Any increase in class one base resulting from enlarged or increased consumption and any producer class one bases forfeited or surrendered shall first be made available to new producers and to the alleviation of hardship and inequity among producers. In the case of any producer who during any accounting period delivers a portion of his milk to persons not fully regulated by the order, provision may be made for reducing the allocation of, or payments to be received by, any such producer under this clause (d) to compensate for any marketings of milk to such other persons for such period or periods as necessary to insure equitable participation in marketings among all producers. Notwithstanding the provisions of subsection

(12) of this section and the last sentence of subsection (19) of this section, order provisions under (d) above shall not become effective in any marketing order unless separately approved by producers in a referendum in which each individual producer shall have one vote and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii)

for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided,* That, it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(H) Marketing orders applicable to milk and its products may be limited in application to milk used for manufacturing.

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Terms common to all orders

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall

be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their power and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of any agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit for canning or freezing one or more representatives of processors of the commodity specified in such order.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order.

* * *

Orders with or without marketing agreement

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal

or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agree-

ment or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

Regional application

(11)(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

Approval of cooperative association as approval of producers

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

* * *

Petition by handler for modification of order or exemption; court review of ruling of Secretary

(15)(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such

proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

Termination of orders and marketing agreements

(16)(A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

APPENDIX B

Pertinent Portions of the Secretary's 1964 Order for the Massachusetts-Rhode Island Milk Marketing Area (7 C.F.R. §§ 1001.70 and 1001.72)

PAYMENTS—GENERAL

§ 1001.70 *Payments to producers.*

(a) On or before the 5th day after the end of the month, each handler shall pay each producer for the approximate value of milk received from him during the first 15 days of the month. This payment shall be at a rate not less than the applicable zone Class II price for the month.

(b) On or before the 20th day after the end of the month, each handler shall make final payment to each producer for the total value of milk received from him during the month at not less than the basic blended price per hundredweight computed under § 1001.64, adjusted by the zone, butterfat, and farm location differentials applicable under §§ 1001.62, 1001.71, and 1001.72, minus the amount of the payment made to the producer under paragraph (a) of this section.

§ 1001.72 *Farm location differentials.*

In making the payments to producers required under § 1001.70, each handler shall add any applicable farm location differential specified in this section.

(a) With respect to milk received from a producer whose farm is located within any of the places specified in this paragraph, the differential shall be 46 cents per hundredweight, unless the addition of 46 cents gives a result greater than the Class I price determined under §§ 1001.60 and 1001.62 which is effective at the plant at which the milk is received. In that event there shall be added a rate which will produce that price.

CONNECTICUT

All of the State of Connecticut east of the Connecticut River and the towns of:

Granby. Suffield.

MAINE

The towns of:

Eliot. Kittery.

MASSACHUSETTS

All counties other than Berkshire County.

NEW HAMPSHIRE

Rockingham County, and the following cities and towns: Allenstown, Amherst, Barrington, Bedford, Bow, Brookline, Chichester, Deering, Dover, Durham, Epsom, Francestown, Goffstown, Greenfield, Greenville, Hinsdale, Hollis, Hooksett, Hudson, Lee, Litchfield, Lyndeborough, Madbury, Manchester, Mason, Merrimack, Milford, Mount Vernon, Nashua, New Boston, New Ipswich, Pelham, Pembroke, Pittsfield, Rochester, Rollinsford, Strafford, Temple, Weare, Wilton, Winchester.

RHODE ISLAND

All of the State of Rhode Island.

VERMONT

The towns of:

Guilford, Halifax, Readsboro, Vernon, Whitingham.

(b) With respect to milk received from a producer whose farm is located within any of the following cities and towns, the differential shall be 23 cents per hundredweight, unless the addition of 23 cents gives a result greater than the Class I price determined under §§ 1001.60 and 1001.62 which is effective at the plant at which the milk is received. In that event there shall be added a rate which will produce that price.

Maine

Berwick, Kennebunk, Kennebunkport, Lebanon, Lyman, North Berwick, Sanford, South Berwick, Wells, York.

Massachusetts

Becket, Florida, Hinsdale, Otis, Peru, Sandisfield, Savoy, Washington, Windsor.

New Hampshire

Antrim, Barnstead, Bennington, Boscawen, Bradford, Canterbury, Chesterfield, Concord, Dublin, Dumbarton, Farmington, Fitzwilliam, Gilmanton, Gilsum, Hancock, Harrisville, Henniker, Hillsborough, Hopkinton, Jeffrey, Keene, Loudon, Marlborough, Middleton, Milton, Nelson, Northfield, Peterborough, Richmond, Rindge, Roxbury, Sharon, Somersworth, Stoddard, Sullivan, Surry, Swanzey, Troy, Webster, Westmoreland, Windsor.

Vermont

Brattleboro, Brookline, Dover, Dummerston, Marlboro, Newfane, Putney, Wilmington.

APPENDIX C

HOUSE OF REPRESENTATIVES

74th Congress 1st Session — Report No. 1241

Agricultural Adjustment Act Amendments

June 15, 1935.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

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Mr. Jones, from the Committee on Agriculture, submitted the following

REPORT

[To accompany H. R. 8492]

The Committee on Agriculture, to whom was referred the bill (H. R. 8492) to amend the Agricultural Adjustment Act, and for other purposes, having had the same under consideration, report it back to the House without amendment and recommend that the bill do pass.

GENERAL STATEMENT

The proposed amendments to the Agricultural Adjustment Act have two principal purposes. The first is to supplement the provisions of the present act in such a way as to permit the agricultural adjustment program to operate more effectively in achieving its objectives. The second is to make certain that the program will be carried out within the limits of the regulatory power given Congress under the Constitution and that no authority to carry out the program will be conferred in conflict with the principle that power cannot be delegated to an executive officer unless adequate standards are provided by Congress to guide him in exercising such power.

The bill proposes to supplement the agricultural adjustment program by (1) providing for the so-called "ever-normal granary plan"; (2) providing for payments in connection with the exportation of basic agricultural commodities and products and for removal of quantities thereof from the normal channels of trade and providing for payments on that part of the production thereof which is for domestic consumption; (3) providing for effective marketing agreements and orders to accomplish the objective of parity price for certain nonbasic agricultural commodities, milk, and tobacco; (4) redefining parity price so as to include increases in tax and interest payments in the computations for determining parity; (5) providing a fund, which is in addition to and apart from Agricultural Adjustment Act funds, which is to be used for exportation of major agricultural commodities and products, removal of agricultural commodities and products from the normal channels of trade and commerce, acquisition of submarginal lands, and financing acreage and production adjustments of agricultural commodities; and (6) authorizing restrictions on imports from abroad which threaten the agricultural program. It is believed that the effect of these amendments will be to safeguard the present act, to extend its usefulness, and to provide programs flexible enough to establish and maintain the rehabilitation of the country's agriculture.

The bill confines the exercise of power to the Federal field of regulation of interstate and foreign commerce and spells out specific standards, guides, and courses of action in such a manner as to find support in the Supreme Court cases establishing the principles of constitutional law applying to the exercise of administrative powers.

An exposition of each of the important points in the bill is set forth below under an appropriate heading. This matter contrasts the particular provision of the bill with the present law, describes how the new provision is designed to

operate, indicates the necessity for the provision dealt with, and, where necessary, explains the legal and constitutional basis for it.

Parity Price

The declaration of policy in the Agricultural Adjustment Act has as its objective the reestablishment of prices paid to farmers at a level that will give agricultural commodities a current purchasing power equivalent to that of the base period. Section 1(a) of the bill amends this provision of the act to provide that, in the case of all commodities for which the base period is the pre-war period (August 1909 to July 1914), such prices will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate as contrasted with such payments during the base period. This provision is intended to give the Agricultural Adjustment Administration a somewhat more adequate standard for determining parity prices. The present method of calculation is composed of an index of prices of goods which farmers buy in relation to the pre-war level and does not cover expenditures for taxes and for debt service. At the present time, taxes per acre and mortgage interest per acre are probably about 160 to 170 percent of the pre-war level. The combination of these two items, together with the index of prices paid by farmers, may be expected to give parity standards approximately 5 percent higher than at present. The corresponding amendment to section 9 (c) of the act, which defines parity price, is made by section 13 of the bill. It is there provided that this amendment shall not affect the rates of any processing taxes now in effect, and shall not require their adjustment until the Secretary finds such adjustment necessary in order to effectuate the declared policy of the act.

Declaration of Policy—Consumer's Interest

Certain changes have been made by section 1(b) of the bill "Declaration of policy" contained in section 2 of the

present act, in order more clearly to delimit the scope of the Secretary's authority under that section. Subsection (3) of the "Declaration of policy" contained in the present act, which was inserted in order to protect consumers against unwarrantably rapid or excessive price increases, is ambiguously worded and has met with some criticism from the courts as being a vague and unintelligible standard, from which the Secretary can derive no adequate guide in the exercise of his powers. This language has, accordingly, been reworded to make it clear that the act confers no authority upon the Secretary to utilize his powers in order to maintain farm prices above the parity level. The amendment does not require either a change in the current rate of the processing tax or a change in the amount of benefits to be paid under the rental and benefit payment provisions of the act.

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MARKETING AGREEMENTS AND ORDERS

The provisions of the present act which relate to marketing agreements and licenses are of vital importance to 2,000,000 or more farmers. The producers of fruits and vegetables and other commodities which have not been named in the act as "basic" commodities have been forced to rely for the most part upon marketing agreements and licenses in order to achieve the goal set forth in the declaration of policy. The proposed amendments substitute the word "order" for "license" in order more accurately to describe the nature of the Secretary's regulatory power. The operations of cooperative marketing associations will be reenforced by the new sections of the bill dealing with these matters and these provisions will assure the cooperation of processors and distributors in programs intended to raise farm prices. The marketing agreements and licenses which have been issued and entered into pursuant to the Agricultural Adjustment Act have contained a great variety of provisions in order to adapt each particular program to

the peculiar problems and circumstances presented in a given area by a particular commodity. The essential purpose of these agreements and licenses has, however, always been to raise producer prices.

The proposed amendments, insofar as they relate to marketing agreements and orders, are primarily intended to implement and spell out in more detail and with greater freedom from ambiguity the powers which were provided for in the original act. The present language of the statute is, unfortunately, subject to serious misconstruction. This has given rise to obstacles in connection with the enforcement of the marketing agreements and licenses which have seriously endangered their successful operation.

Under the amendment proposed in the bill, the orders can be made applicable only to certain commodities named in the bill, and can contain only such terms and conditions as are expressly authorized in the bill. Furthermore, the amendments contain provisions intended to safeguard the exercise of and prevent abuses in the application of the regulatory power conferred upon the Secretary. Specific exemption of producers from the power to issue orders has been provided for, and, except in the case of retailers of milk and its products, the issuance of orders applicable to retailers is restricted as set forth below. A congressional policy that orders shall be limited in their application to the smallest practicable region, and that they shall contain different terms applicable to different areas, has been carefully spelled out. These and other restrictive provisions are, in the opinion of the committee, adequately drawn to guard against any fear that the regulatory power is so broad as to subject its exercise to the risk of abuse.

Section 5 of the bill eliminates the present licensing section (sec. 8(3)) of the Agricultural Adjustment Act, and in lieu thereof authorizes the Secretary of Agriculture to issue orders covering the marketing and distribution of specific agricultural commodities. Because the provisions

of the present law for administrative revocation have been eliminated in the proposed bill, the term "license" has been discarded, and the term "order", in general usage with respect to administrative regulations, such as those of the Interstate Commerce Commission and of the Federal Trade Commission, has been substituted. To eliminate questions of improper delegation of legislative authority raised by the decisions in *Schechter, et al.* v. *United States*, the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing and terminating orders, and specify the terms which may be included in orders dealing with the enumerated commodities. The powers to be exercised under the proposed bill are confined within the limitations upon the Federal Authority over interstate commerce as expressed by the Supreme Court in the *Schechter case* and other cases. A comparison of the proposed provisions and the present law, and a detailed discussion of the proposed provisions with respect to orders is set forth below.

First. Orders may be issued by the Secretary of Agriculture applicable to those engaged in the handling of milk, fruits (except apples and fruits for canning), pecans, walnuts, tobacco, vegetables (except vegetables for canning), and naval stores as defined in the Naval Stores Act, and applicable to those engaged in the handling of products of all of the enumerated commodities except naval stores. Under the present section 8(3) of the Agricultural Adjustment Act there is no restriction upon the number or type of agricultural commodities concerning which licenses may be issued.

The scope of orders under the proposed section 8c is limited to the regulation of the handling of the specified commodities in the current of interstate or foreign commerce or to the handling thereof which directly burdens,

obstructs, or affects interstate or foreign commerce in such commodities or products thereof. Section 8(2) of the Agricultural Adjustment Act now authorizes the Secretary of Agriculture to enter into marketing agreements with processors and others engaged in the handling of any agricultural commodity or product thereof "in competition with" interstate or foreign commerce. This phrase has been omitted from the proposed section 8c (1) of the bill which deals with orders, as well as from the proposed section 8b, which deals with marketing agreements, because the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more is intended to be vested in the Secretary of Agriculture in connection with orders.

Second. Specific provisions governing the Secretary of Agriculture in determining when to issue and in issuing orders are included in the proposed bill. Orders may not become effective until the handlers of not less than 50 percent of the volume of the commodity to be covered by the proposed order have signed a marketing agreement which regulates the handlers in the same manner as the proposed order. But when such a marketing agreement has been signed, if the Secretary finds that the issuance of an order would tend to effectuate the declared policy with respect to the commodity and transactions covered in the order, the Secretary must issue an order. Without such consent of the handlers to be covered thereby, a proposed order may become effective only if the Secretary of Agriculture, with the approval of the President, finds (1) that the failure of the requisite number of handlers to sign a marketing agreement, upon which a hearing has been held, tends to prevent the effectuation of the declared policy; (2) that the issuance of the proposed order is the only practicable means of carrying out the declared policy; and (3) that the issuance of the proposed order is approved or favored by at least two-thirds, by number or volume, of those producing the commodity for market. But, if the Secretary finds the facts set

forth in the preceding sentence, he must issue an order, notwithstanding the failure of the required number of handlers to sign the marketing agreement. An order issued without such consent of the handlers to be covered thereby may not, except in the case of milk and its products, be applicable to any person selling agricultural commodities at retail in his capacity as a retailer, nor may it in any case be applicable to any producer in his capacity as a producer.

So that proper recognition may be given to local differences which may exist in production or marketing methods or conditions, orders are required to be limited in their application to the smallest practicable regional production or marketing areas, and orders applicable to the same commodity or product are required to prescribe such terms applicable to different production or marketing areas as will recognize local production and marketing differences. Orders relating to milk and its products are exempted from the requirement that they be limited in their application to the smallest practicable regional production or marketing areas.

Prior to the issuance of any order, the Secretary of Agriculture is required to give notice of and an opportunity for hearing upon the order proposed. He cannot issue the order unless he finds from the evidence introduced at such hearing that the issuance of the proposed order and each of its terms and conditions will effectuate the declared policy of title 1.

Third. Subsection (5) of the proposed section 8c states specifically the terms which may be included in orders relating to milk and its products. These terms follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present section 8(3) of the Agricultural Adjustment Act. Such orders may contain provisions classifying milk in accordance with its ultimate utilization, and may fix, or provide a method for fixing, minimum prices which shall be paid by

handlers to producers for milk in each use classification. This provision makes it possible to take into consideration in orders dealing with milk, the difference in value between milk sold for consumption in fluid form and that used in the manufacture of such products as butter, evaporated milk, etc.

Minimum prices fixed in such orders are required to be uniform as to all handlers, subject to adjustments for differences in the grade and quality of the milk delivered, for differences in transportation costs from the place at which delivery is made to the handler to the distributing or processing plant, and for volume, market, and production differentials customarily applied by handlers. The volume differential is a differential which is paid when the operations of several country plants are consolidated into one plant. The inconvenience which is caused to producers by closing up plants to which they have been delivering and requiring that all of their milk be handled by one plant, is compensated by an additional payment to the producers. The production differential is the differential which is paid to a producer, compensating him for keeping his farm and milk qualified for a city market even though his milk may actually be going into manufactured use. It is necessary to keep this supply of reserve milk available for periods in which consumption of milk goes up so that the effect is that the producers must keep their farm in the same condition as if they were shipping milk into the city every day. The production differential is a payment to the farmer for performing this function in the market.

The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets.

The authority conferred with respect to price-fixing deals only with prices to be paid by handlers; fixing of prices at which milk and its products may be sold by handlers is not permitted in the proposed bill.

The validity of State legislation fixing minimum prices at which milk may be purchased from producers was sustained in *Nebbia* v. *New York* (291 U.S. 502), and *Hegeman Farms Corporation* v. *Baldwin* (293 U.S. 163) against an attack upon the ground that such legislation violated the due-process clause of the fourteenth amendment. Since the requirements of due process under the fourteenth amendment and under the fifth amendment are identical (*Heiner* v. *Donnan*, 285 U.S. at 312, 326), the price-fixing provisions authorized to be included in orders issued under the proposed section 8c conform to the requirements of due process under the fifth amendment. That regulations fixing the price at which an agricultural commodity may be purchased are proper exercises of the Federal power over interstate commerce is established by such decisions as *Lemke* v. *Farmers' Grain Co.* (258 U. S. 50), and *Baldwin* v. *Seelig* (55 Sup. Ct. Rep., 497).

Alternative methods of distributing the total dollar value of all milk sold in the market among the producers supplying the market are provided. Uniform prices are required to be paid to all producers and associations of producers for all milk delivered by them irrespective of the use to which such milk is put by the particular handler to whom any producer or association of producers sells its milk. An alternative provision may be included, requiring instead the payment of uniform prices by each handler to all producers and associations of producers delivering milk to him, but, except in the case of orders covering manufactured milk products only, such a provision may not be included unless the Secretary finds that its inclusion is approved or favored by three-fourths of the producers by number or by volume of production.

In order to eliminate, so far as possible, violent seasonal fluctuations in the available milk supply with their attendant disturbing effect upon returns to producers, and to encourage a uniform volume of production throughout the year, an adjustment in payments to prdoucers upon the basis of their production records during a representative period may be included in such orders, in addition to the adjustments described above. Milk orders may also provide a method for adjustments among handlers so that the payments for milk made by each handler shall equal the value of the milk to the handler in the use classification to which it is devoted by him.

To prevent the destruction of the minimum price schedules which may be fixed in an order, handlers subject to it may be required to pay, for a period of 90 days, the price fixed for milk classified for manufacturing purposes to producers not therefore selling milk for consumption in the area covered by the order. This time limitation is designed to prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural expansion of the area supplying any market by the introduction of new producers or new producing areas. This is the only limitation upon the entry of new producers—wherever located—into a market, and it can remain effective only for the specified 90-day period. Provisions for verification of weights, for sampling and testing milk, and for insuring that producers will be paid for milk purchased from them may also be included in milk orders.

A specific provision is included in this proposed subsection safeguarding the right of cooperative marketing associations qualified under the Capper-Volstead Act to make distribution of the proceeds of milk sold by them to their members in accordance with the contracts between the cooperatives and their members.

* * * * * * * * * * *

74th Congress, 2d Session - - - - - - House Document No. 501

Report of the

FEDERAL TRADE COMMISSION

on the

DISTRIBUTION AND SALE OF MILK AND MILK PRODUCTS

BOSTON, BALTIMORE, CINCINNATI, ST. LOUIS

LETTER

FROM THE

CHAIRMAN OF THE FEDERAL TRADE COMMISSION

TRANSMITTING

THE FOURTH REPORT OF THE FEDERAL TRADE COMMISSION REGARDING THE DISTRIBUTION AND SALE OF MILK AND MILK PRODUCTS, ENTITLED "REPORT OF FEDERAL TRADE COMMISSION ON MILK-MARKET REGULATION AND PRACTICES OF DISTRIBUTORS IN RELATION TO MARGINS, COSTS, AND PROFITS OF DISTRIBUTORS IN BOSTON, BALTIMORE, CINCINNATI, AND SAINT LOUIS"

JUNE 4, 1936.—Referred to the Committee on Interstate and Foreign Commerce and ordered to be printed

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1936

LETTER OF TRANSMITTAL

FEDERAL TRADE COMMISSION,
Washington, June 4, 1936.

THE SPEAKER OF THE HOUSE,
House of Representatives, Washington, D. C.

SIR: I have the honor to transmit herewith a fourth report of the Federal Trade Commission, regarding the distribution and sale of milk and milk products, entitled "Report of Federal Trade Commission on Milk Market Regulation and Practices of Distributors in Relation to Margins, Costs, and Profits of Distributors in Boston, Baltimore, Cincinnati, and St. Louis."

The three previous reports of the Commission on this subject were as follows: (1) General report, including hearings, on the Connecticut and Philadelphia milksheds (H. Doc. 152, 74th Cong., 1st sess.), (2) costs, investment and profits in the Connecticut and Philadelphia milksheds (H. Doc. 387, 74th Cong., 2d sess.), and (3) a report on the Chicago milkshed which was sent to Congress on April 15, 1936, but which has not yet been printed.

Like the previous reports, the present report was prepared and is submitted pursuant to House Concurrent Resolution No. 32, Seventy-third Congress, second session, adopted June 15, 1934.

By direction of the Commission.

CHARLES H. MARCH, *Chairman.*

APPENDIX B. MARKET ADMINISTRATOR FOR THE GREATER BOSTON MARKETING AREA

Uniform prices for 3.7 milk, by zones, Feb. 9–15, 1936

		Prices per hundredweight for producers with bases	
		Blended price for milk not in excess of base	Class II price for milk in excess of base
For milk delivered to plants located within 40 miles of the Statehouse in Boston:			
1. From farms located within 40 miles of the Statehouse in Boston		$3.30	$1.666
2. From farms located more than 40 miles from the Statehouse in Boston		2.859	1.666
For milk delivered to plants located more than 40 miles from the Statehouse in Boston, as follows:			
Zone:	*Miles*		
5	41- 50	2.414	1.606
6	51- 60	2.402	1.606
7	61- 70	2.396	1.606
8	71- 80	2.384	1.606
9	81- 90	2.378	1.606
10	91-100	2.367	1.606
11	101-110	2.361	1.606
12	111-120	2.355	1.606
13	121-130	2.343	1.606
14	131-140	2.331	1.606
15	141-150	2.331	1.606
16	151-160	2.314	1.606
17	161-170	2.314	1.606
18	171-180	2.308	1.606
19	181-190	2.296	1.606
20	191-200	2.284	1.606
21	201-210	2.284	1.606
22	211-220	2.273	1.606
23	221-230	2.267	1.606
24	231-240	2.261	1.606
25	241-250	2.261	1.606
26	251-260	2.249	1.606
27	261-270	2.243	1.606
28	271-280	2.237	1.606
29	281-290	2.237	1.606
30	291-300	2.226	1.606

Producers without bases are to be paid the Class II price for all milk.

From the above prices, the following deductions are to be made:

Members of qualified associations (Art. IX, Sec. 2) (such deductions as are authorized by members). Nonmembers (Art. IX, Sec. 1) 5 cents per hundredweight of all milk. U. S. D. of A. weighted average price f. o. b. Boston of 40 percent cream of bottling quality for February 9–15, 1936, $16.015.

B. F. differential for each 1/10 of 1% variation from 3.7 test, $0.041.

MARKET ADMINISTRATOR—GREATER BOSTON, MASS., MARKETING AREA

Extracts from the computations which resulted in the uniform prices announced for the February 9–15, 1936, period (Art. VII, Sec. 2, Par. 7)

Art. VII, Sec. 2:		
Par. 1. Total of the respective values of milk		$331,111.59
2. Total net amount of the differentials applicable pursuant to Sec. 4 of Art. VIII		43,533.28
Total		374,644.87
3. Total amount to be paid to producers pursuant to pars. 2, 3, and 4 of Sec. 1 of Art. VIII		46,658.96
Total		327,985.91

Extracts from the computations which resulted in the uniform prices announced for the February 9–15, 1936, period (Art. VII, Sec. 2, Par. 7)—Continued

Art. VII, Sec. 2—Continued.	
Par. 4. Total base milk delivered, except that delivered from farms located within, to plants located within, 40 miles of the statehouse in Boston (pounds)	$12,197,233
Blended price per hundredweight	$2.689
5. Deduction for the purpose of retaining a cash balance	.040
Basic blended price from which zone prices are calculated	$2.649
Art. VIII, Sec. 4:	
Par. 2. Differential to be added to determine the blended price to be paid to a producer for milk not in excess of his base which is delivered from a farm located more than 40 miles, to a handler's plant located within 40 miles, of the statehouse in Boston	.210
	$2.859
Basic blended price, as above	$2.649
Art. VIII, Sec. 4:	
Par. 1. Carlot freight rate per cwt. (considering 85 pounds of milk per can) for zone 5	.2353
Blended price to be paid to a producer for milk not in excess of his base which is delivered to a handler's plant located between 41 and 50 miles from Boston	$2.414

(The blended prices to be paid to producers for milk not in excess of their respective bases which is delivered at handler's plants located more than 50 miles from Boston are determined in the above manner by deducting from the basic blended price ($2.649) the C. L. freight rate per cwt. to Boston from the zone in which the handler's plant is located.)

	Pounds of milk		
	Total	Percent	Daily average
Total receipts reported	14,717,767	100.00	2,102,538
Milk reported not in excess of base	12,559,119	85.33	1,794,160
Net Class I sales reported	8,176,005	55.55	1,168,001
% sales to base	65.10		

Source: Office of the Market Administrator, room 701, 80 Federal St., Boston, Mass., Mar. 4, 1936.

Appendix C. Agreement Between the Cincinnati Sales Association and Milk Distributors

THIS AGREEMENT made and entered into as of the 1st day of July 1935, between the Cincinnati Sales Association, hereinafter called the Association, acting by and through its Pooling Committee, and the undersigned corporations, firms, and individuals, all of whom are milk distributors within the Cincinnati milk-marketing area, hereinafter called distributors, WITNESSETH:

In consideration of the mutual agreements herein contained and in further consideration of the benefits to be derived by the Distributors, signatory to this agreement, and the producer associations and milk producers whose milk is being handled by the Cincinnati Sales Association, the parties hereto agree as follows:

1. The Cincinnati market sales area shall be defined as follows: All cities, towns, and suburban areas in Hamilton and Butler Counties, except Middletown and Oxford, and the town of Milford in Clermont County.

2. Distributors agree to purchase through the Association and the Association agrees to sell to the Distributors all of the milk required by said Distributors for Class 1, Class 1-a, and Class 2 uses, and in addition thereto such quantity of

HOUSE OF REPRESENTATIVES
75th Congress 1st Session

Report No. 468

AGRICULTURAL MARKETING AGREEMENT OF 1937

MARCH 24, 1937.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

MR. FULMER, from the Committee on Agriculture, submitted the following

REPORT

[To accompany H. R. 5722]

* * * * * * * * * *

Approximately 80 marketing programs have been undertaken, pursuant to the provisions of the Agricultural Adjustment Act, since it became effective in May 1933. These programs have proven to be valuable supplements to the cooperative efforts of producers, particularly in the case of fruits, vegetables, and milk. Many of these programs have operated effectively throughout the past 3 or 4 years. Some have been terminated due to changed circumstances, and others encountered certain enforcement difficulties resulting from litigation. Despite these difficulties, however, these programs are gradually finding a definite place in the development of orderly marketing for certain agricultural commodities.

REASONS FOR REENACTING THE MARKETING AGREEMENT AND ORDER PROVISIONS

The Supreme Court in *United States* v. *Butler* ((1936), 297 U. S. 1), declared invalid the provisions of the Agricultural Adjustment Act authorizing production adjust-

ment programs involving processing taxes and benefit payments. The question as to whether Congress has the constitutional power to regulate interstate and foreign commerce in agricultural commodities through marketing agreements and orders as provided in the Agricultural Adjustment Act was not before the court and has not yet been determined by the court. Lower Federal court decisions have differed on the question, and in two cases courts have held that the marketing agreement and order provisions were inseparable from the production adjustment provisions which fell in the *Butler case.* As a consequence of these decisions, doubt has been cast on the validity of all the agreements and orders, and producers of milk, particularly in New England, are now suffering from a seriously demoralized price situation.

The committee is of the opinion that Congress has the power to regulate interstate and foreign commerce in agricultural commodities in the manner provided in the act, and that an examination of the text and organization of the act and of its history shows these provisions are and were intended to be effective independently of the production adjustment provisions. The committee believes that this view will hold the support of the Supreme Court.

Whatever may be the case, in order that whatever decision which may ultimately be rendered with respect to these provisions may turn on their constitutional validity rather than on their separability, and in order that express authority be given to enter into new agreements and orders in the areas in which they are necessary, it is highly desirable that these provisions be reenacted.

Provisions Reenacted

Section 1 of the bill reenacts all marketing agreement and order provisions of the Agricultural Adjustment Act, as amended, as well as certain other provisions not relating to production adjustments. The specific reenacted provisions

and a description of their general subject matter are set forth in section 1 of the bill, and their text is set forth in the comparative print accompanying this report, and do not require further explanation. The sections and parts of sections of the Agricultural Adjustment Act not set forth are neither reenacted nor repealed. It is to be noted that section 1 relates only to provisions which are a part of the Agricultural Adjustment Act itself. Such provisions relating to agriculture as were enacted in the 1935 amendments (Public 320) or in other legislation but which were not specifically a part of the Agricultural Adjustment Act are not involved in any respect in this bill. Section 32, relating to removal of surpluses and section 37, relating to elimination of diseased cattle, of that act are of this character.

* * * * * * * * * *

MISCELLANEOUS PROVISIONS

Section 4 of the bill negatives any implication that its effect is to invalidate or cast doubt on action heretofore taken under the agreements and orders provisions. The section also expressly ratifies, legalizes, and confirms such action. Judicial sanction for such a provision is found in *Mattingly* v. *District of Columbia* ((1878), 97 U. S. 687, 690); *United States* v. *Heinzen* (1907), 206 U. S. 370, 382); *Tiaco* v. *Forbes* ((1913), 228 U. S. 549, 556); *Rafferty* v. *Smith, Bell & Co.* ((1921), 257 U. S. 226, 232); *Isbrandtsen-Moller Company, Inc.*, v. *United States et al.* (No. 307, October term, 1936, United States Supreme Court, decided Feb. 1, 1937); and *Swayne & Hoyt, Ltd., et al.* v. *United States* (No. 494, October term, 1936, United States Supreme Court, decided Mar. 1, 1937).

Section 5 expressly prohibits the levy or collection of processing and compensating taxes under the Agricultural Adjustment Act, as amended. Except for this provision, the bill does not affect provisions of that act not reenacted

by section 1. The section also makes certain that the re-enacted sections will be applicable not only to each other but also to the other parts of the Agricultural Adjustment Act and to other provisions of law to which they relate.

Section 6 of the bill provides that it may be cited as the "Agricultural Marketing Agreement Act of 1937."

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IN THE

[illegible] COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible]

FREDERICK T. ZULER, *et al.*, *Petitioners*,

v.

RUSSELL ALLEN, *et al.*, *Respondents*.

No. [illegible]

CLIFFORD M. HARDIN, Secretary of Agriculture of the United States, *Petitioner*,

v.

RUSSELL ALLEN, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICI CURIAE OF THE ATTORNEYS GENERAL OF MASSACHUSETTS, RHODE ISLAND AND CONNECTICUT

Walter H. Mayo, III
Assistant Attorney General of the Commonwealth of Massachusetts

Charles G. Edwards
Assistant Attorney General of the State of Rhode Island

Michael J. Sanders
Assistant Attorney General of the State of Connecticut

Of Counsel

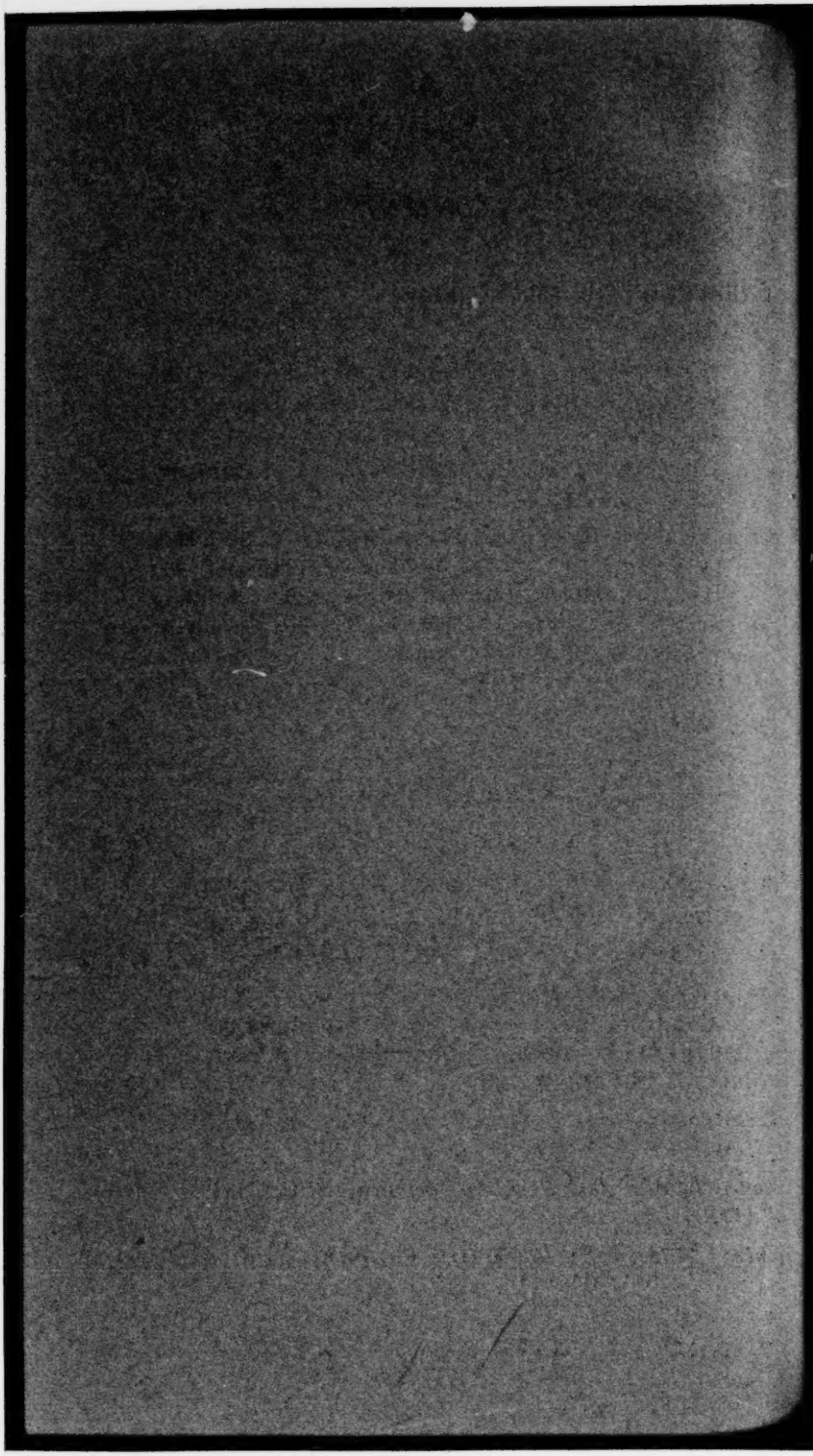
Robert H. Quinn
Attorney General of the Commonwealth of Mass.

Herbert F. DeSimone
Attorney General of the State of Rhode Island

Robert K. Killian
Attorney General of the State of Connecticut

Amici Curiae

Washington, D. C. - [illegible]



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 861

FREDERICK T. ZUBER, *et al.*, *Petitioners*,

v.

RUSSELL ALLEN, *et al.*, *Respondents*.

No. 1076

CLIFFORD M. HARDIN, Secretary of Agriculture of the United States, *Petitioner*,

v.

RUSSELL ALLEN, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICI CURIAE OF THE ATTORNEYS GENERAL OF MASSACHUSETTS, RHODE ISLAND AND CONNECTICUT

The Attorneys General of the Commonwealth of Massachusetts and the States of Rhode Island and Connecticut, pursuant to Rule 42 of the Rules of this Court, urge by this joint brief that this Court reverse the decision of the court below and uphold the legality of the nearby differential provision in issue in the present case. The jurisdictional requisites, the pertinent facts, the questions presented for review and the reasons why the differential provision should be upheld are set forth in the petitioners' briefs and are adopted herein. The opinions below and the relevant statu-

tory and regulatory provisions are printed in either the Appendix or in the briefs of the petitioners.

INTEREST OF THE AMICI CURIAE

The Attorneys General of the Commonwealth of Massachusetts and the States of Rhode Island and Connecticut have joined together in this brief *amici curiae* because a homogeneous duality of interests exists among their three states. First, all three states share a common interest in the economic health and well-being of their dairy farming populations. Virtually all dairy farmers in the three states are nearby producers whose livelihood and capital investments in dairy herds and facilities have been seriously jeopardized by the decision below. Secondly, the consumer populations of the three states are those who buy milk from handlers regulated under the Massachusetts-Rhode Island and Connecticut milk marketing orders.[1] The preservation of an adequate and reliable source of fluid milk supply to those consumers at reasonable prices is also of paramount concern.

The minimum price adjustment provision challenged in the present litigation provides for payment to more than three thousand dairy farmers whose farms are readily accessible to the large population centers of southern New England of somewhat higher prices than those required to be paid to dairy farmers located at greater distances from those centers. Consistent with economic data drawn from different periods, each preceding the institution of Federal regulation in various parts of southern New England over

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[1]The nearby differential provision of the Connecticut Milk Marketing Order was sustained in *Cranston v. Freeman*, 290 F. Supp. 785 (N.D.N.Y. 1968). Appeal of that case is now pending before the U.S. Court of Appeals for the Second Circuit, oral argument having been held before that court on June 12, 1969. (*Cranston, et al. v. Hardin and Guilian, et al.*, Nos. 32,793-796.)

the past three decades,[2] this pricing variation allocates a portion of the total proceeds paid by handlers for milk received by them from producers in approximate conformity with pricing patterns long customary in the affected supply areas.

The provision is vital from an economic standpoint in that it helps preserve in the market that core of producers which, for legitimate economic reasons, including greater evenness of production, the greater availability and reliability of their supply, alternative marketing opportunities, and accessibility to small dealers, provides a substantial contribution to the market over and above that associated with the milk of distant producers. These nearby producers received greater returns than their distant counterparts in each instance prior to the commencement of Federal regulation, and would receive a similarly higher price in its absence. The provision is as well cognizant of the equities inherent in the pre-regulation pricing relationships between generally higher cost "nearby" and generally lower cost "distant" producers. As the Court of Appeals below noted, the provision is "designed 'to reflect the fact that under competitive conditions' nearby producers got a higher price . . . ."[3]

The decision below eliminating this minimum price adjustment provision from the orders ignores customary pricing practices and equitable considerations. In doing so, it takes vast amounts of money from producers who have long depended upon them and pays them, as a windfall, to producers who have never expected to receive them, and who have long supported orders containing such provisions. The decision destroys altogether a pricing relationship which has been an accepted fact of life for all sectors of the dairy industry of New England for more than half a century. In

[2] 1933-37 in the Greater Boston market, 1949 in the Springfield and Worcester markets, 1958 in the southeastern markets and 1959 in the Connecticut market.

[3] *Zuber v. Allen*, 402 F.2d 660, 664 (D.C. Cir. 1968). Cf. *Blair v. Freeman*, 370 F.2d 229, 237 (D.C. Cir. 1966).

the process, by suddenly and drastically reducing the income of southern New England's producers, especially at a time of serious inflationary trends in the national economy, the decision threatens to eliminate a substantial portion and seriously harm all of Southern New England's dairy farming population.[4] Such a result, in the opinion of the Secretary's own experts, may in turn lead to "permanent injury to milk supply for consumers"[5] in the *amici's* states. The interest of the *amici curiae* is therefore apparent.

ARGUMENT

I.

THE COURT BELOW ERRED IN DISREGARDING THE EXPERTISE OF THE SECRETARY WITH RESPECT TO QUESTIONS OF THE UTMOST COMPLEXITY.

The institution and maintenance of a Federal milk order program in a marketing area such as the Massachusetts-Rhode Island area constitutes an undertaking of the utmost economic complexity. It attempts to provide a reasonable return for their milk to thousands of dairy farmers in far-reaching locales and diverse circumstances sufficient to guarantee an adequate supply of milk to millions of consumers of milk living in the regulated area.

The regulatory scheme entrusted to and administered by the Secretary operates in what is generally conceded to be an industry of "labyrinthean complexity".[6] Effective regu-

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[4]Besides the producers located in the *amici's* three states, the nearby producer population serving the southern New England marketing areas includes producers located in Maine, Vermont, New Hampshire and a large portion of southeastern New York State immediately adjacent to Connecticut's western boundary.

[5]See affidavit of Herbert Forest, Director, Dairy Division, Consumer and Marketing Services, U.S. Department of Agriculture, filed with the District Court on January 9, 1967. (R. 52).

[6]*Blair v. Freeman*, *supra*, at 239 (D.C. Cir. 1966).

lation of the industry requires a corresponding intricacy of administrative consideration. In promulgating regional marketing orders, the Secretary must concern himself with a host of factors, including the requirements of large groups of consumers, handlers and producers, interrelationships with other neighboring orders, the larger economy of the regulated region, and considerations of national economic policy. His informed judgment cannot, however, be limited to such broad public considerations, for he must as well, if his regulation is to be effective, take into account the narrow but important concerns of the individual producer and his relationship to the individual handler and individual consumer.

The difficult problems with which the Secretary must grapple in evolving effective regulation of a given milk market are treated in a report made to him in 1962, at his request, by a group of economists representing the private sector.[7] The utter lack of simple solutions in this field is dramatically evidenced by the fact that this report is literally filled with dispute on a vast number of fundamental issues.[8] The chairman of the committee could only, in submitting the report, refer to the adage "doctors disagree" and point out that the report reflects "divergent economic and social philosophies." No less than one-half of the committee filed a dissenting opinion to a substantial portion of the report.[9]

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[7]*Report to the Secretary of Agriculture by the Federal Milk Order Study Committee*, dated December 1962 (also known as the Nourse Committee Report).

[8]Members of the committee, among other things, evinced concern regarding nearby differential adjustments and suggested that they be the subject of further study to determine whether or not they should be reduced or eliminated, principally in those markets having a higher fluid milk utilization. A contrary view stressed the continuing importance of the differential to market stability. No member of the committee questioned the Secretary's power to provide for the differential. (See *Report*, pp. 74-76, 82-86, 97 and 102-05.)

[9]See *Report*, pp. 102-05.

The court below, while paying lip service to the difficult nature of the Secretary's duties under the statute, appears not to have given due recognition to the fact that the Secretary is the expert with respect to milk regulation and that, accordingly, courts should be hesitant to upset the delicate economic relationships worked out in his milk orders without the most compelling of reasons. Even then, it would seem that a court should at least reserve to the Secretary the opportunity to repair or to minimize the individual and public harm and inequities attendant upon the court's regulatory alterations so that they may be tempered by application of administrative expertise and sensitivity. Cf. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, at 618-20 (1944).

The lower court has failed altogether to heed the foregoing considerations. Instead, it has taken upon itself the role of both legislator for the Congress, in reading into the Act an intent contrary to its other provisions and its history, and administrator to the fluid milk markets, in peremptorily eliminating, without dialogue with the Secretary or adequate provision for the relevant economic considerations, a key provision of thirty years standing which was fully supported in the evidentiary record and was peculiarly within the competence of the Secretary.

In acting both as legislator and administrator, the court below has haphazardly undertaken first to immerse itself in a mass of factual detail by way of surmises, guesses and assumptions[10] and then to interpret the meaning of this detail in ways contrary to judgments of economic experts representing both the industry and the Secretary, contrary to true historical perspective and contrary to the rulings of three other courts, including this court.[11] Such an adventure

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[10] E.g., 402 F.2d at 665 ("This surmise"), 670 ("it does not appear"), 673 (n. 36, "It is probably safe to guess. . .").

[11] *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, at 567 (1939); *Green Valley Creamery, Inc. v. United States*, 108 F.2d 342, at 346 (1st Cir. 1939); and *Cranston v. Freeman, supra.*

into the intricacies of a complex regulatory field is fraught with peril from the standpoint of both sound administrative practice and the larger public interest.

II.

THE DECISION BELOW THREATENS SERIOUS HARM TO THE DAIRY ECONOMY OF SOUTHERN NEW ENGLAND.

The decision below not only constitutes a prospective crushing blow to the dairy farmers of the *amici* states, but, as importantly, threatens the orderly market carefully nurtured and maintained by the Secretary to assure adequate supply and reasonable prices to the consumers in these states.

The Massachusetts-Rhode Island Order and its predecessor orders, which have included from their 1936 inception in the Greater Boston market a nearby differential, have worked in practice for over three decades in successfully maintaining "orderly marketing conditions" and an adequate supply and reasonable prices to farmers, the declared statutory objectives. (See § 2 of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 602.) It has preserved, for the benefit of the entire milk market and milk consumers, a nearby source of supply with the attributes of evenness of production, accessibility and reliability, while at the same time affording favorable opportunities for more distant producers to enter the market with ever increasing supplies at an attractive price level. (R. 322-24; 330; 351-52; 515; 521; 615-18 and 625).

Currently nearly 2,500 "nearby" milk producers living in the *amici's* three southern New England states sell their milk to handlers serving the Massachusetts-Rhode Island and Connecticut Milk Marketing Areas. These dairy farmers received approximately one hundred million dollars for milk sold by them in the past year. They consequently occupy a leading place in the southern New England agricultural

economy and a substantial position as well in the larger economy of the region.

For more than three decades Massachusetts dairy farmers have made substantial investment[12] and management decisions predicated upon a form of Federal regulation in which market wide pooling was coupled with a nearby farm location differential provision identical to the one at issue in the present case. Long before the institution of Federal regulation in the Greater Boston market in 1933, nearby producers received prices substantially higher than those received by producers located in northern New England distant from the major markets of the *amici's* states. From its beginnings in the Greater Boston market in 1933, Federal regulation has recognized the continuing viability of the price variation represented by the differential in the Massachusetts markets.

A similar pricing pattern prevailed with respect to producers serving handlers selling milk in both the Connecticut and southeastern New England markets prior to the institution of Federal regulation in those markets in the late 1950's, and its continuing viability has been recognized by the Secretary through nearby differential provisions con-

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[12]The general scarcity of farm labor and its high cost, when obtainable, coupled with the volume economics of present day dairying have compelled farm automation and establishment of larger herds. The investment required to modernize a dairying farm, including increasing a herd from 30 to 50 cows, costs approximately $52,900, including $35,400 for buildings, $9,000 for 20 cows, $4,900 for milking equipment, and $3,600 for a bulk tank. For a 100 cow operation the capital investment would range from $50,000 to $150,000, depending upon the previous size of the farm prior to mechanization for an efficient large scale dairying enterprise. In the nine-year period 1955-1964, it is estimated that, at a minimum, $8 million has been invested by nearby producers in new facilities, based on a price including a nearby differential. The loss of the differential may make even these modernized nearby operations uneconomic and force many nearby farmers out of business with a loss of much of the capital invested in these dairying facilities.

tained in his orders affecting those areas. As a result, nearby producers serving those areas have as well entered into extensive obligations and made decisions upon the assumption that the Secretary's regulation was valid.

The present case has resulted in the escrowing of some $250,000 per month and in a fund which now totals over $7 million.[13] These monies would otherwise accrue to southern New England milk producers, a substantial majority of which are located in the *amici's* states. This withholding of funds has already had serious adverse effects on the southern New England dairy economy, and, if it is made permanent by a decision adverse to the nearby producers in the present case, will only accelerate the currently increasing trend of producers leaving the market.

The decline in numbers of producers throughout the northeastern portion of the country in recent years has prompted the Secretary to institute substantial Class I price increases in the northeastern markets in an emergency fashion. In a recent administrative decision raising the Class I price in six northeastern markets by $.24 per hundredweight, the Secretary in part explained his action in the following terms:

> "Producers continue to drop out of production in the northeast Federal order markets at a rapid rate . . . there was a loss of about 6% in producer numbers in the last year. . . . This continued trend poses a very serious threat to the adequacy of a milk supply for consumers in the northeast. . . . The continuing rise in production costs, the tight labor market and the alternative employment opportunities available to dairy farmers in the northeast pose a serious threat to continuing adequacy of milk supplies in the region." 33 Fed. Reg. 12849-12850 (1968).

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[13] In *Cranston, et al. v. Hardin and Guilian, et al., supra*, in which the validity of the Connecticut nearby differential has been upheld, the escrowed differential amounts currently total over $600,000, with additional amounts accruing at a monthly rate of approximately $25,000.

This trend is particularly striking in the southern New England states affected by the escrowing of nearby differential funds. Massachusetts experienced a decline of 17 percent in its numbers of dairy farmers, losing some 296 producers, in the two year period following creation of the escrow fund. Connecticut's total producer numbers have shrunk from a 1955 total of 3,689 to the current level of less than 1,300.[14] The latter state's average monthly losses for the year ending October 1968 numbered between 7 and 8 producers.[15]

This is in sharp contrast to the fact that the total number of distant producers whose milk is marketed under the Massachusetts-Rhode Island Order increased from 6,413 in October 1966 to 6,578 in October 1968. A decision by this Court that the nearby differential provisions should be eliminated can only accelerate these tendencies, with potentially harmful ramifications for the dairy farmers in the nearby areas in the region formed by the *amici's* states.

The social and economic implications inherent in the departure of producers from dairying, on both a regional and individual scale, was suggested in testimony given by Connecticut Commissioner of Agriculture and Natural Resources, Joseph N. Gill, in 1963 at Federal hearings concerning Class I pricing in the Connecticut market:

> "Think of the bulk tanks for sale, the land lying idle or going into new uses, the people finding new jobs and a new way of life, the changes in tax base for our towns, the cows for sale, the machinery and buildings no longer needed, the effect on suppliers of feed and other inputs, and many other factors (which come into play when producers leave dairy farming) . . . ."[16]

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[14] *Milk Price Handbook for Connecticut* (published September 1968, by Cooperative Extension Service of the College of Agriculture, University of Connecticut), p. 22.

[15] *Connecticut Dairy Facts*, November 1967 - November 1968.

[16] Statement at Hearing on Proposed Amendments to Connecticut and Other Northeastern Federal Milk Orders, beginning May 6, 1963, at Market Administrator's Office, 205 East 42nd Street, New York 17, N.Y.

Beyond the cost increases to the ultimate consumers in the *amici's* heavily populated urban centers which would necessarily follow from the development of inefficient or disorderly marketing patterns, it is to be noted that those knowledgeable in the economics of milk regulation have repeatedly testified in pertinent administrative proceedings that the elimination of the differential would cause a shift of supplies between markets and depress farmer prices. The price drop could in turn bring strong pressure for increments in the Class I price, raising consumer prices. (R. 365-68, 377-79, 494, 505, 515-16, 518 and 556). Dr. Stewart Johnson, Professor of Agricultural Economics of the University of Connecticut, with extensive expertise in milk marketing, stated in this proceeding[17] that the elimination of the nearby differential would result in "shifts of additional New York producers to Massachusetts-Rhode Island order" and a blend price drop. He stated that lower income to southern New England farmers could bring pressure "for relief by higher Class I prices, and consequent higher retail prices to consumers."

That there is a connection between certain of the economic trends occurring in the New England area referred to previously and the concerns expressed by these expert evaluations has been determined by the Secretary. See 33 Fed. Reg. 9502-03 (1968).

Herbert L. Forest, Director, Dairy Division, United States Department of Agriculture, stated, in an affidavit filed January 9, 1967, at the commencement of this case in the District Court, that elimination of the price adjustment at issue in the present case would "bring about chaotic conditions in the market" and "so misalign the existing (milk) price structure, injure producers, and so seriously disturb long-standing marketing relationships that permanent injury to milk supplies for consumers in the region would result."

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[17]Affidavit filed by Petitioners Zuber, et al. with the District Court on September 5, 1967, in connection with their motion to continue the escrow (part of the original record filed with this Court).

(R. 52). This view of an expert charged with supervision of the Federal milk order programs on a national level only serves to underscore the importance of this case to the *amici's* states, which constitute both the situs of the consumers receiving milk affected by the price regulation at issue, and those substantial sectors of the supply areas serving the markets of southern New England which are coincident with the marketing areas involved.

III.

THE WORDS "IRRESPECTIVE OF THE USES MADE OF SUCH MILK BY THE INDIVIDUAL HANDLER TO WHOM IT IS DELIVERED" SET FORTH IN THE AGRICULTURAL MARKETING AGREEMENT ACT WERE INTENDED BY CONGRESS TO ENABLE THE SECRETARY TO REGULATE INDIVIDUAL HANDLERS UNDER MARKETWIDE POOLING PLANS.

At the core of the decision below is its insertion into the Act, by a construction of narrow focus, of a requirement for rigid uniformity of price among farmers without full regard to individual equities. The strained interpretation of the court below, coming after 30 years of contrary construction by the Secretary, knowledgeable experts and three other courts, and outlawing any reliance by the Secretary upon the prohibited factor of fluid use patterns, warrants close attention.

The Court of Appeals for the District of Columbia, in the cases of *Blair v. Freeman* and *Zuber v. Allen*, has held that the clause "irrespective of the uses made of such milk by the individual handler to whom it is delivered" contained in § 608c(5)(B)(ii) of the Act rigorously "forbids" the Secretary from in any way considering, in promulgating adjustments to uniform prices payable to producers, ". . . the use to which the milk of a particular producer or class of producers is put, historically or potentially . . . ." In fact, however, this clause is designed to enable the Secretary, in deter-

mining prices payable to producers under a marketwide pooling plan, to disregard individual handlers' fluid utilization levels. The clause consequently performs a far different task from that assigned it by the court below.

The term "irrespective of the uses made of such milk by the individual handler to whom it is delivered" set forth in subsection 608c(5)(B)(ii) serves to emphasize the contrast between the individual handler pooling authority granted under subsection 608c(5)(B)(i) and the marketwide pooling authority granted under subsection 608c(5)(B)(ii). This descriptive role becomes apparent when it is considered that while, on the one hand, individual handler pooling operates to provide each group of producers supplying each individual handler with uniform minimum prices different from other groups of producers supplying other handlers because of the differing shares of the fluid use market obtained by the various handlers in the market, marketwide pooling, on the other hand, operates to provide uniform minimum prices to all producers "irrespective" of the use classes in which the individual handlers' milk is sold. It further explains why the phrase appears in the subsection authorizing marketwide pooling and does not appear in the subsection authorizing individual handler pooling.

Moreover, and more importantly, in addition to clarifying the difference between individual handler and marketwide pooling, the phrase in issue explicitly lodges positive authority in the Secretary, in instituting marketwide pooling in regulated markets, to ignore those individual handler fluid utilization levels which in regulated individual handler pools and as well generally in unregulated markets are largely determinative of prices paid producers. When considered in the light of the concepts of the limits of governmental regulatory power of the day, it can be seen that the positive authority so granted was of an extremely controversial nature. It expressly permitted the Secretary to provide, in marketwide pooling plans promulgated by him, for the transfer of proceeds obtained in the marketplace

from one handler's sale of milk to the benefit of producers who had never supplied that handler, whose milk may have been sold at an entirely different place and to different customers and who had supplied another handler. In doing so, it enabled the Secretary to deprive high fluid use handlers[18] of a significant competitive advantage they possessed over their lower fluid use competitors in obtaining milk supplies.

It is most anomalous that, at this late date in history, a provision intended to authorize the Secretary to limit the

[18]At the time of the enactment of the legislation there were, and still are, different types of handlers. One example is the small proprietary handler whose business consists principally, if not entirely of a local milk route in a given community. Almost 100% of the sales by this kind of handler are fluid use sales. Similarly, producers selling their milk directly to consumers in the marketing area, known as "producer-handlers," generally market most of their product in fluid form. (The "producer-handlers" are generally exempted from the pooling provisions of the Secretary's orders.) Another type is the large handler serving fluid route sales in a number of communities, both wholesale and retail, and engaged in the manufacture of ice cream, butter and other dairy products throughout the entire area. These large handlers traditionally have had a substantial amount of fluid use sales, but also use a substantial portion of surplus milk for non-fluid sales. A fourth type is the handler whose business consists principally of the manufacture and sale of milk products, such as cheese, butter, ice cream and the like. Virtually none of this fourth type is found in the nearby area. This fourth type of handler at the time of the Act had, and even today has, almost no fluid milk sales. Since the institution of milk orders most, if not all, manufactured milk handlers in the Northeast have made a minimum amount of fluid sales for a minimum portion of the year sufficient to qualify themselves for regulation under federal orders so that their producers will be entitled to share in blend prices. A much larger proportion of the milk produced in distant areas under the Massachusetts-Rhode Island Order goes to this latter type of handler than is the case with milk produced in nearby areas. (It should be noted, parenthetically, that, since characteristics such as evenness of production, accessibility and reliability are only important to the handler primarily selling milk in fluid use, distant producers selling to these manufactured milk handlers are not required through the year to provide as important value contribution as their nearby counterparts, who primarily serve fluid milk handlers.)

potentially disruptive effects of varying handler utilization levels in milk markets should be read now to have precluded a differential adjustment which is not now and never was disruptive in its effects, which does not depend on the individual handler's use of the milk delivered to him, which is economically legitimate and equitable as among producers serving the market, and which preserves one of those market variations the preservation of which the *Rock Royal* court[19] felt was central to the constitutionality of the Act.

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[19]See *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, at 567, 571-73 (1939).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petitioners' briefs, the decisions of the courts below should be reversed and the relief sought by the petitioners should be granted.

Respectfully submitted,

Robert H. Quinn
Attorney General of the
Commonwealth of Massachusetts

Herbert F. DeSimone
Attorney General of the
State of Rhode Island

Robert K. Killian
Attorney General of the
State of Connecticut

Amici Curiae

Of Counsel:

Walter H. Mayo, III
Assistant Attorney General of the
Commonwealth of Massachusetts

Charles G. Edwards
Assistant Attorney General of the
State of Rhode Island

Michael J. Scanlon
Assistant Attorney General of the
State of Connecticut

June 1969

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 25

FREDERICK T. ZUBER, ET AL., PETITIONERS

v.

RUSSELL ALLEN, ET AL.

No. 52

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE, PETITIONER

v.

RUSSELL ALLEN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE

OPINIONS BELOW

The opinion of the court of appeals (A. 187–215) is reported at 402 F.2d 660. The findings and conclusions of the district court and its order granting summary judgment (A. 120–129) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1968 (A. 216). By order of Decem-

ber 14, 1968, Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including February 20, 1969. The petition was filed on that date, and was granted on April 7, 1969 (A. 222A; 394 U.S. 958). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Agriculture has authority, under § 8c(5)(B)(ii) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(5)(B)(ii), to include in a Federal Milk Marketing Order a provision for a farm location differential based on the distance of the producer's farm from the center of the market.

STATUTE AND REGULATION INVOLVED

Section 8c(5) of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 247, as amended, 7 U.S.C. (Supp. IV) 608c(5), provides in pertinent part:

> Milk and its products; terms and conditions or orders:
>
> (5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk

purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the ap-approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials

customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year.

The Massachusetts-Rhode Island Milk Marketing Order, 7 C.F.R. 1001, provides in pertinent part:

§ 1001.72 Farm location differentials:

[*In making the payments to producers required under § 1001.70, each handler shall add any applicable farm location differential specified in this section.*]

(a) With respect to milk received from a producer whose farm is located within any of the places specified in this paragraph, the differential shall be 46 cents per hundredweight, unless the addition of 46 cents gives a result greater than the Class I price determined under §§ 1001.60, 1001.62, and 1001.63 which is effective at the plant at which the milk is received. In that event there shall be added a rate which will produce that price.

CONNECTICUT

All of the State of Connecticut east of the Connecticut River and the towns of:

Granby. Suffield.

MAINE

The towns of:

Eliot.
Kittery.

MASSACHUSETTS

All counties other than Berkshire County.

NEW HAMPSHIRE

Rockingham County, and the following cities and towns:

Allenstown.
Amherst.
Barrington.
Bedford.
Bow.
Brookline.
Chichester.
Deering.
Dover.
Durham.
Epsom.
Francestown.
Goffstown.
Greenfield.
Greenville.
Hinsdale.
Hollis.
Hooksett.
Hudson.
Lee.
Litchfield.
Lyndeborough.
Madbury.
Manchester.
Mason.
Merrimack.
Milford.
Mount Vernon.
Nashua.
New Boston.
New Ipswitch.
Pelham.
Pembroke.
Pittsfield.
Rochester.
Rollinsford.
Strafford.
Temple.
Weare.
Wilton.
Winchester.

RHODE ISLAND

All of the State of Rhode Island.

VERMONT

The towns of:

Guilford.	Vernon.
Halifax.	Whittingham.
Readsboro.	

(b) With respect to milk received from a producer whose farm is located within any of the following cities and towns, the differential shall be 23 cents per hundredweight, unless the addition of 23 cents gives a result greater than the Class I price determined under §§ 1001.60, 1001.62, and 1001.63 which is effective at the plant at which the milk is received. In that event there shall be added a rate which will produce that price.

MAINE

Berwick.	North Berwick.
Kennebunk.	Sanford.
Kennebunkport.	South Berwick.
Lebanon.	Wells.
Lyman.	York.

MASSACHUSETTS

Becket.	Sandisfield.
Florida.	Savoy.
Hinsdale.	Washington.
Otis.	Windsor.
Peru.	

NEW HAMPSHIRE

Antrim.
Barnstead.
Bennington.
Boscawen.
Bradford.
Canterbury.
Chesterfield.
Concord.
Dublin.
Dunbarton.
Farmington.
Fitzwilliam.
Gilmanton.
Gilsum.
Hancock.
Harrisville.
Henniker.
Hillsborough.
Hopkinton.
Jaffrey.
Keene.
Loudon.
Marlborough.
Middleton.
Milton.
Nelson.
Northfield.
Peterborough.
Richmond.
Rindge.
Roxbury.
Sharon.
Somersworth.
Stoddard.
Sullivan.
Surry.
Swanzey.
Troy.
Webster.
Westmoreland.
Windsor.

VERMONT

Brattleboro.
Brookline.
Dover.
Dummerston.
Marlboro.
Newfane.
Putney.
Wilmington.

STATEMENT

Respondents are Vermont dairy farmers selling milk in the Massachusetts-Rhode Island market. They seek to enjoin the operation of the "farm location differential" provision of the Massachusetts-Rhode Island Milk Marketing Order, 7 C.F.R. 1001.72.

The Order provides in general for the computation of a uniform "blended" price to be paid to all farmers marketing milk under the Order; it also provides for specified differential payments to be made, over and above the blended price, to particular farmers. Under the farm location differential, such additional payments are to be made for all milk from farms located near the centers of the market. Respondents' farms are located too far from the market centers to qualify for this payment.

The farm location differential is the direct successor of a similar differential which took effect, as part of the Boston Milk Marketing Order, on February 9, 1936.[1] For years prior to federal regulation of the marketing of milk in the Boston area, farms near

[1] The 1936 Order provided as follows (A. 230–231):

"ARTICLE VIII—PAYMENTS FOR MILK

"SECTION 1. *Time and Method of Payment.*—On or before the 25th day after the end of each delivery period, each handler shall make payments, subject to the butterfat differential set forth in section 3 of this article, for the total value of milk received during such delivery period as required to be computed pursuant to section 1 of article VII, as follows:

"1. To producers, except as set forth in paragraph 2 of this section, at the blended price per hundredweight computed pursuant to section 2 of article VII, subject to the differentials set forth in paragraphs 1 and 2 of section 4 of this article, for that quantity of milk delivered by each producer not in excess of the base of such producer;

"2. To any producer, whose farm is located within forty (40) miles of the State House in Boston and who delivers milk to such handler at a plant located within forty (40) miles of the State House in Boston, at $3.30 per hundredweight for that quantity of milk delivered by such producer not in excess of the base of such producer; * * *"

Boston had received higher prices for their milk than more distant farms. From 1923–1932, the differential "nearby" farms thus experienced averaged in excess of $1.00 per hundredweight of milk (A. 277–278, 283–285). Part of this amount represented lower transportation and handling costs for the nearby farms; but approximately 46 cents of the difference represented a premium in excess of that difference in cost (A. 526, 566; 32 Fed. Reg. 9919). This premium was voluntarily paid by milk processors who had contracts with certain cooperatives from the middle 1920's until the advent of federal licensing in 1933.[2]

This premium reflects the fact that milk for drinking has always been able to command a higher price than milk for manufacturing purposes (ice cream, butter, powdered milk, etc.),[3] and that historically

[2] A detailed historical description of the relevant practices and Federal regulations is found in *Cranston* v. *Freeman*, 290 F. Supp. 785 (N.D.N.Y.), appeals pending, C.A. 2, Nos. 32793–32796; and see 32 Fed. Reg. 9919.

[3] The market for milk for manufacturing purposes is much more subject to competition from low cost sources of supply than that from fluid milk. This results from the high perishability of milk in fluid form, the cyclical nature of milk production, and the relatively constant demand for fluid milk. That is, fluid milk must be consumed within a few days of its production; this limits both the time and space within which it can be used for this purpose. Once milk is manufactured into butter, cheese, or other products, however, it has a much longer useful life. Moreover, cows produce considerably more milk in the spring and summer, the flush season, than in fall and winter; the maintenance of herds sufficient to supply winter drinking needs means that there will be substantial surpluses available for manufacturing during the flush season. Summer fluid milk cannot compete with winter fluid milk; summer, low-cost area manufactured products can always be brought into the com-

nearby farmers have sold a higher proportion of their milk for the former purpose, at a higher price, than have more distant farmers. As this Court has set out elsewhere,[4] regulation of the dairy industry became necessary when competition for the more lucrative fluid market threatened severe dislocations of the industry and, correspondingly, of the supply. While federal regulation sought to control that competition, it did not interfere with the relative positions of nearby and distant producers. Thus, in 1933, a federal license adopted for the Boston area under the Agricultural Adjustment Act ("AAA") preserved the premium nearby farmers had been receiving by giving farmers within a specified distance of Boston a higher base for their milk (A. 38, 39). Since the base determined what proportion of their milk was deemed to have been sold at Class I (fluid milk) prices, they received a higher price for any given quantity of milk than more distant farmers would. In May of 1935, the Boston license was declared invalid for reasons unrelated to this arrangement. *United States* v. *Seven Oaks Dairy Co.*, 10 F. Supp. 995 (D. Mass.).

The Agricultural Adjustment Act was amended in 1935, in part to avoid excessive delegation of authority such as this Court had found objectionable in *A.L.A. Schechter Poultry Corp.* v. *United States*, 295

petition for a particular market. Thus, the price in that market for milk designated for manufacturing uses will be lower than that for fluid milk, even though it is of the same quality.

[4] *Nebbia* v. *New York*, 291 U.S. 502, 516–518; *United States* v. *Rock Royal Co-operative*, 307 U.S. 533, 548–550, 570.

U.S. 495. The Committee Reports recommending passage of the amendments state that the provisions dealing with the marketing and distribution of milk and its products (Section 8c(5)) "follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present Section 8(3) of the Agricultural Adjustment Act." H. Rep. 1241, 74th Cong., 1st Sess. (1935), p. 9; S. Rep. 1011, 74th Cong., 1st Sess. (1935), p. 9. The amended Section 8c(5) is in all relevant respects the same as 7 U.S.C. (Supp. IV) 608c(5), the statutory provision whose meaning is at issue in this case.

The Boston Milk Marketing Order, which went into effect February 9, 1936, was one of the first Milk Marketing Orders issued under the amended statute. It essentially preserved to any producer "whose farm is located within forty (40) miles of the State House in Boston" (A. 231),[5] the premium which had existed under the federal license. The Secretary found that "the payment of Class I [fluid] prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, due to the greater availability of their milk for Class I use" (A. 224).

The Boston Order remained in effect only until August 1, 1936, when the District Court for the District of Massachusetts ruled the amended AAA

[5] See n. 1, *supra*, The Boston Order was then known as "Order No. 4."

unconstitutional. *United States* v. *David Buttrick Co.*, 15 F. Supp. 655, reversed, 91 F. 2d 66 (C.A. 1), certiorari denied, 302 U.S. 737. The Secretary suspended the Boston Order at that time, and it remained suspended until after the passage of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601.[6]

That Act essentially reenacted the marketing order provisions of the AAA, with minor amendments not touching Section 8c(5). This was done to avoid district court decisions, such as *Buttrick, supra,* which had held that the processing tax provisions of the 1935 Act held invalid in *United States* v. *Butler,* 297 U.S. 1, were not severable, and that the whole of the AAA was therefore invalid. H. Rep. 468, 75th Cong., 1st Sess. (1937), p. 2. Section 4 of the 1937 Act, 50 Stat. 249, 7 U.S.C. 672(a), further provided that all existing marketing Orders and their provisions were "expressly ratified, legalized, and confirmed."

The Boston Order was reinstated, with some changes, on August 1, 1937. It again contained a differential based on farm location (2 Fed. Reg. 1331, 1333):

> Section 4. Location differentials:
>
> * * * * *
>
> 3. With respect to milk delivered by a producer whose farm is located more than 40 miles, but not more than 80 miles, from the State House in Boston, there shall be added 23 cents per hundredweight.

[6] See *H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588, 592.

> 4. With respect to milk delivered by a producer whose farm is located not more than 40 miles from the State House in Boston, there shall be added 46 cents per hundredweight unless such addition gives a result greater than $3.19, in which event there shall be added an amount which will give a result of $3.19.

This order soon became the subject of extensive litigation, in which both the constitutionality of the Agricultural Marketing Agreement Act and the validity of various provisions of the Order—including the nearby differential—were attacked. Parallel litigation was brought in New York, attacking the Act and various provisions of the New York Order, including a nearby differential which in that case required handlers to pay producers in 18 counties near New York City $.20 per hundredweight above the uniform or "blend" price.

These cases reached this Court in early 1939. In *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, and *H. P. Hood & Sons* v. *United States*, 307 U.S. 588, it upheld the constitutionality of the Act. *Rock Royal* also held that the New York nearby differential was authorized by Section 8c(5)(A) of the Act, 307 U.S. at 567, over objections by Rock Royal Co-operative that it violated the uniformity provisions of that section of the Act. The attack on the Boston farm location differential was not presented to this Court in *Hood*, but remained in the lower courts for disposition. In December 1939, the Court of Appeals for the First Circuit approved its inclusion in the Boston

Order. *Green Valley Creamery, Inc.* v. *United States*, 108 F. 2d 342, 346.

The Secretary subsequently extended regulation of milk marketing to subsidiary markets in New England, issuing Marketing Orders for the Springfield and Worcester, Massachusetts, areas (14 Fed. Reg. 7085, 7097, Nov. 23, 1949), and for southeastern New England (consisting of Rhode Island and portions of southeastern Massachusetts) (23 Fed. Reg. 8225, Oct. 24, 1958). Each of these orders contained a farm location differential in substantially the same form as the Boston Order.

These orders were consolidated with the Boston Order to form the present Massachusetts-Rhode Island Order in August 1964. 29 Fed. Reg. 11205. When this consolidation was proposed, certain cooperatives whose members were non-nearby producers sought to have the farm location differential deleted from the Order. Groups representing nearby producers, on the other hand, asked that the amount of the differential be increased (A. 474–475). Both proposals were rejected. The Secretary's decision stated:

> Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption cen-

> ters as compared to the market value of milk produced in the more distant areas of the milkshed. [29 Fed. Reg. 11213].

He also found that no showing had been made that these long-standing provisions created unstable marketing conditions (*ibid.*), and that an increase was unwarranted because "the intrinsic value of the [nearby] milk has not been increased" (29 Fed. Reg. 11214). The Secretary's opinion added (*ibid.*):

> As indicated above, we believe there are adequate reasons on this record for continuing the farm location differentials at their present rates. An industry study may be made, of course, at any time or could have been made at any time in the past in preparation for their review. The matter may be reviewed when it is shown that further consideration in hearing is appropriate. We are not warranted in deferring the decision until such a study has been made.

The proposed order consolidating the prior orders, and retaining the farm location differential, was approved by a vote of 89.3 percent of the producers who participated in the referendum, see 29 Fed. Reg. 12237. Two thirds of the eligible farmers reside outside the areas for which the differential is payable (A. 55).[7]

[7] In 1966, various groups proposed amendments to the Massachusetts-Rhode Island Order, including one for the deletion of the farm location differential. 32 Fed. Reg. 9902. Hearings had been held, and these proposals were pending before the Secretary, when the present suit was brought. On July 6, 1967, subsequent to entry of judgment by the district court, the Secretary issued a recommended decision on all proposals. While noting

This action was filed on December 27, 1966, shortly after the United States Court of Appeals for the District of Columbia Circuit had decided in *Blair* v. *Freeman,* 370 F. 2d 229, that a nearby differential provision in the New York-New Jersey Milk Marketing Order was invalid. On January 16, 1967, the district court entered a preliminary injunction against enforcement of the differential and required the Secretary to place future farm location differential payments under the Order into an escrow fund.[8]

The Secretary's subsequent motion to hold the proceedings in abeyance for the pending administrative proceedings, n. 7 *supra,* was denied (A. 107), and respondents moved for summary judgment, which the Secretary opposed (A. 112–115). On May 24, 1967, the district court entered the following order (A. 120):

> The plaintiff's motion for summary judgment is granted on the authority of *Blair et al.* v. *Freeman,* U.S. App. D.C. , No. 19,801, decided November 18,1961.

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the instant litigation and stating that the judicial decision would not in any way be circumvented (32 Fed. Reg. 9920), he discussed the proposal to delete the differential and concluded that "The farm location differential * * * should be continued" (32 Fed. Reg. 9918). He reaffirmed that the differential had been promulgated on a record showing more even seasonal production and ready accessibility of nearby producers' milk (32 Fed. Reg. 9919), and added that he considered the differentials to have been "market differentials customarily applied by the handlers," based on the evidence of pricing of milk prior to regulation (*ibid.*).

[8] The district court denied a motion of petitioners *Zuber, et al.*, in No. 25, to intervene. The court of appeals later permitted them to intervene at the appellate level, for purposes of prosecuting an appeal. See *Zuber* v. *Allen*, 387 F. 2d 862.

Counsel for plaintiffs will submit an appropriate order.

Plaintiffs' counsel submitted lengthy "findings of fact" and "conclusions of law," which the court signed *verbatim.* Cf. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656–657. It then entered judgment permanently enjoining the Secretary and his agents from enforcing the farm location differential.

The Secretary and the intervenors Zuber, *et al.*, appealed. On September 23, 1968, the court of appeals entered an opinion affirming the judgment of the district court on the authority of its *Blair* decision (A. 187–215; 402 F. 2d 660). It gave the district court's action effect from the date of entry of the permanent injunction by ordering that escrowed differential payments relating to the period before that date be paid out to the nearby farmers but that the distant farmers were entitled to share the amounts collected thereafter.[9]

SUMMARY OF ARGUMENT

The principal question presented is whether the Secretary of Agriculture has authority under the Agricultural Marketing Agreement Act of 1937 to provide in federal milk marketing orders that dairy farmers located near market centers shall receive a special differential, in addition to the generally prevailing price in the market, on account of that fact.

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[9] Respondents, by petition for a writ of certiorari in No. 26, O.T. 1969, assert their right to share the earlier payments as well; but this Court has not acted on the petition, and that issue therefor is not involved in the present proceedings.

Subsidiary questions are whether that differential prohibits the marketing in that area from other areas of the United States, in violation of Section 8c(5)(G) of the Act; and whether there was a substantial basis for the Secretary's determination that the continued use of such a differential was warranted in the Massachusetts-Rhode Island market. We deal with each in turn.

The question of statutory authority turns upon the meaning of two phrases in Section 8c(5)(B) of the Act. One, in describing the marketwide pooling type of regulation involved in this case, states that a milk marketing order establishing this type of pool must provide that all producers in the market shall receive "uniform prices for all milk * * * irrespective of the uses made of such milk by the individual handler to whom it is delivered." The other phrase modifies the provision for uniform prices by permitting adjustments, *inter alia,* for "market * * * differentials customarily applied" by milk handlers. Prior to the legislation, there was often destructive competition among producers to sell to handlers for the higher priced fluid (Class I) uses; one of the purposes of the statute was to permit the Secretary to curb such competition. The court of appeals concluded that the "irrespective of the uses" phrase was intended to accomplish this effect by forbidding the Secretary from adopting any adjustment to price which reflected or relied upon patterns of use, and that the farm location differential, which is related to the higher value of nearby farmers' milk for fluid uses, was such an adjustment and therefore forbidden. Without resort to

other legislative history, it limited the phrase "market differential" to a meaning appearing in Committee Reports at the time of its adoption—thus excluding the farm location differential from qualifying under that phrase—and found that the present farm location differential had not been customarily applied prior to 1937, when its immediate predecessor was promulgated.

A.

The differential nearby farmers received for their milk was well established in the Boston market long before the advent of federal regulation, and was recognized by the dairymen's cooperatives that attempted to impose self-regulation on that market in the late '20's and early '30's. Federal regulation began in 1933, with the Agricultural Adjustment Act; the licenses issued under that Act for the Boston milk market also recognized and paid a differential to nearby farmers. Then, as previously in the free market, those farmers received approximately $.46/hundredweight of milk in excess of differences attributable to transportation and handling cost differences. The statutory provisions at issue in this case were adopted as amendments to that Act in 1935, chiefly to avoid any appearance of unconstitutional delegation; in general, moreover, Congress' purpose was to "follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to [that Act] * * *" H. Rep. No. 1241, 74th Cong., 1st Sess. (1935), p. 9; S. Rep. No. 1011, 74th Cong., 1st

Sess. (1935), p. 9. There is no indication that Congress meant radically to revise the regulatory structure of the market from what existed before; elimination of the pricing differential nearby farmers had enjoyed, and substitution of a rigid notion of price equality such as the court below found required, would have constituted such a revision.

When the 1935 amendments were enacted, the Secretary immediately promulgated an Order for the Boston market, which again provided a differential for nearby farmers. Any question as to his authority to do so was settled in 1937, when the Congress again reenacted the agricultural regulatory legislation, as the Agricultural Marketing Agreement Act of 1937; the new statute expressly provided that orders adopted under the prior legislation "are hereby expressly ratified, legalized, and confirmed," 7 U.S.C. 672(a), and its legislative history makes clear that this provision was affirmatively intended to settle any doubts that might have existed concerning the Secretary's authority for his actions under the prior statutes. Again, a revised Boston order was immediately promulgated, and it again contained a differential in addition to transportation and handling advantages of $.46/hundredweight for nearby farmers—this time, substantially in the present form. That differential and a similar provision of the New York milk marketing order were then challenged in court and upheld, despite arguments similar to those adopted by the court below. *Green Valley Creamery, Inc.* v. *United States,* 108 F. 2d 342, 346 (C.A. 1); *United States* v. *Rock Royal Co-operative,* 307 U.S. 533, 567.

B.

Having shown the history of use, recognition, and confirmation of a farm location differential in the Boston market, we then examine the statute more closely, to determine whether it nevertheless requires the conclusion reached below, that a price differential based upon the patterns of use and prices enjoyed by particular groups of farmers is forbidden. When the marketwide pooling technique is considered in relation to the other techniques available to the Secretary, its distinctive feature is seen to be that producers selling under such a pool receive prices which do not vary with the uses to which the handler they sell to puts the milk. Thus, the natural meaning to be assigned to the statute's statement that the price producers receive under marketwide pooling shall be "irrespective of the uses made of such milk by the individual handler" is that it simply describes the special or unique effect of this type of regulation.

The farm location differential does not interfere with that effect. A nearby farmer receives it even if the milk he sells is used entirely for the lower priced manufacturing purposes, and a distant farmer will not receive it even if all his milk is in fact used for the higher priced fluid purposes. The question whether that differential is authorized must be resolved by reference to the permitted classes of adjustments, including "market * * * differentials customarily applied," not circularly by concentrating on the provision for uniform prices without consideration of the permitted adjustments. In any event, in maintaining

the differential the Secretary has relied on economic factors underlying the nearby farmer's traditional advantage in the market, rather than the fact of greater Class I use as such, so that even on the court's premise, its conclusion was wrong.

Turning to the question whether the farm location differential is a permitted "market differential" under the Act, we maintain, as the First Circuit decided in *Green Valley Creamery, supra,* shortly after passage of the Act, that those words should be given their natural import, as referring to any differential existing and customarily applied in the market—which the farm location differential plainly was. The court's contrary view was based on a narrow definition suggested in Committee Reports. But the overall legislative purpose, simply to reiterate former practices in detail sufficient to withstand a claim of unconstitutional delegation, is entirely consistent with the broader meaning. The narrower meaning was subsequently repudiated by the Floor Manager of the bill in the Senate and, if intended, would have signified a radical departure from prior forms of regulation, which the legislative history nowhere reflects. The Secretary and the courts, including this Court, have ascribed the broad meaning to the phrase. The narrower meaning described by the Committee Reports would deprive the phrase of operative meaning, since the differential described could also be justified under another adjustment provision.

Finally, we return to the question whether the farm location differential was one "customarily applied."

The court of appeals thought not because of changes in form which had marked the various milk marketing orders in which it was included. Those changes, however, were not of substance. The critical considerations are that dairy farmers in the Boston market have consistently received a differential of approximately $.46/hundredweight over and above transportation payments or allowances for delivery directly to city markets, and that this differential was attributable only to the factor of farm location. This was true before federal regulation, under the licenses, under the 1936 Boston order, and under the 1937 Boston order and its successors. The change in form in the 1937 order did not alter the continuity with which this differential has existed in the market.

C.

The use of the differential does not "prohibit" the flow of milk from other areas of the country, as is forbidden by Section 8c(5)(G) of the Act, 7 U.S.C. 608c(5)(G). About three fourths of the milk in the market is received from non-nearby sources, the bulk of it from Vermont; there is no evidence that use of the differential—which results in conditions approximating those that would obtain in a free market—has distorted production patterns. And the statute plainly contemplates numerous adjustments in price to producers which might have some effect on flow; Congress could not have intended such effects to constitute a forbidden prohibition, with the consequence that such adjustments could not be made. Finally, the only possible basis for arguing that the differential does "prohibit"

the flow of milk is a theory that, were it not paid, the prices to non-nearby farmers would be higher. Such an effect is entirely speculative, since surplus milk flowing from other areas might quickly restore the price at the edge of the milkshed to the equilibrium with prices in other areas it now enjoys.

II.

The Secretary had a substantial basis for his 1964 decision to continue, but not increase, the farm location differential in New England markets. In two sizeable markets, one unregulated and the other regulated in a manner which permits the price to producers to vary from handler to handler, nearby producers have enjoyed differentials of similar magnitude, as a result of free market forces. The long practice of using such differentials in New England has not proved disruptive; rather, there was evidence from which the Secretary could conclude that withdrawal of the differential would lead to disruption, by substantially weakening the dairy industry near urban centers.

ARGUMENT

I. THE TERMS, BACKGROUND AND HISTORY OF THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, AND OF NEARBY DIFFERENTIAL PROVISIONS, SHOW THAT CONGRESS AUTHORIZED THE SECRETARY OF AGRICULTURE TO EMPLOY SUCH PROVISIONS IN FEDERAL MILK MARKETING ORDERS.

The principal question presented by this case is whether the Secretary of Agriculture has statutory authority to include differentials based upon farm

location in federal Milk Marketing Orders. That question depends upon the meaning of the following language of Section 8c(5) of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 247, 7 U.S.C. (Supp. IV) 608c(5):

In the case of milk and its products, orders * * * shall contain one or more of the following terms and conditions, and * * * no others:

* * * * *

(B) Providing:

* * * * *

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, *irrespective of the uses made of such milk by the individual handler to whom it is* delivered; subject * * * only to adjustments for (a) volume, market, and production differentials customarily applied by handlers subject to such order * * * [Emphasis supplied.]

The emphasized language constitutes the matter most immediately in dispute. The court of appeals understood the reference to "irrespective of the uses made" to mean that the Secretary was forbidden to employ any differential which in any way reflects the extent of Class I sales enjoyed by one group of farmers as compared to another, whatever its economic justification; in its view the statute was intended to provide a uniform price for all, irrespective either of historical price advantages nearby farmers may have enjoyed because a higher proportion of their milk was bought for fluid use, or of the economic reasons for those advantages. It therefore held that the farm location differential was not a "market differential" authorized

by the Act. On the other hand, since federal regulation of milk marketing began, the Secretary has consistently acted on the understanding that he is authorized to establish farm location differentials to reflect the higher prices that farmers located near the market traditionally have been able to obtain in marketing their milk. In his view, he is forbidden to consider only that use which milk delivered to a particular handler *actually* is put to, and is not required to abolish historic patterns of use in the market as a whole ("market differentials") reflecting its economic structure. Since the farmer receiving a farm location differential receives it "irrespective of the uses made of [his] milk by the individual handler" to whom he sells, and has customarily received it because of his role in the market, the statute is complied with.

The dispute between court and Secretary can be viewed in another way; the court appears to view these provisions as designed radically to alter the relationships of groups of producers in the market by imposing an equality of price which never previously existed; the Secretary views them as permitting him simply to stabilize the market, for the benefit of all producers, within the traditional pricing structure.

If the Secretary's less radical interpretation of the statutory language finds any support in the context and history of the Act, it is entitled to great weight.

> This is peculiarly true here where the interpretations involve "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in mo-

tion, of making the parts work efficiently and smoothly while they are yet untried and new. *United States* v. *American Trucking Assns., Inc.,* 310 U.S. 534, 549; *Udall* v. *Tallman,* 380 U.S. 1, 16–18; *Red Lion Broadcasting Co.* v. *Federal Communications Comm'n,* No. 2, Oct. Term, 1968, decided June 9, 1969, 37 U.S.L.W. 4509, 4513. To show that it does, we begin by examining the history of milk marketing in the Boston market.

A. NEARBY FARMERS SELLING MILK IN THE BOSTON MARKET WERE ABLE TO COMMAND A PRICE DIFFERENTIAL BEFORE FEDERAL REGULATION AND, WITH LEGISLATIVE AND JUDICIAL APPROVAL, HAVE CONSISTENTLY RECEIVED THE SAME DIFFERENTIAL UNDER FEDERAL REGULATION SINCE IT BEGAN

1. The marketplace and federal regulation prior to the 1935 amendments to the Agricultural Adjustment Act awarded higher milk prices to farms near the Boston market

The situation as it existed prior to adoption of any federal regulation is clearly set out in the most recent decision of the Secretary discussing the farm location differential, 32 Fed. Reg. 9902, 9919; see also Record, *H. P. Hood & Sons, Inc.,* v. *United States,* 307 U.S. 588, October Term, 1938, No. 772, Vol. II, pp. 76–210; *Cranston* v. *Freeman,* 290 F. Supp. 785, 796–801 (N.D. N.Y.) appeals pending, C.A. 2, Nos. 32793–32796. During the years 1927–1930, producers marketing milk in Southboro, Mass. (a Boston suburb) received $1.16 per hundredweight more than producers selling to the Boston market from 191–200 miles distance; between 1923 and 1932, producers marketing in Bedford, another suburb, enjoyed a $1.04 advantage; and between 1920 and 1930, producers marketing in Salem received $1.20–$1.30 more than producers 191–200 miles away. Of these

sums, only about $.54 was attributable to lower costs of transportation and handling; the remainder was attributable to location. (A. 277–278, 283–285, 299, 320, 645–646.) And this economic advantage was not simply due to the fact that the nearby farmers marketed a greater percentage of their milk in fluid form, although that was true (A. 285–286); they "in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located." *Green Valley Creamery, Inc.*, v. *United States*, 108 F. 2d 342, 346 (C.A. 1). Contracts between cooperatives and handlers in the Boston market regularly provided for such differentials long before federal regulation began. *Cranston, supra*, 290 F. Supp. at 800.

The federal license for the Boston market, adopted shortly after passage of the Agricultural Adjustment Act in 1933, preserved rather than sought to destroy this geographic differential structure. Thus, the first Report of the Agricultural Adjustment Administration, covering the period May 1933 to February 1934, describes the methods of stabilizing and increasing producers' prices as follows:

> A uniform method of establishing minimum producers' prices in each market has been determined upon. This method takes into account three things:
>
> First, the competitive value of milk in relation to its value for uses other than as fluid milk at the outer edge of the milk shed. To this competitive value are added differentials for transportation, for quality, *and for convenience of location of the farm.* The prices of competing manufactured products adjacent to

> the milk shed are both those over a recent period and the anticipated prices in the near future.
>
> Second, the history of prices during the predepression decade in the milk shed under consideration. This includes full consideration of price differentials of class 1 or fluid milk over butter prices, changes in hauling costs and any changes made in the market standards and requirements.
>
> Third, the earning power index of the locality. Pay rolls serve as a good index for this purpose in many cities. [USDA: Agricultural Adjustment: *A Report of Administration of the Agricultural Adjustment Act, May 1933 to February 1934* (GPO 1934) p. 171 (emphasis added).

Although market pooling—in which blended prices are computed and paid on the basis of the use of milk in a market as a whole—was extensively used to eliminate violent price fluctuations, this appears to have resulted in the payment of equal prices to all producers only where no well-defined means of apportioning the market among various classes of producers existed. USDA: *Agricultural Adjustment in 1934, A Report of Administration of the Agricultural Adjustment Act* (GPO 1935), pp. 121, 123. Where such means did exist, producers would be assigned "bases" reflecting their economic position in the market. In such markets,

> producers receive[d] the class I price for delivered base milk, and a lower price for all milk they deliver in excess of their delivered bases. Under this arrangement *producers who are at the same distance from the market* and who

> produce milk of the same butterfat test, re-ceive[d] the same price for that proportion of their milk representing their share of the fluid milk and cream market, and the lower price for the excess portion of their milk that must be converted to manufactured uses. [*Id.* at 121-122; emphasis added.]

Thus, under the Boston license, producers who were located near Boston [10] were given bases of 85 percent of their average deliveries, but distant producers were given bases of only 61 percent of their average deliveries; the practical effect of this arrangement was to give the nearby producers a differential of about $.46 *in addition to* transportation differences. *Cranston, supra,* 290 F. Supp. at 800–801; A. 287, 294.

2. The 1935 amendments, which embodied the provisions here involved, simply carried forward the previous regulatory pattern under slightly modified forms, and the Secretary promptly continued the provision for a differential payable to dairy farmers near the Boston market

In 1935, the license provisions of Section 8(3) of the AAA were supplanted by the Order provisions of Section 8c(5) here involved. Those Order provisions, too, hewed closely to the practices which had developed prior to federal regulation and had been continued under the licenses. Indeed, the Committee Reports recommending passage of the 1935 amendments

[10] "Admittedly, under the language of the license the preferential base was granted to farmers who delivered their milk directly to [plants within 35 miles of the city]. But * * * only producers whose farms were nearby the city could deliver to the city plants because of the delivery methods then in existence." *Cranston, supra,* 290 F. Supp. at 800.

state that the terms of Section 8c(5), dealing with milk marketing orders, "follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present Section 8(3) * * *." H. Rep. 1241, 74th Cong., 1st Sess. (1935), p. 9; S. Rep. 1011, 74th Cong., 1st Sess. (1935), p. 19.

Accordingly, the Act gave the Secretary continued authority to use the three techniques of market control which had been employed under the 1933 Act. The simplest of these, embodied in Section 8c(5)(A), enables him to classify milk according to use, to fix uniform, minimum prices for each use, and to require all handlers to pay those prices for the milk they buy."[11] No blended price is calculated in this case. The second technique, embodied in Section 8c(5)(B)(i), involves pooling by individual handlers; a single, uniform, blended price is calculated for each handler on the basis of the uses to which that particular handler puts the milk he buys. The third technique, embodied in Section 8c(5)(B)(ii) and the technique involved in this case, is that of marketwide pooling, corresponding to the market pools of the licenses. That is, producers are paid a single, uniform, blended price calculated on the basis of milk use in the market as a whole, so that it does not matter how the particular handler a producer sells to uses the milk he buys. Under each technique, the uniform price is

[11] The counterpart of § 8c(5)(A) in the licenses is explained in USDA: *Agricultural Adjustment in 1934*, *supra*, at pp. 120–121 (GPO 1935).

simply a starting point for the determination of how much the producer is to receive; it is subject to adjustments for volume, market, and production differentials customarily applied by handlers under the order, for the grade or quality of the milk delivered, and for the location at which delivery is made.

We discuss these three techniques in greater detail below, at pp. 42–48. We also show, at pp. 53–59, that the farm location differential comes within the statute's reference to market differentials customarily applied. In explaining the provision for market differentials, the Committee Reports describe a situation different from the farm location differential, and the court below took that description to be exclusive. 402 F. 2d at 673. That issue requires particular examination of the legislative history. For the present, it is sufficient to note that the overall impression given by the history of the Act as a whole is one of reiteration, not radical change. Its provisions, in general, readopt the institutions of the 1933 Act, and this was done with a specifically defensive purpose—to provide sufficient detail to avoid a holding in the courts that an unconstitutional delegation of power had been made, as had recently occurred in *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495. Thus, the Committee Reports observe that the 1935 amendments "substitute the word 'order' for 'license' in order more accurately to describe the nature of the Secretary's regulatory power," H. Rep. No. 1241, p. 7, not to make sweeping changes in the scope of that power.

The Secretary promptly acted upon his understanding that, in the words of the Committee Reports, *supra,* p. 31, the new Act permitted him to "follow the methods employed by cooperative associations * * * and the provisions of licenses * * *," under which had been "added differentials for transportation, for quality, and for convenience of location of the farm." USDA: *Agricultural Adjustment* * * * May 1933 to February 1934, *supra,* p. 171. He authorized continued use of farm location differentials. The Boston Order, then known as Order No. 4 (A. 223–233, 248), was one of the first Orders he issued under the 1935 amendments. It provided, from the outset, for a differential payable only to a producer "whose farm is located within forty (40) miles of the State House in Boston" (A. 231).[12] The amount of the differential was in effect the same as had been payable under the Boston license—about $.46 in excess of the difference in transportation and handling costs between nearby and distant milk. The Secretary found that "the payment of class I prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, due to the greater availability of their milk for Class I use" (A. 224).

[12] The differential was also conditioned on delivery of the milk within the same area. It was in addition, however, to the $.21 differential paid to *all* producers for such delivery, *infra,* pp. 61–62; and it was unlikely that any nearby farmer able to sell in the city market would have delivered his milk anywhere else.

3. The Agricultural Marketing and Agreement Act of 1937 reenacted the prior regulatory scheme without material change, and specifically endorsed the Orders adopted under that scheme

The Secretary's reading of the Act gained Congressional approval shortly after the promulgation of the Boston Order. By 1937, the operation of the Agricultural Adjustment Act was again plagued with litigation. The processing tax embodied the Act had been declared unconstitutional in *United States* v. *Butler*, 297 U.S. 1, and several district courts, including the District Court for the District of Massachusetts,[13] then ruled that the processing tax provisions were not severable from the rest of the AAA, and that the whole Act was therefore invalid. The Boston Order was suspended, and the market thrown into chaos, until passage of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. 601, on June 3, 1937.[14]

Congress passed the 1937 Act to save the marketing order provisions of the AAA by reenactment. The Order provisions of Section 8c(5) were reenacted *verbatim*. This reenactment, and the congressional silence which has followed for thirty years, are in themselves sufficient indication that Congress approved the Secretary's interpretation of those provisions to authorize differential payments to nearby farmers. *E.g.*, *Morgan* v. *Commissioner*, 309 U.S. 78, 81; *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 99; *Queensboro Farm*

[13] *United States* v. *David Buttrick Co.*, 15 F. Supp. 655, reversed, 91 F.2d 66 (C.A. 1), certiorari denied, 302 U.S. 737

[14] See *H. P. Hood & Sons, Inc.* v. *United States* 307 U.S. 588, 592.

Products v. *Wickard,* 137 F.2d 969, 977 (C.A. 2). At the time, Congress was aware that as a result of the doubt cast on the validity of the milk marketing orders, "producers of milk, *particularly in New England,* are now suffering from a seriously demoralized price situation." H.Rep. 468, 75th Cong., 1st Sess. (1937), p. 2 (emphasis supplied). Then and now, use of the differential has been a significant factor in milk marketing [15]; as recently as 1965, 40 percent of the milk marketed under federal regulation was marketed in milksheds subject to a farm location differential.[16] Congress amended Section 8c(5), without questioning the Secretary's use of the differential, in that year. P.L. 89–321, 79 Stat. 1187, 7 U.S.C. 608c(5).

Congress, however, did not leave the matter to implication. It provided in Section 4 of the 1937 Act, 7 U.S.C. 672(a) (emphasis supplied), that:

> Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or act of the Secretary of Agriculture in connection with any such agreement,

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[15] See H. Doc. 501, 74th Cong., 2d Sess. (1936), pp. 183–184; Hearings before Subcommittee on Dairy and Poultry, House Comm. on Agriculture, Dairymen's Class I Base Plan, 89th Cong., 1st Sess. (1965), p. 143.

[16] The four milksheds in which nearby differentials were employed—Massachusetts-Rhode Island, Connecticut, New York-New Jersey, and Chicago—accounted for 21.8 billion pounds of milk of a total of 54.4 billion subject to federal regulation in that year. USDA Statistical Bulletin No. 403, Federal Milk Order Market Statistics, Annual Summary for 1966 (1967), pp. 22–23.

> license, or order which has been executed, issued, approved or done under the Agricultural Adjustment Act, or any amendment thereof, but *such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized and confirmed.*

This section explicitly provided that the existing Orders and their provisions were lawful. One of those provisions was that of the Boston Order, Order No. 4, for a premium based upon farm location, designed to compensate nearby producers for the greater availability of their milk for Class I use (A. 224, 231), and in effect granting a differential in the same amount ($.46/hundredweight) to the same class of producers as the farm location differentials of all subsequent New England Orders (A. 285–287; *Cranston* v. *Freeman, supra,* 290 F. Supp. at 800–801).[17]

The court below erred in holding that Section 4 of the 1937 Act was designed merely to prevent "technical abatements" due to reenactment, 402 F. 2d at 670. The House Report recommending adoption of the Agricultural Marketing Agreement Act explained that:

> Section 4 of the bill negatives any implication that its effect is to invalidate or cast doubt on action heretofore taken under the agreements and orders provisions. The section *also expressly ratifies, legalizes, and confirms such action.* Judicial sanction for such a provision is found in *Mattingly* v. *District of Columbia* ((1878), 97 U.S. 687, 690); *United States* v.

[17] We deal below, at pp. 59–63 with the mistaken contention of the court of appeals that there were significant differences between the post-1937 differentials and the earlier ones.

Heinzen ((1907), 206 U.S. 370, 382); *Tiaco* v. *Forbes* ((1913), 228 U.S. 549, 556); *Rafferty* v. *Smith, Bell & Co.* ((1921), 257 U.S. 226, 232); *Isbrandtsen-Moller Company, Inc.* v. *United States et al.* (No. 307, October Term, 1936, United States Supreme Court, decided Feb. 1, 1937); and *Swayne & Hoyt, Ltd., et al.* v. *United States* (No 494, October term, 1936, United States Supreme Court, decided Mar. 1, 1937). [H. Rep. No. 468, 75th Cong., 1st Sess. (1937), p. 4.] [Emphasis supplied.]

Thus, the section was designed to accomplish two objectives: (1) to avoid technical abatements and (2) "also" to ratify, legalize and confirm existing Orders. The decisions of this Court cited to support the latter purpose, all deal with congressional ratification or affirmation of prior Executive action, rather than measures taken only to avert technical abatements.

There was an important reason for explicitly affirming the prior administrative acts. In the preceding years, the Secretary's efforts at effective regulation of agricultural prices—particularly milk prices—had been thwarted by multiple litigation brought by handlers that attacked virtually every major feature of the licenses and orders.[18] For example, the 1936 Boston Milk Marketing Order had had to be suspended only six months after it was instituted, bringing chaos to that market. Representatives of Vermont farmers, in general not entitled to the farm location differential, pleaded with Congress to have the Order reinstated. See, *e.g.*, 81 Cong. Rec. 4964 (1937). No-

[18] See, *e.g.* the lists of cases involving milk marketing in *United States* v. *Seven Oaks Dairy Co.*, 10 F. Supp. 995 (D. Mass.), and in USDA: *Agricultural Adjustment in 1934*, *supra*, pp. 253–260 (GPO 1935).

where is there evidence that they asked Congress to abolish the Secretary's established practice of paying a nearby differential, either in 1937 or subsequently. They, as well as Congress, knew that the Secretary's prior orders embodied the kind of provisions Congress intended him to employ, and wanted Congress to rescue them from a morass of litigation by making this clear through express congressional approval of his actions.

4. Milk Marketing Orders adopted upon passage of the 1937 Act included farm location differentials, which gained contemporaneous judicial approval

Following passage of the 1937 Act, the 1936 Boston Order was immediately reinstated; although the mechanics of the farm location differential were modified, that differential continued to provide an adjustment of about $.46 per hundredweight to farms located near the Boston market. Shortly thereafter, the Secretary adopted a Marketing Order for New York which embodied similar provisions. *United States* v. *Rock Royal Co-operative,* 307 U.S. 533, 567. Both Orders were immediately made the subject of litigation; the farm location, or nearby, differentials were among the provisions attacked.

The challenge to the farm location differential of the Boston Order was decided in the Court of Appeals for the First Circuit, *Green Valley Creamery, Inc.* v. *United States,* 108 F. 2d 342, 346. Writing for a unanimous court, Judge Magruder upheld that provision in the following words:

> Appellants further challenge the validity of certain differentials provided for in Article

VIII, Section 4, paragraphs 3 and 4, of the Order. The section is set forth in the footnote. It is argued that differentials based upon the location of the farms of producers are not authorized by Section 8c(5)(B)(ii)(c) of the Act, which authorizes only differentials based upon "the locations at which delivery of such milk is made." There was evidence before the Secretary to the effect that similar differentials in favor of nearby farms had existed in the Boston market for many years. Various factors were mentioned as accounting for this, including their greater accessibility to the market, and their greater dependability as sources of supply, because, as experience showed, the nearby farms had a more uniform level of production throughout the year. These producers were also potential dealers, who might establish their own milk routes in competition with handlers in the Boston market, if prices were not acceptable. Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted in the Order so as not to disturb the status quo in this respect. Milk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market; and thus, paragraphs 3 and 4 of Section 4, Article VIII, may be said to prescribe differentials having relation to locations at which deliveries are made. This argument need not be labored, however, for the differentials can readily be sustained under Section 8c(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by

handlers subject to the Order. They are called "location differentials" in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market.

Here again it may be observed that similar differentials were contained in the original Order No. 4, effective February 9, 1936, under an administrative interpretation of provisions of the Agricultural Adjustment Act of 1933, as amended (49 Stat. 750), which were re-enacted without change in the Agricultural Marketing Act of 1937.[19]

The challenge to the "nearby differential" of the New York Order was decided in this Court. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 567. Rock Royal Co-operative made the same contention respondents and the court below make today: "* * * [T]he payments are neither contemplated nor authorized by the Act. They are repugnant to 'equalization,' which the statute sought to accomplish. They were a basis of inequality" (Brief of Rock Royal Co-operative, Inc., Oct. Term, 1938, No. 771, p. 76).

[19] The court below attempted to distinguish the ruling in *Green Valley* as dictum, on the ground that the holding there was that the handlers lacked standing to raise the issue. 402 F. 2d at 671. However, the standing point in *Green Valley* more accurately was an alternative and clearly secondary ground of decision; the First Circuit's brief mention of the issue was prefaced with the word "Furthermore" (108 F. 2d at 346). Moreover, regardless how the First Circuit's approval of the differential is characterized, its view has reasonably been relied upon by the Secretary and thousands of New England farmers for 30 years, and clearly was entitled to great deference, if not *stare decisis* effect, by any court siting outside the affected area of New England.

The United States defended the differential on the same rationale of availability for fluid use that the court below found to violate the Act:

> * * * The 18 counties to which the nearby differentials apply are all very close to the marketing area and are separated from the rest of the milkshed by nonproductive mountainous territory * * *. The milk of producers in these counties is readily available for use in the fluid market and producers in these counties have always enjoyed an almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages. Accordingly, it was reasonable that these producers should receive a special differential.* * * [Brief of the United States, No. 771, Oct. Term, 1938, pp. 60–61.]

This Court held: "The Act authorizes such an arrangement. § 8c(5)(A)." 307 U.S. at 567.

Since *Rock Royal* involved not producers but handlers, it involved Section 8c(5)(A) rather than 8c(5)(B) of the Act, and the court below sought to distinguish it on this ground. 402 F. 2d at 674, n. 40.1. The district court in *Cranston* v. *Freeman, supra,* 290 F. Supp. at 806, showed the error of that view:

> It is true that *Rock Royal* was a suit involving handlers and not producers and that Section 8c(5)(A) applies to the former rather than the latter. But Section 8c(5)(A) provides for the same uniform prices subject to the same adjustments as set out in identical language in Section 8c(5)(B) applying to producers. Therefore, the Supreme Court's holding that Section 8c(5)(A) "authorizes such

an arrangement" is most certainly authority that Section 8c(5)(B) authorizes the same arrangement.

Moreover, there was no difference in purpose between the *Rock Royal* "nearby differential" and the Boston farm location differential. Both sought to compensate farmers near the city for the economic advantages of their location, such as greater availability of their milk for fluid use—the purpose which the court below found to be forbidden by the Act.[20]

B. THE SCHEME OF THE ACT PERMITS USE OF A FARM LOCATION DIFFERENTIAL

1. Such a differential does not contravene the requirement that, in a marketwide pool, handlers pay prices which are uniform for the market, "irrespective of the uses made of such milk by the individual handler to whom it is delivered"

a. That requirement does not forbid consideration of patterns of use enjoyed by groups of producers in the market

In overturning the differential, the court below relied heavily on its view that the differential is inconsistent with the language of Section 8c(5)(B)(ii) of the Act, 7 U.S.C. 608c(5)(B)(ii), which states that in a marketwide pool, handlers are to pay producers a uniform price, "irrespective of the uses made of such milk by the individual handler to whom it is delivered." 402 F. 2d at 663; *Blair* v. *Freeman,* 370 F. 2d 229 (C.A.D.C.). There is no such inconsistency; the

[20] Nor can it be urged that the handlers in *Rock Royal* lacked standing to challenge the Secretary's authority to employ the differential. As the opinion of this Court makes clear, 307 U.S. at 567, part of the cost of the differential was "absorbed by the handlers" who paid it.

differential is fully compatible with the purposes of the Act.

No producer receives a higher price under the Massachusetts-Rhode Island Order because of the uses made of the milk by the particular handler with whom he deals. A nearby farmer who sells to a handler who makes only manufactured milk products will receive the same price as one who sells to a handler who deals in Class I uses only; both are entitled to the differential, and therefore receive more than a distant farmer, whatever use is made of the distant farmer's milk by his handler. Thus, the differential is paid only because of farm location, and irrespective of actual use. True, there is a departure from the general command of "uniform price"; but whether that departure is proper is governed, not by the "uniform price" language, but by the next sentence of the section, which provides that the uniform prices are subject to certain adjustments, including adjustments for "volume, market, and production differentials customarily applied by the handlers subject to such order * * *." It is circular to try to resolve the question whether the farm location differential is an authorized adjustment of the uniform price simply by referring to the provision for uniform price.

When the regulatory techniques of Section 8c(5) are viewed in their entirety, we believe it becomes even clearer that the differential does not offend the Act as a whole, or its "irrespective of the uses" language. As already noted, the section provides three different forms of regulation, each reflecting earlier

forms of self-regulation by dairy cooperatives and the techniques of the 1933 Agricultural Adjustment Act. The problem which they were all designed to meet was that of destructive competition among producers seeking to sell their milk at the highest price or to those handlers who used the most milk in fluid form—competition which together with an unmanageable surplus had driven down the price received by all producers. See *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 549–550. Section 8c(5) begins by providing that Milk Marketing Orders "shall contain *one or more* of the following terms and conditions * * *" (emphasis added). A close examination of each reveals the particular function of the marketwide pooling concept of Section 8c(5)(B)(ii) and its "irrespective of the uses" language.

The first term or set of terms authorized is contained in Section 8c(5)(A), 7 U.S.C. 608c(5)(A). It allows the Secretary to provide terms classifying milk in accordance with the form in which it is used (*e.g.*, Class I and Class II), to fix or provide a method for fixing minimum, "uniform" prices for each use classification, and to require all handlers to pay those prices, subject only to adjustments for "volume, market, and production differentials customarily applied * * *," for grade or quality, and for the locations at which delivery is made. Used alone, this would be a relatively simple form of regulation, adequate to meet the most brazen form of handler unfair practices, in which a handler forces neighboring farmers to bid each other down by offering them different prices for milk used the same

way (*e.g.*, as cheese). The Secretary could prevent such practices by making handlers pay the same price for all milk they use in the same way, subject to adjustments which he, not the handler, establishes.

But other competitive evils in milk marketing cannot be met by use of Section 8c(5)(A) alone, and in fact a pure Section 8c(5)(A) plan has never been used. If the handler can chose to whom to pay the uniform price for Class I milk and to whom to pay the lower uniform price for Class II milk, favoritism, abuses, and destructive competition remain possible—again with the possibility of driving down prices. The "handler pools" of Section 8c(5)(B)(i), 7 U.S.C. 608c(5)(B)(i), give the Secretary a means of dealing with this competitive evil. In handler pools, each handler must pay "uniform prices," calculated on the basis of his particular mix of the various uses of milk, for all milk he buys. These prices, too, are subject to the adjustments for volume, market and production differentials customarily applied, quality, and location of delivery; again, these adjustments are set by the Secretary in the Order, not by the handler.

Because the uniform price of handler pool milk varies from handler to handler, handler pools are inadequate to deal with another form of possibly destructive competition—competition among producers to sell to the handlers with the highest proportion of fluid milk usage. Such handlers would have the highest uniform prices under handler pool regulation. The marketwide pools of Section 8c(5)(B)(ii), 7 U.S.C. 608c(5)(B)(ii), enable the Secretary to deal with this

problem. Since the "uniform prices" in a marketwide pool are calculated on the basis of the mix of uses of milk in the market as a whole, subject to the same adjustments made by the Secretary, producers have no incentive to sell to any particular handler. They receive the same price "irrespective of the uses made of [their] milk by the individual handler to whom it is delivered."

These provisions are *not* on the whole designed to eradicate all differences in prices to farmers as the result of geographical differences. Farmers with limited access to the Class I market could not have sold much of their milk for that use under the Section 8c(5)(A) technique, and in fact might have been prevented from undercutting farmers near the markets through the setting of uniform prices by the Secretary. Nor would the situation have been much different under handler pools, since in the 1930's handlers buying milk at a substantial distance from the center of the market generally would manufacture much of that milk in the country (A. 320, 434); their uniform prices would therefore have been lower than those of handlers near the center.[21] And, in discussing the validity of the marketwide pool in *United States* v. *RockRoyal Co-operative, Inc., supra,* 307 U.S. at 571-573, this Court took comfort in the fact that instead of commanding an absolute and possibly unfair "equal-

[21] There were eight handler pools in effect in 1965, accounting for 3.96 billion pounds of milk, or over 7 percent of the total under federal regulation. USDA, Statistical Bulletin No. 403, n. 16, *supra*, pp. 12, 22–23.

ity", "the pooling has differentials to cover the variations of quality and location," *id.* at 573.

In sum, the marketwide pooling technique—

> * * * is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing. [*United States* v. *Rock Royal Co-operative,* 307 U.S. at 572.]

As compared to the other techniques available, the marketwide pool permits the Secretary to deal with more sophisticated forms of price-cutting or price-disruptive competition. There is no evidence, however—and careful examination of the court of appeals' opinion will reveal that it suggests none—that Congress intended to force the Secretary, as a prerequisite to dealing with these competitive evils, radically to alter natural geographic price differences resulting from the greater accessibility of nearby milk, and clearly permissible under the other forms of regulation.[22] Each of the three plans calls for "uniform"

[22] For commodities other than milk, Congress decreed that Orders "shall be limited in their application to the smallest regional production areas or regional marketing areas * * * which the Secretary finds practicable." Section 8c(11)(B), 7 U.S.C. 608c(11)(B). A similar geographical restriction was not imposed upon milk marketing orders. The Committee Reports, however, state that the 1935 Amendments *in toto* were designed "[s]o that proper recognition may be given to local dif-

prices; there is no inherent inconsistency between that language and the fact that all nearby farmers may receive uniformly higher prices. The thrust of all the authorized plans was *stabilization* not disruption of long-standing economic relationships, and the "irrespective of the uses" language of the marketwide pool simply describes that pool's broader effect.

b. Even if traditional patterns of use may not be considered as such under the Act, the Secretary may adopt differentials which reflect the economic realities underlying those patterns

The existence of the the premium which is compensated by the farm location differential can be explained at two levels: first, as a product of the historical fact that nearby farmers were consistently able to sell a higher proportion of their milk at higher prices for Class I uses; second, as a product of economic advantages which determined that historical fact—evenness of production, proximity to the largest market for and to dealers specializing in fluid uses, reliability as a source of supply, and so on. Similarly, there are two possible readings of the Secretary's rationale for adopting the differential: first, that it is designed to compensate nearby producers for their

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ferences which may exist in production or marketing methods or conditions * * *." H. Rep. 1241, 74th Cong., 1st Sess. (1935), p. 9; S. Rep. 1011, 74th Cong., 1st Sess. (1935), p. 9. The manner in which Congress contemplated that such local differences would be handled in milk marketing orders is quite evident—by recourse to the adjustment provisions of Section 8c(5), which were to "follow the methods employed by cooperative associations * * * prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses * * *," *ibid.*, and which did take such differences into account.

larger share of the fluid market prior to marketwide pooling; second, that it is designed to compensate them for economic values or services they supply the market, such as accessibility as a source of supply. The two are not mutually exclusive; the various values nearby milk had, in the years just before federal regulation began, underlay the fact that at that time such milk was sold at a premium.

The court of appeals appeared to believe that both rationales were therefore improper; it did not remand the case to the Secretary once it concluded that the differential was based chiefly on the "condemned factor" of historical usage. (402 F. 2d at 665).[23] Rather, it indicated that the Act, in its view, did not authorize any differential based on farm location, and that even if there were sound economic bases for the differential, the Secretary was required to leave the matter of extra compensation to individual handlers.[24]

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[23] Of course, if the reason given by an agency for a regulatory provisions improper, but the provision might be justifiable on some other proper ground, the matter must be remanded to the agency. *Securities and Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194; *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607; Cf. *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76, 99.

[24] Although the Act makes plain as to each of the three regulatory techniques that it is the Secretary, not individual handlers, that is to set the authorized differentials, the court below expressed the view, 402 F. 2d at 672, as it had in *Blair*, 370 F. 2d at 238, that it must be left to the handlers to pay whatever premium is justified. To the extent this view is independent of the view that the nearby differential is unauthorized, it is clearly in error. Leaving it to individual handlers to pay such differentials as each feels warranted is an invitation to uneven treatment of farmers similarly situated, and thus possibly to the same sort of disruptions of the market that regula-

Even assuming that the "irrespective of the uses" language precludes the Secretary from relying on historical patterns of use, however, we can see no basis for the court of appeals' conclusion that underlying economic values cannot be compensated merely because of their *association* with those patterns. 402 F.2d at 664–666. In a statutory plan relying upon "[c]lassifying milk in accordance with the form in which * * * it is used", Section 8c(5)(A); derived from "the methods employed by cooperative associations * * * prior to enactment" of the Agricultural Adjustment Act "and the provisions of licenses * * *," H. Rep. No. 1241, *supra*, p. 9; and allowing for differentials "customarily applied," references to usage and history are proper. Indeed, most differentials payable under Federal Orders have some relationship to "sales advantage for fluid use"; for example, the butterfat differentials authorized by Section 8c(5)(B) as a quality differential are paid because a higher butter-

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tion is meant to prevent. It is true that in *Blair*, the Secretary stated that he was not basing his retention of the New York-New Jersey nearby differential upon the existence of extra values, which could be paid for by individual handlers. 22 Fed. Reg. 4194, 4213. But in promulgating the Order involved in the present case, he specifically linked the farm location differential with the "higher values * * * attached to milk produced near the principal consumption centers * * *" (29 Fed. Reg. 11213). If he is authorized to promulgate a differential which preserves those higher values, the fact that he might leave it up to the handlers, as he was willing to do in New York-New Jersey, is immaterial. And, of course, there may well be reasons for the differential which individual handlers would not consider of discrete value to them—such as the promotion of orderly marketing conditions.

fat content makes milk more attractive for fluid usage. See 16 Fed. Reg. 9255 (1951). Similarly, the "county station" differential paid for direct delivery to city plants is paid for convenience to Class I usage; manufacturing of milk is mostly done upcountry. See 32 Fed. Reg. 9905 (1967).

Finally, the court erred in concluding that the Secretary had based his adoption of the differential chiefly on the historical fact of usage patterns rather than on the economic considerations underlying those patterns. In promulgating the 1936 order he stated (A. 224):

> the payment of Class I prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, due to the greater availability for Class I use. * * *

Although the court of appeals found itself "unable to distinguish" between this reliance on "availability for Class I use" and the "consideration of historical fluid use patterns" which it believed to be condemned, 402 F. 2d at 665, a reasonable distinction can be drawn. Cf. *Udall* v. *Tallman, supra,* 380 U.S. 1, 16–18. "*Availability* for Class I use" more readily refers to the economic reasons for those patterns than to their simple existence. That the "economic reasons" reading is the correct one is strongly suggested by the fact that when the Order was reissued in 1937, just a year later, the changes then made in the form of the farm location differential were said to be justified "in view of the changes in economic conditions since the

date of the original findings * * *" (2 Fed. Reg. 1331).[25]

There are additional factors which point to the same conclusion. Thus, in *Green Valley Creamery,* the court noted that it was not simply a matter of which farmers sold the most milk in fluid form; nearby producers could command "somewhat more favorable prices *for their fluid milk.*" 108 F. 2d at 346 (emphasis added) It is true that some decisions promulgating secondary orders not directly involved here, notably the Southeastern New England Order, 23 Fed. Reg. 8225, 8238 (1958), refer to the effect of the differential in preserving the *status quo, i.e.,* the existing shares of Class I use. Even there, however, the Secretary referred to value considerations, finding that adoption of a farm location differential "will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization." *Ibid.* This reasoning surely is *not* just one of historical use patterns. The 1964 opinion of the Secretary under review speaks in terms of the "customarily higher values" of nearby milk (29 Fed. Reg. 11213). The court of appeals, again proceeding on its erroneous reading of the Act and drawing the inference least favorable to the Secretary, surmised that this state-

[25] The Secretary has not simply assumed that because the differentials were once approved, they remain economically valid. The question whether they should be continued or extended has been the subject of repeated administrative inquiry. See, *e.g.,* 14 Fed. Reg. 7089 and 7102 (1949); 16 Fed. Reg. 9255 (1951); 22 Fed. Reg. 4213 (1957); 23 Fed. Reg. 8238 (1958); 24 Fed. Reg. 1063 (1959); 29 Fed. Reg. 11213–11214 (1964); 32 Fed. Reg. 9919 (1967).

ment "may be only a less direct way" of referring to the nearby producers' past greater share of the fluid market, instead of other values. Read as whole, however, the 1964 decision tends to point in a different direction.

Thus, the Secretary rejected a proposal to increase the differential when he found that the proponents of the increase were relying on the loss of other differentials and had not shown an increase in inherent value of the nearby milk (29 Fed. Reg. 11214). Similarly, he made clear that he was amenable to giving further consideration to the matter upon a solid "study of the economic and legal aspects" of the differentials (*ibid.*). And his most recent consideration of the differential, which he again found to be required for effective market regulation, plainly reflects such study, not simple reliance on historical patterns. 32 Fed. Reg. 9918–9920 (1967).

2. *As the First Circuit held in* Green Valley Creamery, *the farm location differential is a "market differential" authorized by the Act*

Among the adjustments which the Secretary is permitted to make to price under all three of the regulatory schemes embodied in Section 8c(5)(B) is an adjustment for "volume, market, and production differentials customarily applied by the handlers * * *." For thirty years, the Secretary has understood the phrase "market differentials" to refer to any price differential handlers customarily applied in the market. The farm location differentials of the various Boston and New England Milk Marketing Orders drew

their authority from that phase.[26] *Green Valley Creamery, Inc.* v. *United States, supra; Cranston* v. *Freeman, supra.* The court below, however, decided (402 F. 2d at 672–673) that the phrase "market * * * differentials" encompassed only a single kind of differential, different from the farm location differential.

The court based its view on discussion appearing in the Committee Reports in which the Committees ostensibly described each of the three types of differentials referred to in the "customarily applied" phrase. The Reports describe the market differential as—

> a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because

[26] *Blair* v. *Freeman*, 370 F. 2d 229, involved the nearby differential of the New York-New Jersey Milk Marketing Order. The Secretary's opinion adopting that differential relied solely and specifically on a different source of authority—the Secretary's authority under Section 8c(5)(B) to adopt differentials reflecting "(c) the locations at which delivery of such milk [was] made." The only *holding* in *Blair* was that since not all milk is delivered to handlers at the producers' farms, farms are not "locations at which delivery * * * was made," and the nearby differential could not be supported under that provision. *Blair* is thus technically distinguishable from the present case: "market * * * differentials" were not there involved. There were, of course, extensive *dicta* regarding the meaning of "market differential" and of the "irrespective of the uses" language of Section 8c(5)(B)(ii), and the court's reliance on those *dicta* below requires that we demonstrate their error.

> of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets. [H. Rep. No. 1241, 74th Cong., 1st Sess., p. 10; S. Rep. No. 1011, 74th Cong., 1st Sess., p. 10.]

If this is an exclusive definition, the farm location differential could not qualify as a "market differential," since it does not compensate for delivery and since it was developed in Boston, the primary market. But the reference to "market differential" has never been read so narrowly, and should not be so read today.

First, the legislative history of the 1935 amendments, viewed as a whole, shows a strong contrary current of endorsing all prior regulatory practices, suggesting that "the narrow definition of market differentials contained in the Committee reports must be read as illustrative rather than as restrictive." *Cranston, supra,* 290 F. Supp. at 800. Since the principal pricing features of the 1935 amendments closely follow the licenses, it is reasonable to infer that the differential provisions, too, were designed to follow the licenses and to authorize the Secretary to adopt in milk marketing orders at least the more usual differentials that existed before 1935. The farm location differential was a prominent one, which in the 1930's represented as much as 20 percent of the total price nearby farmers received for their milk (A. 426).[27]

[27] Nearby differentials were of enough importance to warrant mention in the initial report of the Agricultural Adjustment Administration, quoted above, as well as in a Federal Trade Commission Report on Distribution and Sale of Milk and Milk

Had anyone then thought that the 1935 amendments would require its elimination, there would surely be a great deal of legislative history directly in point. But so far as we can determine, there is only one bit of legislative history dealing directly with nearby differentials. That is a colloquy between Senator Murphy, the Floor Manager of the bill, and Senator Copeland of New York, 79 Cong. Rec. 11139-11140 (1935), which clearly evidences an understanding that differentials based on farm location were permissible as "volume, market and production differentials customarily applied * * *" if it was "the present practice of business" (79 Cong. Rec. 11140) to pay them. Significantly, this colloquy took place after the issuance of the Committee Reports. Cf. *Chicago, M., St. P. & P. R. Co.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 470–475.

We showed above, *supra*, pp. 30–32, that in general the 1935 amendments were adopted not to introduce a radically new pricing scheme for milk—as would have occurred had the nearby differentials been forbidden—but to reinstate the prior regulatory scheme in a manner that would avoid *Schechter* delegation problems. In this light, the new reference to "volume, market and production differentials customarily applied" appears to give the Secretary a valuable tool with which to meet a *Schechter* contention: on the

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Products, H. Doc. 501, 74th Cong., 2d Sess. (1936), pp. 183–184. Since prices have risen while the amount of the differential has remained constant, the differential now represents only about 8 percent of the blend price in New England markets (A. 360–361, 463).

one hand, the language is broad enough to permit continued exercise of the discretion the Secretary had under the license provision; on the other, the requirement of customary application makes clear that his discretion was not unbounded, and provides a relatively fixed standard for its exercise—the past practices of cooperatives and under the licenses. The Secretary is unlikely to have viewed *Schechter* and other like decisions as mandating or encouraging him to regulate *more* extensively against the [illegible] of the free market than he had already undertaken to do, and in fact he did not do so. Yet the ruling below would have Congress requiring him radically to alter the relationships of groups of producers in the market by imposing an equality of price which had never previously existed in the cooperative or licensing programs.

All intervening readings of the amendments have ignored the Committee Reports' definition, giving "market differential" its natural, broad meaning. Thus, the Secretary has viewed Section 8c(5)(B) as authorizing "adjustments with respect to quality, location or other differentials customarily practiced in the market"; see U.S.D.A.: *Agricultural Adjustment 1933 to 1935: A Report of Administration of the Agricultural Adjustment Act, May 12, 1933, to December 21, 1935* (GPO 1936), p. 269, and, of course, as permitting farm location differentials. *Supra,* p. 28. In *United States* v. *Rock Royal Co-operative, Inc.,* 307 U.S. 533, 571, this Court described Section 8c(5) as allowing "differentials for quality, location or other

usual market variations * * *." And see *Queensboro Farms Prods.* v. *Wickard,* 137 F. 2d 969, 977 (C.A. 2). *Green Valley Creamery, supra,* not only sustained the farm location differential as a market differential, but also upheld a separate provision for differential payments to associations of producers for marketing services they performed as a market differential. Judge Magruder stated that "The phrase 'market differential,' undefined as it is in the Act, is reasonably susceptible of such an interpretation." 108 F. 2d at 345. In *Brannan* v. *Stark,* 342 U.S. 451, 466, this court endorsed that holding of *Green Valley*:

> Many provisions for payments to cooperatives appearing in other orders have been of a kind specifically authorized by the statute. Thus, the provision of the first Boston Milk Order for a price differential as between cooperative milk and noncooperative milk was upheld in *Green Valley Creamery* v. *United States,* as a "market differential" authorized by § 8c(5)(A)(1).

Finally, as a factual matter, the example given in the Reports is particularly inapt. The differential apparently there described, often known as the "country station" differential, reflects savings in handling costs resulting from delivering milk directly to a city instead of through a country plant.[28] But country station differentials, despite the description in the Committee Reports, are not usually paid in secondary mar-

[28] Compensation for direct delivery is now one component of the "zone differential" of the Massachusetts-Rhode Island Order, 7 C.F.R. 1001.62, which deals with savings in both transportation and handling costs.

kets. *Cranston, supra,* 290 F. Supp. at 798. And, again despite that description, country station differentials are readily contained in the reference to adjustments for "the locations at which delivery * * * is made"; consequently, if only such differentials qualify as "market differentials," the reference to market differentials is redundant.[29] In any event, the whole question was mooted two years later, in 1937, when the Congress by reenactment specifically ratified what the Secretary had done—which included recognition of a farm location differential on the basis of its customary use in the market. See *Red Lion Broadcasting Co., supra,* No. 2, Oct. Term 1968, decided June 9, 1969, sl. op., p. 13.

3. The farm location differential now employed in the Massachusetts-Rhode Island Order is essentially the same as the one Congress ratified

The court below appears to doubt whether farm location differentials—or at least this differential—were differentials "customarily applied by the handlers" in the market. In promulgating the Order under attack, the Secretary found that "Such farm location differentials have been in effect under the several New England orders since the inception of the Orders", that they reflect "historical price relationships by location which prevailed in these markets", and that there

[29] The Court below stated that the adjustment for "the locations at which delivery of such milk is made," Section 8c(5), "plainly * * * was designed to recognize differences in transportation costs only * * *," 402 F. 2d at 672. But had Congress desired so to restrict the provision, it would have been simple to provide for an adjustment "for differences in transportation costs."

were "customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed." 29 Fed. Reg. 11213 (1964). On the basis of the history set out at length above, *supra* pp. 8–13, the other courts which considered the question have agreed that "similar differentials in favor of nearby farms had existed in the Boston market for many years," *Green Valley Creamery, supra,* 108 F. 2d at 346; *Cranston, supra,* 290 F. Supp. at 800; these practices were embodied in the Boston license under the Agricultural Adjustment Act of 1933 and the first Boston Milk Marketing Order, Order No. 4, under the 1935 amendments. *Id.* at 800–801. Thus, little basis for dispute appears.

The court's doubts appear to rest on two mistaken notions regarding the pre-1937 differentials: first, that they were "never * * * payable over and above the transportation differential available to distant producers who delivered to a nearby zone," 402 F. 2d at 670; second, that the present differential is of a markedly different kind than any that ever appeared in a greater Boston license or order before 1937, *ibid.* Its doubts—in themselves a remarkable basis for invalidating a 30-year practice on summary judgment—are unsupported by the record.[30]

[30] Another example of the court's treatment of the record is its statement (402 F. 2d 660, 672–673, n. 36) that "[it] is probably safe to guess that not until bulk tank trucking thereafter made it economically feasible for distant farmers to deliver in the city did the nearby farmers, for self-protection, insist that the

First, it is clear that nearby differentials have been separate from and payable in addition to transportation differentials at all times. *Supra,* pp. 27–28, H. Doc. 501, 74th Cong., 2d Sess. (1936), pp. 183–184; *Cranston, supra,* at 800–801; 32 Fed. Reg. 9919. Indeed, the Secretary specifically stated in promulgating the Order under review that the farm location differential was adopted to provide nearby farmers with the "customarily somewhat higher values, *above those which normally reflected transportation costs,*" that they received in the market. (29 Fed. Reg. 11213; A. 320, 350, 528, 534.)

The court's error is clearly shown by its discussion of the function and relationship of the various differentials embodied in Order No. 4, the 1936 Boston Order. The court believed (402 F. 2d at 664) that distant producers who delivered to a plant within 40 miles of the city under that Order would receive a $.21 country station differential, *and* that this differential was not paid to nearby producers. But in fact, the nearby producer who delivered to nearby plants received a combination payment, which included both the $.21 country station differential and the approximately $.46 farm location differential nearby farmers had customarily received in the free market and under the licenses (Art. VIII, A. 231). In February of 1936, the distant farmer who delivered to a plant within 40 miles

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nearby differential be based solely on farm location." But bulk tanks did not exist in the 1930's, 23 Fed. Reg. 8227, and it was not until 1962 that over 50 percent of the farmers in the Boston Market shipped in bulk.

of Boston received a total price of $2,859/hundredweight; the nearby farmer who delivered to the same plant received $3.30/hundredweight. H. Doc. 501, 74th Cong., 2d Sess. (1936), pp. 183–184. The difference, $.441, is attributable to only one consideration, farm location;[31] its equivalence to the earlier and later differentials of the same magnitude, also attributable only to farm location, is apparent.

The court's concern that the 1937 Order's farm location differential was in a different form than the differentials embodied in the earlier licenses and Orders raises no matter of substance. In effect, all the Secretary did in 1937 was to separate the country station differential of $.21, applying to *all* producers who delivered directly under the 1936 Order, from the (then) $.44 farm location differential, which was available only to nearby producers. 2 Fed. Reg. 1331, 1333. Thus, what had always been two separate differentials in fact were simply recognized as such in the 1937 order. Such a purely formal change—made within a month of the 1937 Act's passage—lends no support to the court's conclusion that the farm location

[31] This amount was also in addition to transportation differences. If a distant farmer delivered to a plant close to the city, he paid the cost of transporting the milk out of his pocket, and there would be no formal "transportation differential." But if he delivered to a country plant, he bore the expense of getting the milk to that plant, and his blend price was further reduced by a transportation charge, or differential, based on the distance from the country sttaion to Boston. See H. Doc. 501, *supra*, pp. 183–184.

differential was not one "customarily applied by the handlers" in the market.[32]

Again, the earlier provisions embodied a preferential basing system, described above; but the economic realities of the situation remained the same. Under the licenses, the 1936 Order, the 1937 Order, and all succeeding orders including the present one, there has always been a differential of approximately $.46[33] payable only to nearby producers, and for the same purpose—to compensate them for the economic advantages of proximity to the market.

C. THE FARM LOCATION DIFFERENTIAL DOES NOT "PROHIBIT" THE FLOW OF MILK FROM OTHER AREAS OF THE COUNTRY, IN VIOLATION OF SECTION 8C(5)(G)

The court below did not consider respondents' contention that the differential "prohibits" the flow of milk from other areas of the country, in violation of Section 8c(5)(G) of the Act, 7 U.S.C. 608c(5)(G). The contention is without merit.[34]

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[32] In any event, if the present farm location differential is deficient only in form, the appropriate course for the court of appeals would have been to remand the matter to the Secretary to give him an opportunity to consider whether to revert, for example, to the terms of the 1936 Order.

[33] The maximum price a producer could receive has always been limited, in theory, by the Class I price. However, because at least 40 percent of the milk in the Boston market is surplus, or Class II milk, the blended pool price does not come within $.46 of the Class I price. Accordingly, at all relevant times the differential has had the approximate value referred to in the text.

[34] Further, respondents lack standing to attack the differential on this ground. Producers, although not regulated under the Agricultural Marketing Agreement Act of 1937, see 7 U.S.C. 608c(13)(B), may challenge provisions of Milk Marketing

In order for a provision of a milk marketing order regulating milk to constitute a trade barrier forbidden by Section 8c(5)(G), it must either directly or as a matter of practical economic effect "prohibit" the marketing in that area of milk produced in some other area.[35] *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76. The farm location differential is not a direct bar to the introduction of milk into the Massachusetts-Rhode Island area; respondents contend that it is an "economic" trade barrier within the meaning of *Lehigh Valley*. Since the amounts payable under the differential are taken

Orders in some circumstances. *Stark* v. *Wickard*, 321 U.S. 288. But they may not challenge a provision simply because it results in a lower minimum price to them. *Benson* v. *Schofield*, 236 F. 2d 719 (C.A.D.C.), certiorari denied, 352 U.S. 976; *United Milk Producers of New Jersey* v. *Benson*, 225 F. 2d 527, 529 (C.A.D.C.); *Calhoun* v. *Freeman*, 316 F. 2d 386 (C.A.D.C.); *Velman* v. *Freeman*, 267 F. Supp. 842, 844–846 (E.D. Wis.), affirmed, 388 F. 2d 308 (C.A. 7), certiorari denied 390 U.S. 1026. While they have standing under *Stark* to contend that the differential is not authorized by Section 8c(5)(B) and thus results in an improper "diversion" from the pool, *Blair* v. *Freeman*, *supra*, they would not have standing to challenge the differential as being illegal on grounds unrelated to allocation of pool funds, such as the "trade barrier" contention, under those cases. Moreover, Section 8c(5)(G) deals with barriers to handlers, not producers. If the differential really had the tendency of keeping additional milk from coming into the Massachusetts-Rhode Island market, as respondents seem to urge, that presumably would redound to their benefit.

[35] Section 8c(5)(G), 7 U.S.C. 608c(5)(G), provides:

"No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

from the pool before calculation of the uniform blend price, its immediate apparent effect[36] is to reduce that uniform price, which (subject to other adjustments) is the price payable to distant farmers under the Order. Respondents claim that the fact that such a reduction occurs tends to make the marketing of milk under the Order less attractive to the distant producer, and therefore constitutes a "trade barrier" to the marketing of their milk.

The flaws in this argument are many. First, there is no evidence that the farm location differential in fact has effectively limited—much less prohibited—the marketing in the Massachusetts-Rhode Island area of milk produced in other areas of the United States. Such a showing is necessary. Cf. *United States* v. *Lewes Dairy, Inc.*, 337 F. 2d 827 (C.A. 3), certiorari denied, 379 U.S. 1000; *Lewes Dairy, Inc.* v. *Freeman*, 401 F. 2d 308 (C.A. 3), certiorari denied, 394 U.S. 929. The facts show, instead, that the differential has not at all inhibited the free flow of milk across State lines. As the Brief *amicus curiae* of the Attorney General of Vermont in opposition to the petition in No. 25 pointed out (p. 3), "In 1968, Vermont producers supplied 1,649,300,000 pounds of milk" to the Massachusetts-Rhode Island market. Indeed, more milk is delivered from Vermont to the market than from any other State, including Massachusetts (A. 81). About three-fourths of the milk in this market is received from non-nearby sources (A. 615–618);

[36] It is disputable whether, over the long run, the differential does substantially lower the blend price. See pp. 67–68, *infra*.

as of 1962, more than 90 percent of the milk in the Boston market, which has had such differentials since the 1920's, came from such producers (A. 615).

The evidence further shows that farm location differentials have not tended to spur production in nearby areas or depress production in distant areas (A. 490), closely approximate the situation obtained in free markets and handler pools, and "will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization," 23 Fed. Reg. 8238 (1958). Such a measure is not a "barrier" to the marketing of milk produced in outside areas.[37]

Moreover, Section 8c(5)(G) was not designed to preclude the Secretary from taking "local differences which may exist in production or marketing methods or conditions" S. Rep. 1011, *supra*, p. 9, into account; otherwise, the pricing provisions of Section 8c(5)(B), including the adjustment provisions, would be meaningless. See remarks of Rep. Marvin Jones, H. Conf. Rep. No. 1757, 74th Cong., 1st Sess. (1935), p. 21:

> * * * The language adopted by the conference agreement does not refer to milk, and so does not negate the applicability to milk, for use

[37] The farm location differential does not discourage *handlers* from bringing distant milk into the Massachusetts-Rhode Island Order. It is accordingly distinguishable from the provisions involved in *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, *supra*, and in *Polar Co.* v. *Andrews*, 375 U.S. 361. In *Lehigh Valley* this Court implied that a marketing order which included a rate of compensatory payments merely placing non-pool (unregulated) handlers on a par with pool (regulated) handlers would not be a trade barrier. 370 U.S. at 98, and 87 n. 13.

> in fluid form or for manufacturing purposes, of the provisions of the bill relating to milk, such as the provisions on price fixing, price adjustment, payments for milk, etc.

See also *Cranston* v. *Freeman, supra,* 290 F. Supp. at 804–805. Congress must have recognized that every time the Secretary established prices pursuant to Section 8c(5), or established a transportation differential, or nearby differential, or other differential, there might be some effect on the flow of milk. The mere fact that the otherwise authorized pricing plan may result in a lower minimum price payable to a producer than he believes that he ought to receive does not create an illegal "trade barrier" under Section 8c(5)(G).

A stated policy reason for the pricing provisions, 7 U.S.C. 602, is to ensure an orderly flow of milk to and within the market.

The Secretary honored that policy when he refused to increase the farm location differential in 1964 while reducing transportation differentials which also served to increase the nearby farmers' share of the pool. He noted that the reduction was required to redress a relative imbalance in values which had led to excessive cross-transportation of milk—distant milk to the city for fluid use, and nearby milk to country manufacturing plants. 29 Fed. Reg. 11207. Complete elimination of the differential, on the other hand, could disrupt the orderly flow of milk. As noted *infra,* p. 71, the consequent lowering of price to nearby farmers might put them out of business, depriving the cities of ready sources of supply. The short run

rise in the blend price received at the distant parts of the milkshed might simply attract more surplus milk from other, neighboring milksheds until it again dropped into parity with the prices available in those milksheds. (A. 554–556; cf. 7 C.F.R. 1001.60.) In the long run, the price would remain higher than it presently is at the edge of the milkshed only if so many nearby farmers were forced out of the market that permanent new sources of supply were required; the result would be diversion of those sources from their previous markets and a net rise in the prices consumers pay. Such an effect in itself disserves the orderly flow of milk to the market.[38]

Finally, as discussed earlier, *supra,* pp. 34–38, Congress has ratified, legalized and confirmed this differential, thereby foreclosing any Section 8c(5)(G) attack upon the Secretary's statutory authority to use it. Moreover, the history of the provision, showing that ever since the inception of Federal regulation, Congress, the Secretary and the courts have always considered such differentials to be authorized, also strongly indicates that they do not raise forbidden "trade barriers."

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[38] Respondents' real complaint seems to be that the farm location differential is unconstitutionally discriminatory against them. But a differential which in effect partly retains an advantage which one group held prior to regulation is a rational method of regulation and not an unconstitutional discrimination. *Secretary of Agriculture* v. *Central Roig Refining Co.* 338 U.S. 604, 616–618: *Texas American Asphalt Corp.* v. *Walker,* 177 F. Supp. 315, 326–327 (S.D. Tex.)

II. THE SECRETARY HAD A SUBSTANTIAL BASIS FOR INCLUDING A FARM LOCATION DIFFERENTIAL IN THE MASSACHUSETTS-RHODE ISLAND ORDER

Since the court of appeals viewed the inclusion of a differential based upon farm location as being beyond the Secretary's statutory authority, it did not reach the question whether he had a substantial basis for including it in the 1964 Order. Ordinarily, of course, this question would be one appropriate for the court of appeals in the first instance. However, since this Court granted the petition for a writ of certiorari in *Zuber* v. *Allen*, No. 25, without limitation and that question was there presented, we discuss it briefly here.

The 1964 Order was the product of extensive hearings on numerous issues concerning the various New England Milk Marketing Orders then extant. In that Order, the Secretary continued the previous differential for farm location in effect, rejecting suggestions both that it be increased and that it be decreased. 29 Fed. Reg. 11213–11214. He had an ample basis for that action.

Differential pricing structures not only were customarily applied in New England markets prior to regulation, but also continue to exist in free markets and handler pools. Thus, an economist testifying at the hearings preceding issuance of the 1964 Order pointed out that in California "producers located nearby Los Angeles distributing plants are able to obtain more favorable contracts, and thus a higher Class I utilization, than producers that are located

in the central valley or any other place" (A. 549). The Los Angeles market is unregulated. Similarly, in Philadelphia (Delaware Valley), where a handler pool was in use in 1964, nearby producers were able to obtain a premium of about 45¢ over other producers selling in the market (A. 528). Similar results were observed in southeastern New England in the late 1950's, before that area came under federal regulation (A. 527).

The Secretary also noted that the long practice of paying such differentials under federal milk marketing orders in New England has not resulted "in unstable or disruptive marketing conditions" (29 Fed. Reg. 11213), such as undue stimulation of production in nearby areas or depression in distant areas (A. 490); such disruption could be expected if the differential were at war with the economics of the marketplace. There was testimony (A. 52) that, especially in New England, the

> location advantages of nearby supplies include greater availability at any time when transportation may be interfered with seriously. The nearby milk also is more available for quality supervision, particularly by small processors.

Though the accessibility of distant milk has increased due to improved transportation and the phenomenon of bulk tanks,[39] still

> * * * nearby milk does have a value on account of its accessibility to the market * * * [W]e have had many cases in Massachusetts, Worces-

[39] See n. 30, *supra*.

> ter, particularly, of something that has happened in the plant, either through accident or bad milk or spillage, that the handler has had to send out his trucks and pick up milk on a second pick up on the farm in order to have milk to use that day which would be impossible if he had to go to distant farms for it. [A. 564.]

There was also evidence before the Secretary that the abolition of the differential could force many nearby farmers out of the dairy business (A. 491, 515, 563), thus diminishing natural, long-standing, and reliable sources of supply for city markets,[40] and that the market structure now reflected investment decisions based on the assumption that the differential would continue (A. 466–467). In the 1930's for example, the existence of the differential led some nearby farmers to forego a course they might otherwise have taken, of becoming producer-handlers not regulated under the order. See A. 270. Moreover, elimination of the differential now could imperil small handlers, who necessarily rely upon nearby sources, and thus speed the undesirable trend toward handler concentration (A. 490–492).

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[40] One student of agricultural economics, a nearby dairy farmers, remarked that (A. 494):

"No economist in his right mind would advocate such a drastic drop in price for any group of milk producers. No administrator could justify such treatment. There would be no economic gain to any consumer. In fact, just the opposite would be true, because larger amounts of milk would have to be transported longer distances to meet the Class I demands of consumers in Southern New England.

"In the words of Mr. Beal, it is uneconomic to transport a product which 'contains about 88 per cent water.' Soon the diseconomy would result in an increase in the Class I price or a greater cost of milk to the consumer."

In sum, there is substantial evidence that the differential is consonant with the declared policies of the Act, 7 U.S.C. 602, to establish and maintain orderly marketing conditions and an orderly flow of commodities to the market for the benefit of both producers and consumers, and to return parity prices to farmers. Such differentials have been an integral part of milk marketing orders for more than 30 years; during that time, those orders have tended successfully to advance those statutory objectives. The Secretary found, accordingly, that the farm location differential, together with the remainder of the Order provisions, "will tend to effectuate the declared policy of the Act." 29 Fed. Reg. 12236, 12237.

Of course, there has been a long-continuing debate concerning such differentials.[41] But, as shown above, there was ample basis for the Secretary's determination that the differential should be continued in effect. "Such an administrative determination carries a presumption of the existence of a state of facts justifying the action far too strong to be overturned by such suggestions as are made here." *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 567–568.

[41] For example, in 1962, a Federal Milk Order Study Committee, known as the "Nourse Committee," recommended in a report adopted by a 9–8 vote of its members, *inter alia*, that the Secretary give further consideration to whether such differentials should be reduced or eliminated. Federal Milk Order Study Committee Report to the Secretary of Agriculture (1962).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
PETER L. STRAUSS,
Assistant to the Solicitor General.
ALAN S. ROSENTHAL,
WALTER H. FLEISCHER,
Attorneys.

JULY 1969.

U. S. GOVERNMENT PRINTING OFFICE: 1969

Nos. 35, 52

IN THE

Supreme Court of the United States

October Term, 1969

FILED
AUG 30 1969
JOHN F. DAVIS, CLERK

FREDERICK T. ZUBER, ET AL.,
Petitioners,

v.

RUSSELL ALLEN, ET AL.,
Respondents

CLIFFORD M. HARDIN, Secretary of Agriculture,
Petitioner

v.

RUSSELL ALLEN, ET AL.,
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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE OF THE ATTORNEY GENERAL OF THE STATE OF VERMONT

JAMES M. JEFFORDS,
Attorney General of the State of Vermont

EDWIN H. AMIDON, JR.
Assistant Attorney General

State Supreme Court Building
Montpelier, Vermont 05602

IN THE

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE ATTORNEY GENERAL OF THE STATE OF VERMONT

The State of Vermont, as *Amicus Curiae,* pursuant to Rule 42 of the Rules of this Court, respectfully urges affirmance of that portion of the decision of the court below which has been appealed

by the petitioners herein, and hereby concurs with the counter-statement of the questions presented, counterstatement of the case and argument as set forth in the respondents' brief herein.

INTEREST OF THE AMICUS CURIAE

The State of Vermont, by and through its Attorney General, represents the interests of the dairy farmers of the State of Vermont, almost all of whom are so-called "non-nearby producers" like respondents and who, as a result of the differential payments at issue herein, are required indirectly to pay to the dairy farmers of Massachusetts, Rhode Island and portions of Connecticut ("nearby producers") an amount equal to 46¢ or 23¢ per hundredweight of milk sold by the nearby producers. 7 C.F.R. 1015.70, 1015.72 (1968).

In 1968, almost half of the producers operating under the 1964 Massachusetts-Rhode Island Milk Order ("the Order") here at issue were located in Vermont. *Mass.-R.I.-N.H. Milk Market Statistics* (Market Administrator Fed. Order No. 1, March 1969), p. 5. (Hereinafter *"Statistics"*). Over two thirds of Vermont's total dairy production is sold under this Order. *Statistics,* p. 5; *Biennial Report of the Vermont Commissioner of Agriculture* (1968), p.51. (Hereinafter *"Biennial Report"*). Moreover, not only is the Vermont dairy industry highly dependent on the Massachusetts-Rhode Island market, but the Vermont dairy industry, in turn, provides over three-quarters of the total dollar receipts from Vermont agricultural products. *Biennial Report,* p. 29. Thus, the regulated Massachusetts-Rhode Island market for dairy products represents about half of the *total* market for *all* Vermont agricultural products. When it is considered that agricultural business is the number one industry in the state, the enormous significance of the nearby differential to the *amicus curiae* becomes plain.

The Vermont dairy industry which, as indicated above, is highly dependent on the Massachusetts-Rhode Island market, is no longer able to afford the payment of a differential-type "tariff" for the privilege of selling milk in southern New England. This mainstay of the State's economy has suffered a serious decline in recent years and Vermont dairymen are being financially squeezed to the point of having to abandon their operations. Thus, there has been a steady decrease in the total number of Vermont producers, total number of herds and total number of cows to the point where in 1968 these figures were at their lowest level in the Twentieth Century. *Farming Trends in Vermont,* Misc. Pub. 52, University

of Vt. (1968), pp. 1-7. The number of producers and percentage share of Vermont producers in the Massachusetts-Rhode Island market is similarly at its lowest point ever. *Statistics*, p. 5. The only effect of the "orderly market carefully nurtured and maintained"[1] under the Secretary of Agriculture's Order has been to cost Vermont producers 1.75 to 2 million dollars annually and to accelerate their departure from the market in favor of the larger and more prosperous urban area "nearby producers".[2] This is a matter of great concern to the people of Vermont and, moreover, should be of great concern to the people of southern New England who are dependent upon the Vermont dairy industry for half their milk supply.

The fact is that the "nearby differential" has since 1949 been introduced by the Secretary even into areas like Worcester, Springfield and Connecticut purely as an illegal form of protection to Massachusetts and Connecticut "nearby producers." See 14 Fed. Reg. 7085, 7097 (1949), 24 Fed. Reg. 1049 (1959). The Connecticut differential was not even introduced until 1959 and then only because it existed in surrounding markets. 24 Fed. Reg. 1049 (1959). The economic justification for the differential, if it ever existed, has long since disappeared and, in any event, there has never been and would be today no "customarily applied" nearby differential in any unregulated New England market. Moreover, the very exaction of a differential under an order requiring only the payment of *minimum* prices by handlers is a clear admission that the differential would not exist under unregulated conditions.

There are absolutely no differences between Vermont and southern New England dairy farms in the factors of "availability" and "reliability" (as claimed at page 3 of the Brief *Amici Curiae*) and "accessibility" is meaningless in this day of bulk tank delivery

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[1] See p. 7 of the Brief *Amici Curiae* of the Attorneys General of Massachusetts, Rhode Island and Connecticut (hereinafter referred to as "Brief *Amici Curiae*").

[2] In 1966, prior to the entry of the escrow injunction herein, there were 1,594,780,000 pounds of Vermont milk sold in the Massachusetts-Rhode Island milk market. *Statistics* (March 1967), p. 5. The cost of the farm location differential to so-called distant producers was at least twelve cents (12¢) per hundred weight. See *Market Administrator's Review*, Vol. 19, No. 1, p. 1 (Jan. 1967). Therefore, the total cost of the differential to the Vermont dairy industry in 1966 was $1,913,736.00.

and high-speed Interstate highways. Moreover, "eveness of production" for individual producers, no matter where located in the milkshed, is already compensated for under the seasonal adjustment fund of the Order and should not be rewarded twice. See 32 Fed. Reg. 5286 (1967). Finally, many elements of the cost of production for Vermont "non-nearby producers" have reached the level of "nearby producers" costs, including equipment, feed, livestock and even land values (due to recreational demand), and if the nearby differential was ever equitably justifiable on that ground, such justification is a thing of the past.[3]

Far from acquiescing in this unwarranted discrimination (as implied on p. 3 of the Brief *Amici Curiae*), Vermont farmers have fought the nearby differential, which exists nowhere else in the country except New England, at every opportunity since its inception, including, for example, the 1951 hearings on the proposal to eliminate such payments to nearby producers. See 16 Fed. Reg. 9250 (1951). Vermont farmers have, of course, been forced to accept the differential in order to obtain the advantages of federal regulation. But there is no question that the differential was from the beginning an involuntary "sweetener" to the nearby producers and the Massachusetts Milk Control Board to induce them to cooperate with federal regulation. See *Zuber v. Allen*, 402 F.2d 660, 664 (D.C. Cir. 1968).

The "windfall," if any, has been to southern New England dairy farmers who have long been aware that the nearby differential rests on precarious legal and economic grounds. If, as claimed by the *amici curiae,* termination of the differential will bring pressure for increases in Class I (fluid milk) prices, thereby raising retail prices to consumers (Brief *Amici Curiae*, p. 11), this will simply mean that the southern New England dairy farmer

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[3] For example, as of November 1968, the value per acre of Massachusetts farm real estate had gone up only 53% since 1960, while Vermont farm real estate had gone up 79% in value during the same period. *Farm Real Estate Market Developments,* CD-72, U. S. Dept. of Agriculture (March 1969), p. 6. So, too, average dairy feed prices paid by Vermont farmers in February 1969 were about the same or slightly higher than prices paid in southern New England. *Agricultural Prices,* U. S. Dept. of Agriculture (Feb. 15, 1969), p. 27. In the case of "nearby producer" farms actually located in close proximity to metropolitan areas where land values remain higher than in Vermont, such farms are now inevitably being held for sale or sold to land developers and cannot be considered as "available" or "reliable" sources of milk supply in any meaningful long term sense.

refuses to participate in the subsidization of the southern New England consumer, a subsidy now being borne only by Vermont and other "non-nearby producers." Certainly the termination of the differential in the New York-New Jersey market as ordered by *Blair v. Freeman,* 370 F.2d 229 (D.C. Cir. 1966), has not created any significant market disruption and no price increases have resulted which can be attributed to the court's decision. See 33 Fed. Reg. 9502, 12849 (1968). The Massachusetts-Rhode Island Milk Order may "have worked in practice for over three decades in successfully maintaining 'orderly marketing conditions' " (Brief *Amici Curiae,* p. 7), but these conditions have at least since World War II heavily favored the southern New England dairy farmers who cry poverty and yet in 1967 recovered average net farm income 25% higher than Vermont farmers. See 1967 *ELFAC Dairy Farm Business Analysis* (University of Vt., October 1968), p. 3.

Thus, as the foregoing makes clear, elimination of this unlawful and discriminatory differential is of the most critical importance to the State of Vermont, *amicus curiae,* and to its dairy farmers, who already labor under a justifiable transportation differential handicap in their sales to the southern New England "distant" markets and who, under today's economic conditions, can no longer competitively stand the additional handicap of the protectionist "nearby differential."

ARGUMENT

THE NEARBY DIFFERENTIAL IS NOT A "MARKET . . . DIFFERENTIAL CUSTOMARILY APPLIED" BY HANDLERS SUBJECT TO THE MILK ORDER AT ISSUE HEREIN AND IS THUS UNLAWFUL

Petitioner nearby farmers and the Secretary of Agriculture ("Secretary") acknowledge that the farm location or "nearby" differential at issue herein is lawful only if it is a "market . . . differential customarily applied" by handlers subject to the Order within the meaning of Sec. 8c(5)(B)(ii) of the Agricultural Marketing Agreement Act of 1937 (hereinafter "the Act"). See Petitioner's Brief, p. 26; Secretary's Brief, p. 18. Thus, the nearby farmers and the Secretary have apparently abandoned their previous efforts to fit the nearby differential under one of the other statutorily authorized adjustments which the Act permits in setting

the uniform blended price for milk.[4] However, as is made clear hereinafter, the nearby differential is no more justifiable as a "market differential" than it is as a "location" or other type of permited adjustment.

First, the contemporaneous Congressional reports with respect to the Act specifically state that:

> "(t)he market differential is a differential which is given to the producer *to compensate him for delivering milk to a city market instead of to a country plant.*" H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess., 10 (1935). (Emphasis supplied).

Yet the nearby differential at issue herein is based solely upon *the location of the producer's farm* and not whether he, in fact, saves expense for the handler by delivering milk to a city market instead of to a country plant. In fact, a nearby producer who delivers to a country plant (as many do) still receives the alleged "market differential," while a "non-nearby" producer who delivers to a city market receives no such differential. Moreover, a differential for such direct delivery is already included in the Secretary's so-called "zone differential" under the Order. These zone differentials vary inversely with the distance from Boston of the handler's plant to which the producer delivers his milk and, according to the Secretary, "must closely reflect costs generally incurred in receiving milk at country plants and moving such milk to city plants." 7 C.F.R. Sec. 1001.62 (1968); 29 Fed. Reg. 11205, 11210 (1964).[5]

V.

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4. Sec. 8c(5)(B)(ii) of the Act provides that the uniform price shall be subject *"only* to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk desired, (c) the locations at which delivery of such milk is made, and (d) a further adjustment . . . ." (Emphasis supplied). (The last adjustment pertains to base rating and has no relationship to the nearby differential involved herein). In *Blair v. Freeman,* 370 F.2d 229 (D.C. Cir. 1966), the nearby farmers and the Secretary argued that a nearby differential in substance identical to the differential here at issue was a "location" adjustment and did not even attempt to justify the differential as a "market differential." See 370 F.2d 238, n. 37.

5. The Secretary stated as follows on August 4, 1964, in reducing the zone differential from 54 cents to 47 cents:
"3. *Zone differentials and zoning.* * * * The present nearby plant Class I zone differential of 54 cents is based on two principal factors:

Secondly, the Secretary's own justifications for the nearby differential, as set forth in the Order, *say nothing whatsoever about direct delivery to city markets* but, instead, are entirely limited to the historical fact of higher payment to nearby producers in the Boston area due to their better competitive position in the 1930's and to the statutorily forbidden factor of fluid (Class I) use of their milk.[6] Thus, in issuing the Order in 1964, he stated:

> "Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal con-

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(1) Freight charges for hauling milk from plants located in the 21st zone to city plants, and (2) *the difference between costs incurred in the assembly of producer milk at country plants for transfer to city plants and costs incurred in receiving milk at city plants directly from producers.* The total freight charge allowed in the present differential is 41 cents per hundred weight, which includes a Federal transportation tax no longer in effect. In earlier computations of the difference between country and city receiving costs, total *country plant handling costs* were considered to be 23 cents per hundred-weight. Of the latter amount, 20 cents represented the cost of operating the country plant and the remaining three cents was to cover the cost to the handler in furnishing cans for the shipment of milk from the country plant to the city plant. Handling costs for receiving, weighing, and testing milk received from farms at the city plant were considered to be 10 cents per hundredweight, with the difference between this amount and the country plant handling costs thus being 13 cents.

* * *

It is therefore concluded that the allowance for transportation to be reflected in the city plant zone differential should be 37 cents. Further, the *handling allowance* to be reflected in this differential should continue to be 10 cents. Accordingly, the Class I price applicable at nearby (city) plants under the Connecticut order and the proposed Massachusetts-Rhode Island order would be 47 cents greater than the Class I price at plants located in the 21st zone." (29 Fed. Reg. 11210-11211). (Emphasis supplied).

[6] Sec. 8c(5)(B)(ii) of the Act states that a uniform blended price shall be paid to all producers "irrespective of the uses made of such milk by the individual handler to whom it is delivered," subject only to the enumerated adjustments.

sumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.

• • •

. . . we believe there are adequate reasons on this record for continuing the farm location differentials at their present rates." 29 Fed. Reg. 11205, 11213-14 (1964).

And, for example, in justifying the nearby differential in the 1958 southeastern New England order (now consolidated into the 1964 Massachusetts-Rhode Island Order), the Secretary explained that

"Historically, dairy farmers in the States of Massachusetts, Rhode Island, and Connecticut, because of their location with reference to the large population concentrations of New England *have disposed of a substantially larger percentage of their production for fluid uses than have dairy farmers in the upcountry area. Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market.* Under the marketwide pooling system herein proposed and without some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk on the milkshed rather than according to the utilization of his milk. Under a regulated market, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation and has assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources. The distant producer also benefits from an established Class I price, and by the fact that he gains a larger share of the fluid market than is likely without market-wide equalization.

The use of a nearby differential will return to nearby producers a somewhat greater share of the Class I price than they would otherwise obtain through marketwide pooling. Moreover such a differential will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization." (Emphasis supplied). 23 Fed. Reg. 8238 (1958).

As the foregoing abstracts make clear, the nearby differential was not promulgated by the Secretary as a "market differential"

for direct delivery by nearby producers, of the type as authorized by the Act, but was, in fact, justified as exactly the type of extra payment for fluid (Class I) use of milk which is expressly proscribed by the Act[7].

Finally, in view of the above demonstrated patent unlawfulness of the nearby differential, it becomes unnecessary to consider whether, as claimed by the southern New England Attorneys General, the lower courts should have deferred to the Secretary's administrative "expertise." (Brief *Amici Curiae,* pp. 4-7). See *SEC v. Chenery Corp.,* 318 U.S. 80, 87 L.Ed. 626, 636 (1943) ("... an order may not stand if the agency has misconceived the law"). Also irrelevant is the Attorneys General's concluding argument that, somehow, the clause in the Act requiring uniform prices "irrespective of the uses made of such milk by the individual handlers to whom it is delivered"[7] does not mean what it says, but really permits a differential based upon fluid milk use so long as it is not such use by a given individual handler (see Brief *Amici Curiae,* pp. 12-15). This argument is irrelevant because of the fact that, as clearly shown above, the nearby differential is not, in the first instance, a "market differential" or any other permitted type of differential.

Thus, since the nearby differential at issue herein does not depend upon the nature of the market to which delivery is made and cannot be fitted within the permitted "market differential" adjustment category (and, in fact, has never until this proceeding been claimed to be "market differential"), and since petitioners and the Secretary admit that the nearby differential is not an adjustment otherwise permitted under the Act, the efforts by petitioners and the Secretary to legitimatize this unlawful discrimination must fail.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the respondents' brief, the decisions of the court below should be affirmed and the escrow fund distributed in full to the non-nearby producers.

Respectfully submitted,
JAMES M. JEFFORDS
Attorney General of the State of Vermont
EDWIN H. AMIDON, JR.
Assistant Attorney General

August 1969

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[7] Sec. 608(c)(5)(B)(ii).

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Nos. 25 & 52

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IN THE

Supreme Court of the United States

October Term, 1969

No. 25

FREDERICK T. ZUBER, *et al.*,

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Respondents.

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Petitioner,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENTS RUSSELL ALLEN, *ET AL.*,

CHARLES P. RYAN
EDWARD V. RYAN
JOHN J. SIMARD
400 Prudential Building
Washington, D. C. 20005

Attorneys for Respondents

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NOTE

Respondents apologize for the length of this breif but are are of the respectful view that the court may be assisted thereby because of the nature of the case. Additionally, respondents have had to respond to breifs of the petitioners totalling 168 pages, plus 174 extensive footnotes and 34 page appendix, and lengthy reply breifs will also be filed by petitioners.

IN THE

Supreme Court of the United States

October Term, 1969

No. 25

FREDERICK T. ZUBER, *et al.*,

Petitioners,

v.

RUSSELL ALLEN, *et al.*,

Respondents.

No. 52

CLIFFORD M. HARDIN, Secretary of Agriculture,

Petitioner,

v.

RUSSELL ALLEN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS RUSSELL ALLEN, *ET AL.*, IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 402 F.2d 660. The findings and conclusions of the District Court and its judgment (A. 120-21) are not reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitioners' briefs.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601, *et seq.*), the Secretary of Agriculture was authorized to include in the Massachusetts-Rhode Island milk order of October 1, 1964, a nearby

farm location differential provision, 7 C.F.R. 1001.72, under which producers whose farms are located in either of two designated "nearby" areas are entitled to receive a differential payment which varies the uniform price required under Sec. 8c(5)(B)(ii) in recognition of (1) the use made of nearby producers' milk or (2) the allegedly higher prices received by nearby producers prior to Federal regulation, the aforesaid section providing that all producers are to receive a uniform price for all of their milk irrespective of the use thereof.

2. Whether the nearby differential provision promulgated on October 1, 1964, is an authorized adjustment to the uniform price, either under Sec. 8c(5)(B)(ii)(c) concerning "the locations at which delivery of such milk is made", or under (a) relating to "market * * * differentials customarily applied by the *handlers*", when such payments are made by "non-nearby" dairy farmers regularly supplying the fluid milk market to other producers whose farms are located in certain designated "nearby" areas, and when the "nearby" producers are already compensated for any location value of their milk under the zone differential of the milk order, 7 C.F.R. 1001.62, which includes an additional payment over the uniform price and includes (1) the authorized market differential for direct delivery of milk to a city plant or market; (2) the transportation differential paid for milk delivered progressively closer to the primary market; and (3) the higher transportation rates paid within the "nearby" zone as contrasted with the rates for each 10-mile zone in the balance of the milkshed.

3. Whether the nearby differential violates Sec. 8c(5)(D) or (G) of the Act.

4. Whether the nearby differential interferes with the free flow of trade between states and burdens interstate commerce in violation of the Constitution.

5. Whether the operation of the nearby differential is illegally discriminatory and violative of constitutional rights to due process and equal protection of law.

6. Whether the Secretary's findings were deficient, inconsistent and unsupported by valid and substantial evidence, and his conclusions and decisions irrational, inconsistent and arbitrary.

STATUTE INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, particularly Section 608c(5) thereof.

The regulation involved is the Federal Order regulating the handling of milk in the Massachusetts-Rhode Island marketing area, 7 C.F.R. 1001 *et seq.*, particularly 1001.72 thereof, promulgated in 1964.

COUNTERSTATEMENT OF THE CASE

1. NATURE OF THE CASE

The respondents, hereafter referred to as the "non-nearby" dairy farmers, brought this action against the Secretary of Agriculture in the United States District Court for the District of Columbia on December 27, 1966, and their complaint requested a judgment declaring the invalidity of the nearby farm location differential provision of the Massachusetts-Rhode Island federal milk order, 7 C.F.R. 1001.72, as well as an injunction against the future enforcement of such provision by the Secretary.

The Massachusetts-Rhode Island milk order is one of approximately 75 federal orders which regulate the handling of milk in the various regional milk marketing areas throughout the United States. It was promulgated by the

Secretary effective October 1, 1964, pursuant to the Agricultural Marketing Agreement Act of 1937, as amended 7 U.S.C. 601 *et seq.*, 50 Stat. 246, after extensive administrative hearings. The order consolidated the federal milk Orders that regulated the handling of milk in the Greater Boston, Worcester, Springfield, and Southeastern milk marketing areas, the latter milk order having encompassed the entire State of Rhode Island and a substantial part of southeastern Massachusetts.

The Secretary's decision in respect to the issuance of the consolidated Order and the contested nearby farm location differential provision is found at 29 Federal Register 11205, dated August 4, 1964, and the pertinent parts thereof are set forth in the joint appendix commencing at page 346. Relevant excerpts from the decisions promulgating the Southeastern New England milk order, 23 Fed. Reg. 8225, October 24, 1958, and the Springfield and Worcester federal orders, 14 Fed. Reg. 7085, 7097, November 23, 1949, are reproduced at pages 331-46 of the joint appendix. The findings of the Secretary in issuing the first order regulating the handling of milk in the Greater Boston marketing area, effective February 9, 1936, are found in the order itself, this also being true in respect to the Boston order issued on August 1, 1937, which contained the first nearby farm location differential provision. Relevant portions of the 1936 and 1937 Boston orders are set forth at pages 223 and 248 of the joint appendix, and pertinent excerpts from the economic briefs submitted by the Department of Agriculture at the administrative hearings for the Boston orders are found at pages 247 and 669 of the appendix.

The nearby farm location differential provision of the 1964 Massachusetts-Rhode Island milk marketing order, 7 C.F.R. 1001.72(a), provides that producers whose farms are located in Rhode Island, in all of that part of Connecticut east of the Connecticut River and the towns of

Granby and Suffield, and in certain enumerated towns, cities and counties in specified New England states, primarily Massachusetts, shall receive a differential payment of 46 cents per hundredweight for their milk over and above the "uniform" price received by all producers, unless the addition of 46 cents gives a result greater than the Class I or fluid milk price at the plant at which the milk is received, in which event there shall be added a rate which will produce that price. Subsection (b) of the nearby farm location differential provision provides for the payment of 23 cents per hundredweight or such lesser sum as will equal the Class I or fluid use price at the plant where the milk is received from producers whose farms are located in other enumerated cities and towns in specified New England states.

Only small portions of the States of Maine, New Hampshire, and Vermont are included in the preferential areas enumerated in the Order provisions, and the great bulk of the producers in those States are thus classified as "nonnearby" or ineligible producers by the Secretary's action. All but 57 of the approximately 4,136 Vermont dairymen regularly supplying the Massachusetts-Rhode Island marketing area in 1968 were required to sustain a reduction in their uniform minimum price because of the existence and operation of the farm location differential provision. The loss to Vermont dairymen alone amounts to about $2 million per year, and the total loss to all of the approximately 6,600 non-nearby dairy farmers is at least $3 million annually. Non-nearby dairy farmers regularly supply about 75 percent of the milk for the marketing area, the State of Vermont furnishing one-half of the milk supply (A. 74).

The monies to pay the differentials to some 2,100 nearby producers are deducted from the marketwide equalization pool prior to the computation and announcement of the monthly uniform minimum milk price by the

Market Administrator. Such deduction necessarily reduces in corresponding amount the monies in the marketwide equalization pool belonging in equity to all producers regularly supplying the market, and the payment of the nearby differentials to the nearby producers by the Secretary admittedly constitutes a diversion of a part of the uniform minimum price that non-nearby producers would otherwise received for their milk (A. 350). The mechanics and operation of the marketwide equalization pool and the relevant provisions of the Order are described more fully in a subsequent part of this brief. (See A. 669-73).

The unusual differential provision presently exists in only the Connecticut federal order out of approximately 75 such orders in the United States. Interestingly, the Connecticut milk order is also the only federal order wherein the marketing area is specifically defined by the borders of a State. The Connecticut federal order and nearby farm location differential provision, 7 C.F.R. 1015.72, were promulgated by the Secretary effective February 9, 1959, and his relevant decisions are found at 24 Fed. Reg. 1049, dated February 9, 1959, and at 25 Fed. Reg. 1063, dated August 16, 16, 1960. The Connecticut nearby differential provision, 7 C.F.R. 1015.72 (a) provides for the payment of a differential of 46 cents per cwt. over the "uniform" price to producers whose farms are located in Connecticut, Rhode Island, part of Massachusetts, and a very limited part of New York State. Producers whose farms are located in another small part of New York State or within a portion of Berkshire County, Massachusetts, are to be paid 23 cents per cwt. over the uniform price. As of 1967, there were only 89 non-nearby producers authorized as regular suppliers of the Connecticut area, although approximately fifty percent of its fluid milk supply must be obtained from outside

of the State.[1] These non-nearby producers were forced to pay 46 cents per cwt. to Connecticut producers in order to market their needed milk in the deficit Connecticut market. However, the operation of the Connecticut nearby differential provision returns but about 2 cents per cwt. to approximately 1,800 "nearby" producers.[2] The 90 nearby producers in the intermediate 23-cents areas actually sustain a *loss* of about 17 cents per cwt. instead of the required gain of 23 cents because there are so few non-nearby producers to make the differential payments.[3] In other words, elimination of the Connecticut nearby differentials would result in gain of 44 cents per cwt. to the non-nearby producers, a gain of 17 cents to the nearby producers in the 23-cents areas, and a loss of 2 cents per cwt. to the producers in the 46-cents areas. (A. 431-32; See also, 25 Fed. Reg. 7834, August 16, 1960). Many of the non-nearby producers lose $5,000 - $6,000 annually under the Connecticut nearby differential provision although the average gain to the Connecticut nearby producer is only about $12.50 per month.

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[1] Much of the milk is obtained by methods which do not accord the suppliers thereof a status as regular producers. See 24 Fed. Reg. 1049-50 and Report of the Federal Milk Order Study Committee, transmitted to the Secretary of Agriculture March 16, 1962, pp. 64-76, also set forth at pp. 24e-29e of appendix of respondents' brief in opposition to brief *amicus curiae* of the State of Connecticut filed in connection with petitions for certiorari.

[2] Although the opinion and findings of fact in *Cranston v. Freeman,* (D.C.N.Y.) 290 F. Supp. 785 (1968), states that there are 3,000 "nearby" producers under the Connecticut Order, the record of that suit discloses that the government advised there were only 1,800 (*Cranston* record 1163, pp. 161-163).

[3] Finding of Fact No. 8 in *Cranston v. Freeman, supra,* states that "The challenged order provision *results* in producers whose farms are located in two specified geographical areas *receiving* a

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Additionally, the Connecticut, Rhode Island, and Massachusetts producers, with minor exceptions, receive the nearby differential payments from the respondents' uniform milk price for every hundredweight of milk that they market under the Massachusetts-Rhode Island Order, and the respondents are also required to again pay a 46-cents nearby differential to the same "nearby" producers, with said minor exceptions, under the Connecticut Order whenever the respondents' milk is needed in Connecticut. Also, the dumping of unneeded Connecticut milk in the Massachusetts-Rhode Island market lowers the uniform price of milk in this market by contributing to its surplus of milk, the said marketings simultaneously raising the uniform price in Connecticut by virtue of the lowering of surplus in that market. Many of the relevant findings in the Secretary's 1964 decision pertain to both the Massachusetts-Rhode Island and the Connecticut milk orders, and reference is therefore made herein to the Connecticut Order wherever appropriate.

The 1964 Order has not been in existence "for over 30 years" as petitioners repeatedly allege, but the 1937 Boston Order which was consolidated into the present Order did contain a differential payable by about 20,000 producers to only 5% of those serving the market. The cost as recently as 1962 was 3 cents per cwt. but has increased 400 percent under the consolidated Order. (A. 633, 648).

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3 (cont'd) differential over and above the uniform price for milk of 46¢ and 23¢ per hundredweight, respectively, for their milk which is priced under the Order depending upon the designated area in which their farms are located." This finding appears to ignore the fact that such nearby producers actually sustain a gain of 2¢ and a loss of 17¢, respectively, and that the latter *nearby* producers are included by consent of the parties in the plaintiffs' "class" of non-nearby producers, such fact hardly concealing the irrationality of the Connecticut nearby differential any more than if the intermediate "nearby" producers had been included in the class of the nearby producers in the 46¢ areas.

The respondents here briefly note that Section 8c(5)(B)(ii) of the Agricultural Marketing Agreement Act of 1937 provides for the marketwide pooling of milk and for the payment of uniform prices to all producers for all milk delivered to all handlers, irrespective of the use made of their particular milk by the handler to whom it was delivered, such uniform price being subject only to a few adjustments enumerated in the Act and specifically defined in the Congressional Reports pertaining to the Act. Before examining the purpose, policy and various relevant provisions of the Act, it appears that a consideration of the events and conditions leading up to the Act would be both appropriate and helpful.

2. THE BACKGROUND OF THE LEGISLATION

Initially it should be noted that there are certain problems inherent in the production and marketing of milk that necessitated the passage of State and Federal legislation for the regulation of the dairy industry. Milk is a highly perishable product which does not lend itself to leisurely bargaining on an offer and acceptance basis. It is a fertile field for bacteria and considerable investment is required by all dairy farmers for the purchase of equipment and the maintenance of sanitary health standards in a fluid milk market. Cows give more milk from April through August than they do in the remaining months of the year but the size of the herd must be maintained the entire year in order that sufficient milk is available in the period of shorter supply, the variance in production thus creating a surplus of milk in the flush season of the year. The consumer demand for milk is rather constant the entire year but a reserve milk supply of approximately 20 percent to meet daily fluctuations and unexpected contingencies in demand for fluid milk is also necessary. The maintenance of such necessary reserve during the short-production season naturally results in a much

greater surplus of milk during the flush production season.

The surplus of milk not used for fluid or drinking purposes is not discarded as a total loss by the handler but is manufactured into such dairy products as cheese, butter, ice cream, powdered milk and other less perishable products. These milk products, often referred to as surplus as manufactured milk, must compete in the marketplace with other like products from distant lower-cost production areas of the country, due to the very fact of their non-perishability, and they consequently return a smaller margin of profit to the handler than the higher-priced fluid milk.[4]

Moreover, even prior to the passage of the Agricultural Adjustment Act of 1933, the surplus milk in the Boston milkshed and other fluid markets was produced under the same sanitary health standards as that of milk used for fluid purposes and was thus actually in competition with the fluid milk.[5] (A. 669). This fact and the entry of cream and other dairy products into the Boston market from distant areas of the country had a natural depressant effect on the prices received by dairy farmers for their fluid milk.

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[4] "Creamery-butter production in New England declined from 21,087,000 pounds in 1921 to only 3,889,000 pounds in 1933... In these areas there was a shift from the production of milk for manufactured dairy products to the production of milk for use in fluid form." USDA: *Agricultural Adjustment in 1934: A Report of Administratiion of the AAA* (GPO 1935).

[5] Economic Brief of USDA, filed in administrative hearing record of Greater Boston milk order issued August 1, 1937. Much of the explanatory and factual material presented in the above

(cont'd)

The problems engendered for the dairy farmer by these biological and competitive factors were compounded by the operation of the basic laws of economics in respect to the excess of supply over demand in a free and unregulated market and by the ready inclination of most handlers to take full advantage of the situation. Consequently, many dairy farmers banded together as a matter of economic self-preservation,[6] and they sought to control the supply of milk in their locality in order to bargain with the handler for fairer prices. The success of any such cooperative effort necessarily rested upon a uniform price treatment of those dairymen associating together for their common welfare.

Some associations contracted with the handler for the payment of a flat price for all of the milk that the membership agreed to furnish to the handler during a particular period, a plan that assured uniformity of price for the producer and one that worked fairly well in those

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[5] (cont'd) Statement of the Case is reflected in the Economic Brief of the USDA, set forth at pages 669-73 of the Joint Appendix, part of which is a portion of the original record filed in this Court, and its importance is underscored by the fact that petitioners have arbitrarily placed it in at the end of the appendix with other important material harmful to their position.

[6] The cooperative form of organization had come into wide use in the butter and cheese industries long before the fluid milk cooperatives assumed importance in the 1920's. They are of two general types, bargaining cooperatives and operating cooperatives, and the primary function of the former is to negotiate terms of sale for the production of their producer members. The operating cooperatives actually receive and dispose of the milk and manufacture butter, cheese or other by-products from the surplus. In actual practice, each type of cooperative performs some of the functions of the other in a great number of instances. Benedict & Stine, *The Agricultural Commodity Programs* (1956), p. 442.

areas where the amount of production and the use of milk was generally predictable by both the cooperative association and the handler. However, the flat price plan was far from satisfactory in the many instances where the handler's actual use of the milk varied from that originally contemplated, and this pricing arrangement obviously contributed to market instability and disorderly marketing under such circumstances.

The most acceptable plan to producers in most areas, evolved by cooperative associations in England, provided for the classification of milk according to its use by the handler as either fluid milk or cream and manufactured milk products.[7] This plan sought to recognize the relationship of price to the actual use of the milk by the handler in providing for different prices for each use classification of milk.

In addition to assuring that the handler paid his producers in accordance with the use value of the milk to the handler, the classified price plan also sought to assure each dairy farmer of uniform price treatment by reason of the fact that he was not to be paid according to the use made of his particular milk. Previously, the handler had been able to pay his producers a milk price reflective of the surplus conditions in the milkshed or he could pay a higher price to a portion of his producers because of the use of their particular milk for fluid purposes. However, such price preferences naturally resulted in discontent and unrest among the other producers whose

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[7] In some markets there were only two classifications of milk, Class I for fluid or drinking milk and Class II for cream and manufactured milk products. Some markets place cream in an intermediate position and assign manufactured milk products to Class II or differentiate even more extensively in respect to the classification of by-products of milk.

milk was produced for the same purpose, and the variances in prices had precipitated a self-defeating competition that only served to lower the price for all producers.

The classified price plan contemplated the payment of a composite or blend price to each producer for every hundredweight of milk delivered to his handler, irrespective of the use made of his particular milk, such composite or blend price resulting from the average use made by the handler of all of the milk of his producers disposed of by him at the respective classified prices.[8] As explained in the Economic Brief (A. 669-73) of the USDA, pp. 82-84, filed in the administrative hearing record for the 1937 Greater Boston milk order:

> "Equalization of fluid milk sales is simply an extension of a plan that has been employed by each handler and each cooperative creamery. If a creamery sold 75% of its milk as whole milk and the remainder as cream, it did not pay 75% of its producers the fluid milk price for all their milk and the remaining 25% the cream price for all their milk. Such a method obviously would have been inequitable. Instead each producer was paid the whole milk price for 75% of his deliveries and the cream price for the remaining 25%. * * *."

At least in theory, the classified price plan obviously possessed a number of advantages over prior arrangements, such as uniformity of price to the producer without regard to the use of his particular milk, payment by the handler according to the use value of the milk disposed of by him, the setting of a price for fluid milk high enough to induce production in the period of lowest production,

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[8] Such an arrangement is known as a handler pool or individual handler pooling of milk.

the guarantee of an adequate supply of milk by virtue of the handler's receipt of all milk offered by the producers, and other like factors that promised better conditions for the producers.

However, the classified price plan in operation also was subject to certain flaws that precluded market stability, the major defects relating to a persistent variance in prices to producers, the lack of marketwide control in a multi-handler milkshed, and the absence of any effective method to investigate underpayments and enforce the payment of the classified prices by all handlers. Of some significance is the additional fact that numerous sub-plans for the distribution of the monies by the associations to their members existed in the milkshed. In some instances, various associations blended the monies received for their members' milk from all of the dealers served by the association in order to pay all of its members the same basic price. Some assigned a "base" to each member which required that he deliver a certain amount of milk, based usually upon his past deliveries over a particular period, and he received a blended price only for his base milk. Other associations returned the Class I or fluid milk price for the base milk of its members, and all milk delivered above the base received a surplus or Class II price. Some associations deducted penalties from the milk checks of members for failure to deliver as much milk as specified in their base. The evident inequities and confusion attendant to such varying plans and prices and the resultant need for marketwide uniformity was recognized by the USDA representative (A. 235) at the hearings of December 10-12, 1935, for the Boston Order of February 9, 1936:

> "You see, the idea of the whole thing is to work out and finally get on to a uniform rating plan that applies generally throughout the milkshed. * * * At the present time many different

systems obtain. There are rating plans in effect under which farmers are paid, and many farmers in other groups at the present time receive payment on what is called a composite price basis, that is, no rating. It is true that there is a rating plan in the market by which the proceeds are allotted among different groups, but each of these groups takes proceeds allotted to it by the farmer plan, and distributes it in its own way, and the result is that it is very difficult for your farmers to determine whether you, as an individual and a member of one group, are paid equitably in comparison with some other farmer as a member of some other group, because your bases of payment are somewhat, and often very different. So it seems as if, as we proceed in our efforts to work out a general marketing scheme in the market, we should give a lot of attention to some plan that will at least gradually bring the procedure of dividing up the Class I market among producers on a uniform plan."

Moreover, as the foregoing testimony indicates, there was still another side to the coin in respect to the varying prices received by producers when the milkshed lacked marketwide control and uniformity of price. A handler's ability to pay his producers a favorable composite or blend price, as compared with the price of his competitors, depended largely upon his market outlet and his not having so great a volume of surplus sales as his competitors. Under normal conditions in the Eastern markets in the 1930's, fluid milk prices averaged approximately twice as high as the prices paid for milk used as cream.[9] Nevertheless, the milk used as cream was of the

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[9] A. 669. "It was demonstrated that whenever any significant excess of milk was produced for the fluid market, prices would fall to the level of manufacturing milk prices * * *.

(cont'd)

same quality as the milk used for fluid milk and could at any time be sold as fluid milk in competition with it. Quite predictably, a number of handlers with fluid outlets found it to their advantage to purchase the surplus milk of another handler's producers at slightly above the composite or blend price for disposition as fluid milk at the Class I or fluid price. The greater the margin between the fluid and surplus prices, the greater the incentive for such practices by independent handlers and the more unstable the market. Many producers, attracted by a price higher than the composite or blend price paid by their own handler, further contributed to market instability by increasing their production and the market surplus.

Other handlers lowered their price for fluid milk in order to capture a larger share of the fluid milk market. If, by cutting prices, a group succeeded in selling a larger percentage of its milk as fluid milk, its composite or blend price would be higher than that of another handler and group that received the full market price for their fluid sales but carried a larger percentage of the surplus. Thus it was that a handler could cut the price of fluid milk in the city market and still pay a blend price to his producers, as high or even higher than that of his competitors who did not cut prices. If the price-cutting handler did make full payment to his producers, the higher blend price received by them would usually attract other producers serving a different handler much in the same manner as producers were attracted to a handler who normally disposed of most of his milk at the higher priced fluid use. In most instances, however, the price-cutting handler probably would continue to pay his producers approximately the same net price as other competing handlers in

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9 (cont'd) In the absence of regulation, the maintenance of a necessary reserve of milk above Class I requirements has a depressing effect upon the prices for all uses of milk, including producer returns, and an unstabilizing effect upon the marketing of milk in the area." 28 Fed. Reg. 11956.

the territory and pocket the increased return. Obviously, if the handler originally and consistently had a low volume of fluid sales, there was no way that he could meet the prevailing blend price of other handlers in the area, and the classified price system simply resulted in the slow death of such handlers and the lack of any market for some of his producers.[10]

Normally, the price-cutting handler and his group of producers would have increased their share of fluid milk sales only at the expense of another group in the market, and this second group would bear the transferred increase in surplus and resulting lower price. More likely, in order to retain its fluid milk sales and maintain its price to producers, the second group, as well as others similarly threatened, would lower its own price. Eventually, before the cut-price group succeeded in selling its surplus milk at a cut price, it might have had to offer it to several customers and thereby have forced down the price on fluid milk sales of several times the volume of milk which it had to offer. This type of self-defeating competition among groups of producers and handlers reduced the net return to all producers in the Boston milkshed much below a fair price.

Some handlers, particularly the smaller dealers served by local producers near the large metropolitan areas, flaty refused to bear their share of the market's surplus. Since they disposed of virtually all of their milk for fluid purposes by accepting only what was necessary to meet such needs, preferring to purchase on an "emergency"

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[10] *Hood & Sons v. United States,* 26 F. Supp. 672, *affirmed,* 307 U.S. 588.

basis when more fluid milk was required, they were naturally able to return a higher price to their producers if they chose to do so, even when they had disposed of their milk at less than the full fluid milk price. Their producers maintained that they were not "contributing" to the surplus of the market under such circumstances and that the necessary surplus of the market should not be reflected in their milk price. The injurious effect of such market practices by the smaller dealers was noted in *United States v. H.P. Hood & Sons*, 26 F. Supp. 672, *affirmed*, 307 U.S. 525, and in the report of the Pitcher Committee, a special joint legislative committee appointed by the New York State Legislature to study the demoralized price structure of the dairy industry, which stated in part as follows in its report of March 10, 1932:

> "The fact that the larger distributors find it necessary to carry large quantities of surplus while the smaller distributors do not, leads to price-cutting and other forms of destructive competition, especially when the surplus is abnormally large. The small distributors can contract for his minimum requirements and depend upon emergency purchases when threatened with a shortage. The larger distributors can not do this since the same percentage deficiency in volume would involve quantities too great to be obtained on short notice. The result of this situation is that the smaller distributors who take no responsibility for the surplus, by purchasing their milk on the basis of the blended returns by the larger organizations, are in a position to undersell the larger distributors in the cities."

Some of the smaller dealers also found it to their advantage to pay a premium for the local milk instead of paying the higher railroad transportation rates applicable to less-than-carlot shipments of milk from more distant

production areas when all of the milk was shipped by rail transportation. Additionally, the local milk was sometimes delivered in cans directly by truck to the city plant or market, a service that made it unnecessary for the smaller dealer to maintain a country receiving station where the milk is cooled, weighed, etc., prior to shipment to the city plant or market. Such direct-delivery of milk also eliminated the double handling costs of the larger handlers who found it necessary to maintain country receiving stations in the areas where the great bulk of the market's fluid milk was produced. Although the factor of direct-delivery of milk is still a service warranting an extra payment therefor,[11] the increased use of the motor truck and other improvements and technological advances in the early 1930's actually increased the independence of the smaller dealers and created additional price-cutting competition[12] among the market's producers and handlers:

> "The situation was further complicated by the fact that transportation improvements during the last 20 years have continuously widened the area from which fluid milk and cream can be profitably shipped to market. The natural protection formerly enjoyed by producers in the vicinity of the large industrial cities of the East has been greatly decreased not only through the development of railroad tank cars for shipping milk and cream, but particularly by the growing use of the motor-truck. Improvements in roads and in truck-refrigeration methods, including

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[11] 29 Fed. Reg. 11211.

[12] *Nebbia v. New York*, 291 U.S. 502 (1934).

> tank trucks, have greatly increased the distance over which fluid milk and cream may be shipped to market." *Barriers to Internal Trade In Farm Products, A Special Report,* the Secretary of Agriculture USDA (1939), p. 14).

The cost of transporting the milk to market necessarily enters into the price of milk, and the producer's uniform price was always adjusted according to the place where delivery of his milk was made to the handler. The rates for transporting the milk to market from the place of delivery to the handler were naturally related to the primary fluid milk market for which all milk was produced, and the milkshed was consequently broken up into freight zones[13] outward from the Boston "nearby plant" area or zone under the Boston Order in order to apply a graduated transportation adjustment according to the location at which the milk was delivered to the handler. This basic economic principle was followed in promulgating the 1964 consolidated Order:

> "The basing point for computing zone prices under the consolidated order should be Boston. * * * The purpose of establishing zone differentials is to achieve a high degree of *uniformity* in prices to all handlers f.o.b. the market for milk which is received from producers at plants located at varying distances from the principal consumption area. To achieve this purpose, the zone differentials must closely reflect costs generally incurred in receiving milk at country plants and moving such milk to the city plants." (29 Fed. Reg. at 11210, 2nd col., last para.).

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[13] See A. 255 for Boston Order and 29 Fed. Reg. at 11236 for the 1964 Mass.-R.I. zone schedule in effect at time of filing of suit, a number of changes having been made since then. 32 Fed. Reg. 9900. For the Connecticut Zone schedule in 1964, see 29 Fed. Reg. at 11248.

The double *handling* costs involved in receiving the milk at country plants instead of by direct delivery to the city plants has already been mentioned. In view of the fact that fluid milk processing plants were located in cities other than Boston it is evident that the direct delivery of milk to those city plants or markets provided a service to the handlers operating such plants and had no exclusive relationship to the primary fluid market as did the transportation adjustment or freight differential. The premium for such service would normally be the difference between costs in receiving the milk directly at the city plant or market and the cost in receiving the milk at the country plant where the double handling costs would arise. Of course, the amount of any such premium would also depend upon the amount of the milk supply adjacent to the particular secondary city market and the alternative costs involved in obtaining the handler's supply from such source and any country plant that might be in the locality.

One of the most informative decisions by the Secretary concerning such direct-delivery or "customary market differentials" is found at 22 Fed. Reg. 4212-16, dated June 14, 1957, and the Secretary there discusses whether such market differentials should be continued in both the metropolitan area and in the secondary New York State markets as they existed prior to Federal regulation. After continuing the direct-delivery or market differential under Federal regulation in the secondary markets such as Albany, Troy, Schenectady, Syracuse and other Upstate New York secondary markets (22 Fed. Reg. 4216), the Secretary then revoked these customary market differentials in 1963 in the secondary markets and lowered it to but 5 cents per cwt. in the metropolitan area because of decreased handling costs, improved transportation that enabled large amounts to be direct-shipped, alternative supplies

available in secondary markets, and the closing of many country receiving plants.[14]

The improvement in roads and motor transportation in the early 1930's not only virtually eliminated the preferential position of the nearby producer but also wrought other significant changes for the more distant producer that caused further upheaval in the milkshed. Numerous country receiving stations located close to the producers' farms were closed and consolidated into larger plants more distant from the farm where larger volumes of milk could be handled on a more economical basis by the receiving handler. This significance of this development is noted even in the article cited by the petitioners and prepared by H.L. Forest and other experts from both the USDA and the Farm Credit Administration in 1938.[15]

> "Country station costs per unit, as a rule, tend to vary inversely with the volume of milk handled. A recent study of stations in Boston, for example, showed that the per unit costs for stations having a volume of from 2 to 5 million pounds per year were about 70 percent higher than for

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[14] See also 24 Fed. Reg. at 1652-53, February 1, 1964, wherein the Secretary again discusses the direct-delivery differential in refusing to raise the prices received by Upstate New York producers to the level of the "historical (prior to regulation in the Capital District) relationship of prices" to Capital District producers to prices received by other New York-New Jersey producers equi-distant from the Metropolitan District because "the Capital District producers are assured of a protected market by being under a Federal order."

[15] H.L. Forest, E.W. Gaumnitz and O.M. Reed, AAA, and T.G. Stitts and W.C. Weiden, FCA, *Relative Prices To Producers Under Selected Types of Milk Pools,* Farm Credit Admin., Cooperative Division, Bulletin No. 25, June 1938, Page 70.

> stations with 15 to 20 million pounds per year. The stations in the milkshed ranged from less than 2 million to over 5 million pounds per year. Under these conditions a question arises as to how equitable it is to have a uniform country station charge (presumably an average) for the entire area. From the producer's point of view, the answers would seem to depend first upon the nature of the factors contributing to the high volume, whether high volume per shipper, heavy concentration of average-volume shippers, or a larger-than-average local hauling distance from farm to station; and second, on whether differences in these factors justify a difference in costs or charges to producers. *The justification for a lower charge at high-volume plants would seem to be somewhat clearer where the high volume had resulted from closing other stations and forcing a longer and more costly local haul from farm to station platform."*

The aforesaid article also states at page 54 that, "Usually the costs of processing milk are lower in large plants than in small ones,"[16] and further notes at page 38 that, "The Dairymen's League pools the returns from all milk sold for its members and pays a uniform price to all, subject to certain differentials for location, grade, butterfat, and *plant* volume.

These technological advances in consolidating the milk supply, refrigeration, tank trucks and railroad tanks in place of cans, improved highways, and other aids to distribution made the distant milk accessible to even the

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[16] C.R. Tucker, *Costs of Handling Fluid Milk and Cream in Country Plants,* Cornell Univ. Exp. Stat. Bull. 473, (1925); R.W. Bartlett, *Milk Marketing In Pennsylvania – Shipping Station Operations,* Penn State Coll. Agr. Exp. Stat. Bull. 219 (1928).

small dealer. Simultaneously, however, the nearby producers found it much more difficult to enter the retail market because of the increased costs attendant to such improvements, and his bargaining position with handlers in this respect quickly evaporated. Dealers will never pay more for one supply of milk when an alternative supply of equal quality is available at a lower price, and the petitioners acknowledge that many dealers would pit one group of producers against the other in order to break down prices in the entire milkshed. Producers outside the milkshed who bore no responsibility for the shouldering of the surplus in the flush season or the supplying of the needs of the market during the short production months also found it advantageous to sell their milk under such conditions to handlers who utilized the same to beat down local prices within the milkshed.

The depression further aggravated the deteriorating price situation because of the decreased purchasing power of the consumer and his resultant inability to purchase fluid milk at even the lowered prices. The increased surplus of milk was compounded by the desperation reaction of many dairy farmers in overproducing in an attempt to obtain sufficient income to survive. Kickbacks, rebates, refunds, penalties, excessive hauling charges, special deals on classification, quota systems and other similar arrangements with a handler with a high fluid milk utilization were often a prerequisite to the retention of an outlet by the dairy farmer, most of whom were unaware of the prices being received by other producers because of the prevalency of such market practices (A. 690) and the various pricing plans in effect in the milkshed. The competiton of producers for fluid milk outlets became so intense in the early 1930's that milk wars, violence and surplus milk prices were the inevitable result. The situation was seen by most handlers as a golden opportunity to exploit the helpless dairy farmers, their tendencies in this regard being related in many of the early cases.

From 1927 through 1931, prices to dairy farmers fell more than fifty percent, although the handlers were still able to make a net profit on their investment of more than twenty-five percent.[17] The problems of surplus milk, price-cutting, varying milk prices to producers, and cut-throat competition for fluid milk sales could not be solved by the cooperative associations to any appreciable degree because of their inability to control the entire market and effectuate a marketwide pool and their efforts ultimately collapsed completely.

The chaos that ensued prompted the passage of state legislation to deal with the demoralized price conditions that existed in every market, but much of such legislation was marked by a narrow self-interest and a short-sightedness that failed to perceive the necessity for marketwide control and a consideration of the interests of producers in other States.[18] *Hood & Sons v. DuMond,* 336 U.S. 526 (1949). Over 90 percent of the fluid milk for the Boston market was regularly obtained from sources outside of Massachusetts (A. 223, 673, 679), 60 percent of the milk being from the State of Vermont in 1934 (A. 674, 679), and the need for an overall control because

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[17] H.R. Concurrent Resolution No. 32, 73rd Cong., 2nd Sess., May 14, 1934. See also, the Report of the FTC to the Congress, H. Doc. 152, 74th Cong., 1st Sess. (1934), for information on which 1935 Act was enacted.

[18] See *Barriers to Internal Trade In Farm Products, A Special Report to the Secretary of Agriculture by the Bureau of Agriculture Economics, USDA* (GPO, March, 1939). This Report enumerates many barriers and discriminatory obstacles to free trade between the New England States during the early 1930's and gives an excellent documentation and discussion of the situation facing the Congress in 1933 and 1935.

of the interrelationship of the milk supply was noted in *United States v. H.P. Hood & Sons,* 26 F. Supp. at 680, *affirmed* 307 U.S. 588, wherein the Court stated that, "the introduction of as little as 2,000 extra quarts of milk into the marketing area might affect the price of milk within the area * * * as little as a carload of milk would drop the wholesale price in Boston as much as one cent per day. Clearly, then, it cannot be denied that the milk wholly raised, processed, and sold in Massachusetts does not have a direct effect or burden on the marketing of interstate milk."

The same Massachusetts federal court made a similar finding in the related case of *United States v. Whiting Milk Co.,* 21 F. Supp., 321 (1937), wherein it also recognized the public interest aspect of the milk industry:

> "A continuous flow of fresh milk into the Boston area, which includes thirty-seven cities and towns, from rural New England is imperative. From the urban viewpoint, it is a matter of real necessity. From the producer's viewpoint, it provides a dependable market for their product, and is an important source of income to them. Less than 12 per centum of the milk brought into the Boston area originates in Massachusetts, and less than 2 percentum of it is handled exclusively in intrastate commerce. From 1929 to 1933, the prices paid for milk to the producers of New England declined steadily. In 1936, the price paid to producers of Vermont was 34 per cencentum below the 1929 level. Conditions in other states were comparable."

In *Nebbia v. New York,* 291 U.S. 502 (1934), the Supreme Court took notice of the depressed price conditions then prevailing in upholding legislation enacted by the State of New York which provided for minimum prices in the retail sales of milk:

> "During 1932 the prices received by farmers for milk was much below the cost of production. The decline in prices during 1931 and 1932 was much greater than that of prices generally. The situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve."

The discriminatory state regulations also pointed up the inability of a state to legally regulate and control the sale of milk pruchased without its borders (344, 332, 336-37), and to provide marketwide supervision and enforcement in respect to the interstate production and handling of milk. *Baldwin v. Seelig,* 294 U.S. 511 (1935). The Congress was forced to meet the disastrous national problem by the enactment of the Agricultural Adjustment Act of 1933, 48 Stat. 31, an act that was long overdue and one which had been forestalled by the general aversion to public participation in economic activities. Consequently, much of the program embodied in the initial legislation was regarded as not only of an emergency measure but also a temporary one that would be supplanted by a normal and uncontrolled economy as soon as the intended recovery of agriculture was effectuated.

3. THE CONGRESSIONAL LEGISLATION AND THE REGULATORY PROGRAM

The 1933 Act authorized the Secretary to enter into marketing agreements with processors, associations of producers, and others engaged in the handling of any agricultural commodity or product in interstate or foreign commerce. Licenses were issued to handlers in conjunction with the approval of a marketing agreement in order to facilitate compliance with the terms and conditions of the agreement, which was primarily concerned with the elimination of

unfair trade practices or excessive charges against farmers.[19] The Secretary could suspend or revoke such licenses and violators were subject to a maximum fine of $1,000 per day for each violation.

The programs formulated in the agreements and licenses by interested parties "usually included some features that were of doubtful legality. Others, though not vulnerable from a legal standpoint, were considered questionable in terms of public policy."[20] The agreements could be expected to include only those features that promised sufficient mutual advantage for the groups submitting the same, and the Act was so vague as to even raise the question whether the agreements and licenses should come under the Agricultural Adjustment Administration or be handled under the industry-wide codes of the NRA. It did not provide usable guides or standards for arriving at prices to be paid and charged for milk, and failed to indicate what practices were "unfair" or what charges would tend to "prevent the effectuation of the declared policy." There was even question as to whether the classified price system could be used.[21]

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19 The 1935 Act, sec. 8c(7)(A), follows the 1933 Act and the terms of the agreements and licenses in respect to agricultural commodities by "(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof."

20 Benedict & Stine, *The Agricultural Commodity Programs* (1956), p. 455.

21 Benedict & Stine, *The Agricultural Commodity Programs*, p. 454. There were even differences within the AAA as to the basic approach to accomplish the desired objectives, and the plan of organization was drastically overhauled in December, 1933, after Chester Davis became the Administrator. The agreements had also undertaken to establish and enforce retail milk prices, and there was a marked decline in dealer interest when the government announced

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One of the major issues raised was whether the AAA was attempting to regulate intrastate commerce, the previous question being whether the states were burdening interstate commerce. Another controversy related to whether the AAA could legally control production through some of the measures in the agreements and licenses, and still another question that recurred with regularity was whether the Act involved an unconstitutional delegation of power to the Secretary.

Non-compliance with the licenses became commonplace, and the growing spread between fluid milk and that used for manufacturing purposes enabled many dealers to manipulate prices to the injury of producers. Non-violators watched their competitors continue to refuse to make payments to marketwide equalization funds and decline to pay administrative assessments and other charges. Those dealers who refused to cooperate found many adherents among producers who objected to the bases awarded them under the licenses or who opposed equalization with other producers. The situation was compounded by the admitted illegalities in the licenses, and the Department of Justice even refused to bring suit against some cooperative handlers for monies owed the equalization pool because of the AAA's acknowledged failure to assign bases to about half of the milkshed's producers, the uncertainty in respect to the prevailing prices because of refusal or failure of many handlers to furnish reports of prices and sales, the resultant basing

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Ftn. 21 (Cont'd.)
in January, 1934, that it would not continue to establish resale prices. Dealers refused thereafter to become parties to marketing agreements and those in effect were terminated by the AAA on February 1, 1934. Reliance then came to be placed entirely on the licenses but enforcement was virtually impossible because of the tedious and time-consuming nature of the work involved, the tendencies of courts to refuse to apply drastic penalties for minor violations, and the inclusion of illegal features in many programs.

of the Administrator's blended price on conjecture, and the questionable legality of a number of features of the Boston program.[22]

The problem of enforcement was aggravated in the Boston market by the insistence of Massachusetts producers and the Massachusetts Milk Control Board that such producers could not be required to equalize their price with other producers and by the Board's resultant failure to enforce the federal license on intrastate milk. As previously stated, only a small amount of the milk, if let unregulated, could adversely affect the price of all other producers, and many small handlers buying Massachusetts "nearby" milk were not complying with the license. (A. 633). The AAA was thus forced to capitulate to the Board and nearby producers on a supposedly temporary basis (A. 230, 234-35, 238, 241, 245) in order to gain the essential enforcement support for the fledgling program. (A. 193, 237, 405, 633). In exchange for such enforcement support, it was agreed that Massachusetts producers located within 40 miles of Boston who delivered directly to market would be given preferential bases or quotas for their milk.[23] The situation continued to deteriorate, however, as legal attacks were mounted against the federal licenses.

The Congress, of course, was fully aware of the continuing existence of many of the factors that contributed to disorderly marketing and ruinous price conditions and of the new elements that had developed within various markets to compound the difficulties of the AAA. Additional controversy within the industry and lessening of

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22 "A lack of full agreement between the Agricultural Adjustment Administration and the Department of Justice, and within the Agricultural Adjustment Administration itself, further complicated the situation." Benedict & Stine, *The Agricultural Commodity Programs*, p. 374.

23 The early base-rating assignments under the Boston licenses are discussed in detail hereafter.

confidence on the part of producers had been occasioned by the Secretary's announcement that audits of the books of dealers in Boston, Philadelphia, St. Louis and Chicago disclosed net profits of 22.45%, 30.76%, 14.64%, and 25.84%, respectively, during the depression period. As a consequence, on June 15, 1934, the Congress had directed the Federal Trade Commission to investigate the milk industry.[24] The Report of the FTC for the Boston milkshed was not completed until June, 1936 (H. Doc. 501, 74th Cong., 2nd Sess. 1936) but the FTC Report for the Connecticut and Philadelphia milksheds was ordered to be printed by the Congress on April 5, 1935, and that Report documented a number of the problems and practices that existed in virtually every milkshed and fully confirmed the need for extensive legislation to deal with the myriad matters that the 1933 Act failed to remedy. The FTC Report emphasized the need for marketwide control, a uniformity of price and treatment for all producers within the milkshed, the inability and refusal in some instances of associations to effect either objective, and the affirmative action of some associations that tended to foster fluid milk monopolies for some members.[25]

Even prior to this time, however, the Congress was aware that the 1933 Act might not survive a court

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[24] The Congressional resolution, H.R. Con. Resol. No. 32, 73rd Cong., 1st Sess., noted that during the same period "the wholesale price of milk sold by farmers declined by 50 per centum", and that "there is reason to believe that there exists a close tie between certain leaders of milk producers cooperatives and milk distributors, which tie is unbeknown to milk producers and detrimental to their interests," the resolution further stating that, "the continuation of the practices now engaged in by milk distributors and certain leaders of milk cooperatives seriously endangers the efforts of the AAA and of the several States to alleviate and remedy the distress now widespread among dairy farmers in the United States..."

[25] H.R. Doc. 152, 74th Cong., 1st Sess. (1935). See testimony of C.E. Hough at pp. 130-33, 142, and of Evanuk, Foster and Exh. 71. Also A. 681-82.

challenge on constitutional grounds.[26] This Court handed down its decision in *Panama Refining Co. v. Ryan,* 293 U.S. 388, on January 7, 1935, holding that the power sought to be delegated under Sec. 9(c) of the NIR Act was legislative power, such attempted delegation being void because of the absence of any definite standard or guide.

This Court's decision in the *Schechter* case[27] repeated its prior action in the aforesaid case in respect to Section 3 of the NRA concerning delegation of legislative power, and it also held the entire Act unconstitutional, as applied to that case, because it exceeded the power of Congress to regulate intrastate commerce. This case re-emphasized the need for Congressional action, and it was able to act without undue delay because of its continuous study of the situation over an extended period during which numerous bills were introduced, each succeeding bill drafted in the House Committee on Agriculture being larger, more detailed, and more restrictive of the powers of the Secretary than the previous one. See 79 Congressional Record 9465, 9478, 11033-34, 11036 (1935).[28]

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26 "As early as 1934, the administrator of the AAA and the Department of Agriculture had sought, unsuccessfully, to have the marketing agreement provisions of the law amended and strengthened. By the summer of 1935, it had become evident that the low as then drawn could not be made workable." Benedict & Stine, *The Agricultural Commodity Programs,* p. 374.

27 *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495.

28 "The provisions of the present act which relate to marketing agreements and licenses are of vital importance to 2,000,000 or more farmers. These provisions have been extesnively revised in the proposed amendments . . . " S. Rep. No. 1011, 74th Cong., 1st Sess. 2 (1935); "Under the amendment proposed in the bill, the orders can be made applicable only to certain commodities named in the bill, and can contain only such terms and conditions as are *expressly* authorized in the bill. Furthermore, the amendments contain provisions intended to safeguard the exercise of and prevent abuses in the application of the regulatory power conferred upon the Secretary." H.R. Rep. No. 1241, 74th Cong., 1st Sess. (1935).

4. THE LEGISLATIVE REVISIONS OF AUGUST 24, 1935

"This legislation, though actually passed as part of the Agricultural Adjustment Act amendments of 1935, was so extensive that the enactments later were designated collectively as the Marketing Agreement Act of 1935."[29]

The system of licenses was discontinued and replaced with "orders" issued by the Secretary in respect to certain named commodities and such handling thereof "as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof."[30] The relevant section of the Act, 608c, also provided that the orders, unlike the licenses, could be issued by the Secretary only after a hearing, 608c(3), and then only "if he finds, and sets forth in such order, upon the evidence introduced at the hearing * * * that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy" of the Act. 608c(4).

Section 608c(5) of the Act pertains to milk and its products and provides that the orders "shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) *no others.*"[31]

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[29] Benedict & Stine, *The Agricultural Commodity Programs*, p. 460-61.

[30] This definition embraced the marketings of Massachusetts "nearby" producers.

[31] There was no limitation on the terms and conditions that could be included in the licenses, a situation that resulted in the insertion of illegal and improper terms by interested parties who would hardly propose a disadvantageous condition or term.

Subsection 8c(5)(A) empowers the Secretary to classify milk in accordance with the form in which or the purpose for which it is used by the handlers and to fix, or provide a method of fixing, *minimum* prices for each use classification which all handlers shall pay for milk purchased from producers, the minimum prices being subject to certain enumerated adjustments hereafter discussed.[32]

Under the Order, the milk used for fluid purposes is assigned to Class I and carries the highest price because it returns a greater price and profit to the handler than the surplus or manufactured milk which is assigned to Class II or broken down into even lower classes. The Class II milk in this market is no different from the milk used for Class I purposes, but it returns a lower price and profit to the handler when disposed of in such manner and is therefore assigned a lower price.

The 1935 Act provided "for the payment to all producers and associations or producers delivering milk to the same handler of uniform prices for all milk delivered by them," and subsection 8c(5)(B)(i) thus authorized individual-handler pools if such type of pooling was approved by at least three-fourths of the producers in the regional milkshed after a referendum on this issue alone and in which each producer would cast his own ballot. Under individual-handler pooling, every producer serving the same handler receives a uniform price for his milk,

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32 "Such orders may contain provisions classifying milk in accordance with its ultimate utilization and may fix, or provide a method of fixing, minimum prices which shall be paid by handlers to producers for milk in each use classification. This provision makes it possible to take into consideration in orders dealing with milk, the difference in value between milk sold for consumption in fluid form and that used in the manufacture of such products as butter, evaporated milk, etc. Minimum prices fixed in such orders are required to be uniform as to all handlers * * *." H.R. Rep. No. 1241, 74th Cong., 1st Sess. (1935). See also S. Rep. No. 1011.

computed from the average use made of all milk by the handler, and irrespective of the use made of his particular milk.

Alternatively, the Act provides in 8c(5)(B)(ii) "for the payment to all producers or associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered." This provision obviously authorizes the marketwide equalization pool that was needed in the Boston and Connecticut milksheds, the absence of which prevented uniformity of price among handlers and producers and resulted in market instability, price-cutting, and self-defeating competition.[33]

The Massachusetts-Rhode Island Order provides for the marketwide pooling of milk, the Secretary stating as follows in his 1964 decision (A. 347, 358-59):

> "It is clear that a single marketing area has developed where previously separate markets existed. Under this circumstance, the economic stresses, market instability, and price uncertainties which have developed and persisted must

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[33] "*Alternative* methods of distributing the total dollar value of all milk sold among the producers supplying the market are provided. Uniform prices are required to be paid to all producers for all milk delivered by them irrespective of the use to which such milk is put by the particular handler to whom any producer or association of producers sells its milk. An alternative provision may be included, requiring instead the payment of uniform prices by each handler to all producers and associations of producers delivering milk to him, but, except in the case of orders covering manufactured milk products only, such a provision may not be included unless the Secretary finds that its inclusion is approved or favored by three-fourths of the producers by number or by volume of production." H.R. Rep. No. 1241, 74th Cong., 1st Sess. (1935). See also S. Rep. No. 1011.

> be eliminated by the adoption of a single order with a single marketwide pool. . . . The major readjustment of the entire marketing structure in New England which undoubtedly would accompany the institution of individual-handler pooling would not promote the objective of more uniform alignment of prices to producers which, as elsewhere described in the decision, is important to orderly marketing in New England. The application of marketwide pooling under a merged order will promote market stability by insuring that all producers supplying the Massachusetts–Rhode Island market will share on a uniform basis the Class I and Class II utilization in the entire market and thus assist to permit the assembly of supplies in an economical manner for available outlets. Accordingly, the proposals for individual-handler pooling are denied." 29 Fed. Reg. 11205, 11208.

Since some handlers dispose of most of their milk for fluid or Class I use and others primarily for Class II or manufacturing use, it is obvious that some system would have to be devised to enable each handler to pay his producers the uniform or marketwide average price. Also, subsection 8c(5)(A) specifies that handlers shall pay the minimum prices set for each use classification of milk, a seemingly inconsistency with the requirement of (B) that all producers be paid a uniform price. However, 8c(5)(C) of the Act authorizes the Secretary, in order to accomplish the purposes set forth in (A) and (B), to provide a method for making adjustments in payments, as among handlers, to the end that the total sums paid by each handler shall equal the value of the milk purchased by him according to the minimum classified prices.

The Order therefore provides for a producer settlement fund to be administered by a Market Administrator, and handlers are required to submit monthly reports on the total purchases made by them in each use category at the respective minimum prices. A marketwide average or "blended" price is computed by adding together such sales by all handlers and dividing by the total amount of milk. Those handlers who disposed of most of their milk for fluid purposes, and therefore at an overall monthly return in excess of the markets' uniform price, are required to pay the excess over their sales into the fund or pool. Those handlers who disposed of most of their milk at Class II use, and thus below the marketwide average or uniform price, are entitled to withdraw such monies from the fund in order that they may pay their producers the uniform price. In this way, handlers pay for their milk according to the value of the same to them at the respective classified prices, and each producer is thereby enabled to be paid the required uniform price, irrespective of how his particular milk was used by the handler to whom it was delivered.

It is as if all the milk in the milkshed was placed in a giant pool from which all the handlers procured their supplies, paying for the same according to the purpose or use made of the milk, the payments then being divided up in such manner that each producer received the same uniform price for his milk in the pool, none of which can be distinguished from the milk of any other producer and all of which is available for fluid or Class I use. This is the true concept of marketwide equalization pooling of milk (A. 669-73), and the producer settlement fund, with its system of debits and credits for the individual account of each regulated handler, is the formal device for effectuating the equalization of payments. The Act clearly authorizes such action by the Secretary under 8c(5)(C), and the carefully drafted

Congressional reports accompanying the 1935 Act likewise confirm such power.[34]

As in the case of 8c(5)(A) relating to payment by handlers at the classified minimum prices, 8c(5)(B)(i) and (ii) provide that the uniform price required to be paid to producers shall be:

> "subject in either case, *only* to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, * * * during a representative period of time, * * *."[35]

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34 "Milk orders may also provide a method for adjustments among handlers so that the payments for milk made by each handler shall equal the value of the milk to the handler in the use classification to which it has been devoted by him." H.R. Rep. No. 1241, p. 11; Sen. R. No. 2011, p. 11

35 "The volume differential is a differential which is paid when the operations of several country plants are consolidated into one plant. The inconvenience which is caused to producers by closing up plants to which they have been delivering and requiring that all of their milk be handled by one plant, is compensated by an additional payment to the producers. The production differential is the differential which is paid to a producer to compensate him for keeping his farm and milk qualified for a city market even though his milk may actually be going into manufactured use. It is necessary to keep this supply of reserve milk available for periods in which consumption of fluid milk goes up. The effect is that the producers are paid for keeping their farms in the same condition as if they were shipping milk into the city every day. The production differential is a payment to the farmer for

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The specified adjustments to the uniform price are discussed in a subsequent part of this brief, but it should be noted here that adjustment (d) is concerned with minimizing the seasonal fluctuations in milk production. It authorizes the establishment of plans for such purpose (A. 360) which are variously known as base-rating, base-surplus, base-excess, or Class I base-rating plans. Such a plan contemplates the assignment of a "base" or quota of milk for each producer, determined by his deliveries of milk over a representative period of time, usually the short production season, for which the producer is paid the Class I or fluid milk price for all milk delivered within his "base." He may produce more milk than his base but receives only the Class II or surplus price for milk in excess of his base.[36] Due to varying amounts of deliveries among producers, it is evident that their bases cannot be equal but they must be determined in the same manner over the same period of time, other than for new producers. All producers are entitled to the Class I price for their base milk, and there are certain safeguards provided for in the legislation to prevent

Ftn. 35 (Cont'd.)
performing this function in the market. The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets." H.R. Rep. No. 1241; see also, S. Rep. No. 1011.

36 "In order to eliminate, so far as possible, violent seasonal fluctuations in the available milk supply with their attendant disturbing effect upon returns to producers, and to encourage a uniform volume of production throughout the year, an adjustment in payments to producers upon the basis of their production records may be included in such orders, in addition to the adjustments described above." H.R. Report No. 1241; see also S. Rep. No. 1011.

an abuse of this provision, in that such a plan had to be separately approved by producers in a referendum on this one issue by the individual vote of the producers.[37] The early base-rating of the licenses and 1936 Boston Order did not conform to the requirements of lawful base-rating by virtue of the fact that only certain producers received bases and the nearby producers were the only producers to receive a Class I price for their base milk, the other producers receiving a composite price that reflected the surplus of the market. (A. 231 (No. 2), 225 (Sec. 2-1), 236, 634-35).

Neither this Order or the Connecticut Order includes a base-rating plan, although both Orders do include a seasonal incentive plan that accomplishes the same purpose by withholding a part of the uniform price in the flush production months and adding such withheld sums to the uniform price during the short production months. 7 C.F.R. 1001.64; 7 CFR 1015.64; See 32 Fed. Reg. 5288, March 29, 1967.

The nearby farm location differential is not among the enumerated adjustments in the Act, and no mention of such a differential is contained in either Congressional report.

Two other provisions of the Act are relevant, however, for Subsection 8c(5)(D) provides that any new producer shall be paid for the first two months of regular delivery of milk at the price for the lowest use classification, "subject to the adjustments specified in paragraph (B) of this subsection." This provision is to protect the regular suppliers of the market from those who would choose to make their milk available only at opportune times and who would thus refuse to bear the surplus of the market and the responsibility for assuring an adequate supply of

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[37] See subsection 8c(5)(B)(ii)(d) and also the Food and Agriculture Act of 1965, 79 Stat. 1187; H.R. 9811, 89th Cong. (1965).

milk for the market. Handlers had previously used such milk to beat down local prices within a milkshed, and this provision not only protects the milkshed's regular producers but also assures any producer of the right to enter a market on the same terms as regular producers after the two month period.[38]

The period of three months was changed to two months during a conference between the House and Senate. (H.R. Rep. No. 1757, 74th Cong., 1st Sess. 2 (1935), Amendment No. 22).

Companion subsection 8c(5)(G) of the Act provides as follows:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

The above provision was introduced in the course of House debate on the 1935 legislation and no additional

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38 "To prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural expansion of the area supplying any market by the introduction of new producers or new producing areas, orders may provide that for the first three months of regular delivery, payments shall be made to producers not theretofore selling milk in the area covered by the order at the price fixed for the lowest use classification. *This is the only limitation upon the entry of new producers–wherever located–into a market, and it can remain effective only for the specified 3-month period.*" S. Rep. No. 2011, p. 11; see also, H.R. Rep. No. 1241, p. 10, for very similar language.

language was added to the Congressional reports, although the conference report makes reference to (G) in Amendment No. 24, H.R. Rep. No. 1757, 74th Cong., 1st Sess. 3 (1935). In addition to the detailed analysis of the bill H.R. 8492 in the lengthy House and Senate reports, the Conference report treats 52 amendments and notes that the House receded from 95 amendments and the Senate from 12, only 4 amendments resulting in disagreement and none of which relate to milk. The Statement of the Managers of the bill on the part of the House discusses 162 amendments.

The Act also contains a provision specifying that the minimum prices fixed by the Secretary were to be exercised "within specific *regional* areas", 8c(11)(A), and all orders "*except in the case of milk and its products*" are to be limited to the smallest practicable *regional* area under 8c(11)(B). Different terms and conditions are to be prescribed in the various orders issued for each *regional* area under 8c(11)(C).[39]

A number of provisions of lesser relevancy are set forth in the Act and are referred to in the Reports of the House and Senate. Such provisions are noted in subsequent parts of this brief where appropriate and germane to the issue.

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39 "So that proper recognition may be given to local differences which may exist in production or marketing methods or conditions, orders are required to be limited in their application to the smallest practicable *regional* production or marketing areas, and orders applicable to the same commodity or product are required to prescribe such terms applicable to different production or marketing areas as will recognize local production and marketing differences. Orders relating to milk and its products are exempted from the requirement that they be limited in their application to the smallest practicable *regional* production or marketing areas." H.R. Rep. No. 1241. See also, S. Rep. No. 1011.

5. THE PROCEEDINGS BELOW IN THIS CASE

The respondents brought this action against the Secretary of Agriculture on December 27, 1966, for themselves, individually, and for the benefit of all other dairy farmers similarly situated in the States of Vermont, Maine, New Hampshire and other states, and whose farms are so located as to render them ineligible for the "nearby farm location differential" payments of the 1964 Massachusetts–Rhode Island milk order. Their complaint requested a judgment declaring the invalidity of the nearby differential provision, 7 C.F.R. 1001.72, as well as an injunction against the future enforcement of such differential provision by the Secretary.

The District Court, after fully contested hearings on the matter, issued a preliminary injunction on January 16, 1967 (A. 62) against the Secretary and provided therein for the escrowing of the contested differential payments during the pendency of the suit. Since the nearby differentials are deducted from the marketwide equalization pool prior to computation of the uniform price, approximately 25 percent of the nearly differentials emanate from nearby producers who receive such 25 percent back along with the other 75 percent of the differentials emanating from non-nearby producers. The preliminary injunction provided for the escrowing of the entire differential payments, and the plaintiffs were contemplating proceeding against the 25 percent of the differentials emanating from nearby producers if they prevailed in the case. The *Blair* opinion had indicated that it would be unfair to pick and choose individual producers from whom to demand redress for past damages but this situation would not apply where the monies of all nearby producers were in a fund against which the non-nearby producers could levy claims for damages. The nearby producers' attorneys, who participated in the *Blair* case in both the district and circuit courts and who have participated in

this case from its very beginning, requested the Secretary to suspend or terminate the nearby differential during the pendency of the legal proceedings in order to avoid the escrowing of the nearby producers' monies and preclude the possibility of such monies being lost to non-nearby producers as damages for past nearby differential payments. The suspension or termination of the nearby differential would have put an end to all escrowing, and the nearby producers were thus willing to forego the nearby differential payments emanating from non-nearby producers which have been escrowed during this litigation. A similar request for suspension of the nearby differential of the Connecticut Order was made shortly after the issuance of the preliminary injunction in this case and *prior* to the institution of the *Cranston* suit on February 9, 1967. These requests were not granted because such suspension would constitute an indirect admission of the invalidity of the nearby differential.

Two cooperative associations, the Connecticut Milk Producers Association (CMPA) and the New England Milk Producers Association (NEMPA), attempted to intervene as defendants on January 5, 1967, said associations being represented by Reuben Hall, Frederick Conard, and present counsel for petitioners Zuber, *et al.* (A. 36, 58, 711), who were likewise associated as counsel for the CMPA and NEMPA in the *Blair* case. On January 11, 1967, date of the hearing on the preliminary injunction, a motion to expedite the case was filed by the government with the approval of the present attorneys for petitioners Zuber, *et al.*, said motion proposing that the case be heard on cross-motions for summary judgment on February 8, 1967, and that the motions of the government and applicants for intervention be filed on or before January 27, 1967 (A. 57). The motion of the CMPA and NEMPA for intervention was denied (A. 61), and it should be noted that no problem existed as to the administrative record at that time.

On January 23, 1967, plaintiffs filed a motion for an order authorizing the maintenance of the suit as a class action, and an Order (A. 68) was entered to such effect on February 1, 1967, after a full hearing. The plaintiffs increased the individual plaintiffs to 168 at that time (A. 72) and offered to increase the number to 1,000 if necessary (A. 67). In view of the attempt of petitioners Zuber, *et al.*, to equate the plaintiffs' representative suit with their unsupported actions herein, the plaintiffs have filed the handwritten names and addresses of over 2,000 additional plaintiffs in the district court.

In spite of the request for expedition and the alleged need for the differential payments related in affidavits (A. 60) filed by the Zuber petitioners on January 11, 1967, they delayed filing their motion for intervention (A. 84) until February 24, 1967, date on which plaintiffs filed for summary judgment (A. 72-83). The Zuber papers proposed additional delay because of alleged unavailability of the administrative record, and the government moved on March 6, 1967, for a suspension of proceedings pending the exhaustion of alleged administrative remedies on the ground that it had discovered that a non-nearby dairy farmer had requested the termination of the nearby differential in connection with an administrative hearing involving other matters. That hearing had been concluded long before the present suit was filed, and the Act accords an administrative remedy only to handlers.[39a] The plaintiffs opposed the government motion on several grounds (A. 87), and it was denied by Order entered on March 13, 1967 (A. 107). The Zuber motion to intervene was denied on March 21, 1967, after a full hearing (A. 119), and a motion for summary reversal upon appeal thereof was denied by the Court of Appeals on May 5, 1967 (A. 129-30).

[39a] See Public Law 90288, 82 Stat. 93-5, April 16, 1968, Sec. 6(a) giving producers the right to obtain temporary injunction and Sec.6(c) according right to sue for damages, plus attorney fees and costs, for discriminatory practices without resort to any administrative "remedy".

Although plaintiffs were repeatedly and intentionally served with motions, affidavits, etc., immediately prior to various hearings in order to prevent adequate opposition thereto (A. 59-60, 139-47, 659, 216 and designated items deliberately omitted from appendix), they offered petitioners Zuber, *et al.*, at least three different opportunities over a period of two months to present any claim, defense, or material that they wished the district court to consider, even after said petitioners' motion for summary reversal of denial of intervention was denied by the Court of Appeals (A. 657, 658-59, 111). They also furnished both petitioners with a list of all pages of the 5,000-page administrative record for the 1964 Order in which the nearby differential was mentioned (A. 108-09), and it is noted that such list, furnished on March 17, 1967, includes the page reference containing testimony that petitioners Zuber, *et al.*, now claim they would have brought to the attention of the district court at the hearing of May 16, 1967, if allowed to intervene therein. Petitioners Zuber, *et al.*, did avail themselves of such opportunity by filing an extensive brief *amicus curiae* in the name of the Commonwealth of Massachusetts (A. 125) on May 15, 1967, the day before the hearing on summary judgment, and have worked with government counsel throughout this case. Further, the plaintiffs suggested and consented to a modification of the preliminary injunction (A. 109) in order to allow the nearby producers to receive their escrowed monies and their full uniform price without deduction therefrom in the future. Said modified Order was entered on March 17, 1967, after petitioners' attorneys stressed the need of nearby producers for said funds, the plaintiffs also waiving any claims against said producers for past damages in reliance upon representations of petitioners' attorneys that plaintiffs would have their escrowed monies returned to them if they prevailed herein.

Plaintffs inquired of the government as to whether any additional administrative records were considered necessary for the court's consideration (A. 660-61), and they filed

summaries in anticipation of the furnishing of such records when no reply was forthcoming from the government (A. 661-704). Such summaries set forth the testimony *favoring* the nearby differential, and the main summary for the 1964 Order hearings was supported with the pages of the administrative record cited in the summary. The other administrative record material filed by the government consisted of pertinent parts of the hearing record for the first Boston Order of February 9, 1936; that for the 1937 Boston Order containing the first nearby differential; that for the 1951 Boston amendatory hearings relating to the nearby differential; and that for the 1964 consolidated Order involved herein, together with the respective Orders and Decisions of the Secretary relating to all of said records. Plaintiffs also filed relevant parts of the economic brief of the USDA for the 1937 Boston Order hearings, and such brief (A. 669-73), which petitioners Zuber, *et al.*, maintain should not have been considered by the district court, is virtually identical in language to the Boston *Handbook for Producers*, which they contend they would have brought to the attention of the court if allowed to intervene. After being furnished with summaries of the hearing records pertaining to the secondary milk orders (A. 689-704), the government failed to produce such records which had been certified by the USDA and transmitted to government counsel (A. 120).

A memorandum granting summary judgment was filed on May 24, 1967 (A. 120) subsequent to full hearing thereon on May 16, 1967, and the court entered an Order and Judgment on June 15, 1967 (A. 121) after objection and response (A. 728) thereto. The Order and Judgment consisted in large part of prior orders prepared by the court (A. 62, 68, 107, 109), and the court previously and thereafter rejected various proposed orders submitted by all parties and applicants for intervention. The court also took the step of filing various proposed orders to show that they had been considered by the court (A. 165, 3, 5), and most

of those proffered by the petitioners were rejected because of inaccurate, unfair and prejudicial language therein.

When it appeared that the Secretary did not intend to appeal the judgment (A. 129), the petitioners Zuber, *et al.*, were allowed a choice of continuing with their appeal concerning denial of intervention or abandoning the same in favor of intervening for the sole purpose of prosecuting an appeal from the judgment (A. 129). They notified the Court of Appeals that they chose to appeal the judgment but they presently attempt to pursue both the appeal of the judgment and the denial of intervention in violation of their own representations and the Order of the Court of Appeals. Moreover, they have attempted to bring before this Court the denial of intervention of the NEMPA which was never appealed and which initial attempt to enter this case was unbeknown to and against the wishes of its non-nearby members (A. 166-86). Although plaintiffs consented to a number of matters in the district court, even in respect to continuance of the escrowing of their own monies until a hearing could be held thereon after the judgment of the district court (A. 111, 131-33 (consent not printed), 659), the petition of Zuber, *et al.*, to this Court actually stated that plaintiffs had "forged" the record below. Those petitioners have not only utilized such misrepresentations to accomplish their own ends but have appeared in court without any notice to plaintiffs in attempts to obtain orders to their advantage and have also intentionally given little notice of such appearances on other occasions. (A. 139, 143, 659)

The USDA issued a recommended decision on July 6, 1967, in connection with the aforesaid administrative hearing and proposed therein to continue the nearby differential on the basis of "new findings" to replace those not made in 1937 and the deficient findings made in 1964. A motion to preserve the effectiveness of the Order and Judgment of June 15, 1967, was filed by plaintiffs

(A. 133), and the transcript of the hearing (A. 148) illustrates the attempt to circumvent the Court's Order and Judgment. The government subsequently appealed the district court's judgment. The Court of Appeals entered its decision on the consolidated appeals on September 23, 1968 (A. 167, 216), affirming the judgment of the district court but awarding the nearby producers that portion of the escrowed monies emanating solely from the non-nearby producers which were collected prior to the district court's Judgment of June 15, 1967, the balance of the monies escrowed thereafter being awarded to the non-nearby producers. The respondents filed a petition for certiorari from that part of the lower court's decision that awarded a portion of their monies to nearby producers but no action has been taken by the court on said petition, No. 26 herein.

SUMMARY OF ARGUMENT

The nearby differential is unauthorized under the Act by reason of the fact that it diverts a part of respondents' uniform minimum price to illegally preferred "nearby" producers on the basis of the historical use of their milk for fluid use and in violation of the command of the Act and the marketwide pooling provision thereof that all producers are to be paid a uniform price for their milk, irrespective of the use thereof. The historically higher prices allegedly received by nearby producers also relate to fluid use of milk, and those compiled under Federal or State regulation are incompetent for any purpose, particularly when all producers were receiving depressed prices prior to the Act.

The differential payments are geared to the fluid use of milk, being paid at 46¢ per cwt., or such lesser sum as will equal the fluid milk price. Its operation constitutes a use apportionment of the marketwide equalization pool with

resultant payment based on use of milk, the injury being the greatest to respondents when the prices are the lowest.

The differential does nc' constitute one of the enumerated statutory adjustments to the uniform price, being based on location of the producer's farm rather than on the location at which delivery of his milk is made. Nor is it a market differential, for this adjustment is the direct delivery differential provided for in the zone differential provision of the Order and which is paid for the savings effected when milk is delivered directly to a city market rather than to a country plant where double handling is involved. A nearby producer may deliver his milk to a country plant and receive the nearby differential, whereas a non-nearby producer may deliver his milk to the market center and he still has to pay the nearby differential, this fact conclusively indicating that location of the producer's farm is the critical criterion. Moreover, the Secretary admitted in the *Blair* case that the nearby differential involved in this case could not be issued on the authorized market differential and that all nearby differentials had always been issued as location differentials under 8c(5)(B)(ii)(c) of the Act.

The Act provides for differentials customarily applied by handlers, not producers, and the differential is illegally discriminatory because nearby producers provide no service or value for the payments. The preferential price treatment to nearby producers is compounded by the requirement that the differential be paid out of respondents' minimum milk price, and this violates respondents' rights to due process and equal protection of law.

The Act provides only for the payment of *minimum* prices, and the nearby producers may receive any premium from handlers if their milk actually does have any additional value. They could not be injured by the termination

of the differential, and their insistence that respondents pay the differential is an admission that nearby milk has no additional value. The Secretary has found that handlers should pay for the factors of availability, accessability, or inherent value of nearby milk, and the nearby producers are already compensated for the location value of their milk by the differentials for transportation and direct-delivery, as well as by the seasonal incentive plan for the factor of seasonality or evenness of production.

The Secretary's findings are deficient and inconsistent, and his conclusions are irrational and arbitrary, in that his findings not only relate to use of nearby milk but acknowledge that nearby producers required Federal regulation in order to maintain any market or reasonable price for their milk. His conclusions are at variance with those made in other decisions and completely self-contradictory.

The present nearby differential and Order, promulgated in 1964, is a final Order and the non-nearby producers continue to sustain irreparable injury by virtue of the differential. The differential in the 1937 Boston Order was not promulgated until after the re-enactment of the Act here involved, and that nearby differential applied to only 5% of the producers in the milkshed at a rate of 3 cents per cwt. The present differential has increased 400 percent by virtue of the 1964 Order and approximately one-fourth of the producers are now classified as "nearby" and entitled to the differential.

The petitioners have presented nothing to reflect in any manner upon the propriety of the granting of summary judgment by the district court and the affirmance thereof by the Court of Appeals. Indeed, the judicial validation of this differential would open the floodgates to the issuance of similar discriminatory preferences across the nation that would result in disorderly marketing and the eventual nullification of the Act.

ARGUMENT

A. THE NEARBY DIFFERENTIAL IS UNAUTHORIZED UNDER THE ACT AND CONTRARY THERETO.

1. The nearby differential violates the Act's requirement of a uniform price, irrespective of the use of milk.

The very heart of the Act is its requirement that all regular producers be paid a uniform price for their milk irrespective of how it is used by the handler to whom it is delivered. This legislation was urgently needed by all dairy farmers, and the chaotic conditions and depressed prices that led to its passage are recognized in the Act itself, the legislative history, and in several court decisions.[40] The fundamental problem, which was particularly acute in New England, was a surplus of milk and a resultant self-defeating and cut-throat competition among dairy farmers for a fluid market outlet. The Congressional answer was a carefully devised program that provided for the sharing of the benefits (fluid or Class I use) and the burdens (surplus or Class II use) of the milk market by all dairy farmers through the medium of a uniform price, irrespective of the use made of the milk of a particular producer or group of producers.

The Congress was necessarily aware that a few producers, through circumstances or good fortune, might have a preferential price position with a handler who disposed of his milk for fluid or Class I use. But it was also totally aware of the overall disorderly marketing conditions and demoralized price structure in all markets and of the necessity for such few producers to forego any transitory

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[40] *United States v. Rock Royal*, 307 U.S. 533; *Hood & Sons v. Dumond*, 336 U.S. 525; *Blair v. Freeman*, 370 F.2d 229.

price advantage they might have in order that a sound foundation might be formulated for a program that would stabilize marketing conditions, improve the natural economy and credit structure, and inure in other respects to the common good of producers and consumers alike:

> "§ 601. DECLARATION OF CONDITIONS.
> It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the *national credit structure* and that these conditions affect transactions in agricultural commodities with a *national public interest*, and burden and obstruct the normal channels of interstate commerce."

The lower court in *Blair v. Freeman*, 370 F.2d 229 (1966), recently reaffirmed this keystone purpose of the legislation when it stated:

> "The core of the Congressional program was a uniform price for producers that did not turn on or vary with the nature of the use for which a producer was able to dispose of his milk. Hectic and unsettling competition among producers impelled Congress to formulate a device – uniform prices apportioned irrespective of individual utilization – that would recognize the use factor in the computation of the marketwide pool, but would not distinguish between producers on the basis of the use made of their milk."

This core or heart of the Congressional program has been consistently recognized by every court which has had this question before it, and the Economic Brief of the USDA (A. 669-73), filed in the hearing record for the 1937 Greater Boston milk order clearly sets forth this

basic feature of the legislation in explaining individual-handler and marketwide pooling of milk:

> "The use plan of payments for milk puts all handlers in the market on an equitable competitive basis, and *equalization of fluid milk sales* is intended to do the same thing for all producers. Equalization of fluid milk sales is simply an extension of a plan that has been employed by each handler and each cooperative creamery.[41] If a creamery sold 75% of its milk as whole milk and the remainder as cream, it did not pay 75% of its producers the fluid milk price for all their milk and the remaining 25% the cream price for all of their milk. Such a method obviously would have been inequitable. Instead each producer was paid the whole milk price for 75% of his deliveries and the cream price for the remaining 25%. Under the proposed amendment to Order No. 4 the fluid milk sales of the whole market are distributed among all producers in the milkshed in exactly the same way as though they were all members of a cooperative association which equalized its fluid milk sales among its members.[42] * * * The actual operation of the equalization plan is simply a means of distributing to all producers equally the value of the fluid milk sales

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41 Congress intended to "follow the methods employed by cooperative associations." H.R. Rep. No. 1241, 74th Cong., 1st Sess.; S. Rep. No. 1011, 74th Cong., 1st Sess. (1935).

42 No marketwide pool existed prior to federal regulation in the Boston market and, therefore, no nearby differential could have been paid from out of such non-existent source.

> in the market by all handlers. With a 40% surplus in a market, each producer should get surplus prices on 40% of his deliveries. The Class I and Class II sales are not distributed equally among handlers. One handler may have no Class I sales, yet his producers are entitled to Class I price for 60% of their deliveries. But another handler may sell 100% of his producers' milk as Class I and his producers, if they are to carry the same amount of surplus as other producers, should get Class I price for only 60% of their deliveries. * * * ."

The respondents confess an utter inability to perceive even the slightest logic or merit in the novel and limited contentions now made by the petitioners that producers may be paid on the basis of the use made of their particular milk. Indeed, the brief (A. 715) of the Secretary in the *Blair* case stated as follows at the very outset of its summary of argument in this regard:

> "Congress, desirous of eliminating the cut-throat competition between milk producers, enacted the Agricultural Marketing Agreement Act (50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*) and authorized the Secretary of Agriculture to promulgate milk marketing orders with the object, *inter alia,* of insuring that producers would receive uniform minimum prices for their milk regardless of the use made by the handler *of their particular production.* 7 U.S.C. 608c(5)."[43]

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[43] The Secretary's brief in *Blair* was filed as an exhibit in the District Court and is part of the original record filed in this Court. The Secretary admitted in *Blair* that the 1937 Boston nearby differential was "identical in purpose and effect" (A. 718) and promulgated on "very similar findings" (A. 722) as the N.Y.–N.J.

(cont'd)

And in *United States v. Rock Royal,* 307 U.S. 533 (1939), this Court accepted the Secretary's argument concerning this keystone feature of the statute when an attack was made on the equalization pool employed in the old New York federal order:

> "The result of the use of the device of an equalization pool is that *each producer,* dealing with a proprietary handler, gets a uniform or weighted average price for *his* milk with differentials for quality, location and other *usual* market variations, *irrespective of the manner of its use.*"

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[43] (con'td) nearby differential declared illegal in *Blair.* The brief admitted that the nearby differential had always been promulgated under 608c(5)(B)(ii)(c) as the location differential authorized for "the locations at which delivery of such milk is made" (A. 719), and it also quoted approvingly the Congressional definition of the market differential authorized under (a) to illustrate that the nearby differential could not be issued as the authorized market differential. (A. 715-16). Petitioners attempted to hide this item and other relevant exhibits by contending that they were not of record (A. 656) and by placing them at the end of Vol. 2 of the appendix. They then added undesignated material from the Secretary's brief which they contend is not of record to the beginning and end of excerpts designated by respondents in order to further conceal such admissions. The bulk of the excerpts from the brief printed in the appendix are those added by petitioners who also substituted the names of the *amici curiae* in *Blair* for that of the Secretary on the heading of such brief (A. 715) in a further attempt to hide such official admissions of the Secretary. It was only after this item and 112 similar major additions of undesignated material and at least 15 omissions were brought to the attention of the Second Circuit in the related *Cranston* case that petitioners hastened to advise for the record that they had discovered such single error and will correct the same.

The Court there noted that "handlers are not at liberty to pay *the producer* in accordance with the *use of the producer's milk* but must distribute the surplus to others whose milk was resold less advantageously", and it further stated in regard to the contention of a cooperative association that it need not equalize its fluid sales that, "If the cooperative members were freed of the burden of carrying their proportion of milk going to manufacturing use, the discrimination in their favor would be the most strongly marked."

As this Court also explained in *Lehigh Valley Co-op v. United States,* 370 U.S. 76 (1962), in commenting upon the operation of the marketwide equalization pool or producer settlement fund which effectuates the uniform price:

> "The net effect is that each handler pays for his milk at the price he would have paid had it been earmarked at the outset for the use to which it was ultimately put. But the farmer who produces the milk is protected from the effects of competition for premium outlets *since he is automatically allotted a proportional share of each of the different 'use' markets.*"

And the dissenting opinion in *Lehigh Valley* was to the same effect:

> "In order to put an end to this competition which was pushing farmers to the wall, *the 1935 Act* gave the Secretary specific power to set up *regional* marketing areas within which he could, for the Government, fix minimum prices handlers would have to pay to producers for the various uses of milk, require that those minimum prices be paid to a pool for the area and distribute the proceeds of the pool so that *each farmer* selling milk through the pool could ultimately be paid at the *same* uniform rate

> or 'blend price' *regardless of the use to which his particular milk was put.* 50 Stat. 246, as amended, 7 U.S.C. § 608c."

And the lower court in *Lehigh Valley*, 287 F.2d 726, also set forth in its decision the universal understanding concerning this fundamental aspect of the Act:

> "After adding the totals and making certain additions and/or subtractions not relevant here, he divides that figure by the aggregate volume of milk of all classifications used in the Marketing Area to determine the uniform price *which is paid to all producers regardless of the utilization of their milk.*"

Again in *Brannan v. Stark*, 342 U.S. 388, this Court also noted that, "Producers, however, are paid the same price for milk delivered no matter what use is made of the *particular milk* by the handler."

In *Grant v. Benson*, 229 F.2d 765, *cert. denied*, 350 U.S. 1015, it was stated:

> "Thus the price paid by the handler is geared to the use which he makes of the milk. In contrast, the marketing plan is designed to give the producer a uniform price for all the milk he sells regardless of the use made of it by the handler who purchases it."

Many other cases could be cited to like effect, and it must be noted that the Secretary himself has repeatedly acknowledged that a producer is required to be paid the uniform price for his milk on the basis of the average utilization of all milk in the milkshed under true market-wide equalization pooling instead of on the basis of the use of his particular milk. He has also acknowledged that he has deviated from this basic requirement in those few instances wherein he has succumbed to improper pressures and promulgated a nearby differential in a milk

order. Of the four milk orders consolidated into the Massachusetts–Rhode Island Order in 1964, only the Boston Order was larger in number of producers than the Southeastern New England Order which encompassed the State of Rhode Island and a substantial part of Massachusetts. The Secretary's decision of October 21, 1958, 23 Fed. Reg. 8238, promulgating the latter milk order stated as follows concerning payment of the nearby farm location differential to Massachusetts, Rhode Island, and Connecticut producers:

> "Historically, dairy farmers in the States of Massachusetts, Rhode Island and Connecticut, because of their location with reference to the large population concentrations of New England have disposed of a substantially larger percentage of their production for fluid use than have dairy farmers in the upcountry area. Hence, nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. Under the marketwide pooling herein proposed and without some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk in the milkshed *rather than according to utilization of his own milk.* Under a regulated market, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation. * * *".

The Secretary's rationale in issuing the Connecticut Order and nearby differential in 1959, 24 Fed. Reg. 1063, was also clearly based on the prohibited considerations respecting the use of milk of nearby producers for fluid purposes, and he again acknowledged the identical basis on which all of the nearby differential provisions had been promulgated:

"The Federal order markets in the New England and the New York-New Jersey market provide for similar differentials * * * . *The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes.*"

Again, in 1960 at 25 Fed. Reg. 7833, the Secretary found as follows in regard to the Connecticut nearby differential:

"As stated in the Secretary's decision of February 9, 1959 (24 F.R. 1049), the present provisions were established in recognition of the higher Class I utilization, and higher returns that nearby producers had customarily received over more distant producers."

The findings and rationale of the Secretary were virtually identical in issuing the nearby farm location differential of the New York-New Jersey Order in 1957, 22 Fed. Reg. 4213:

"Historically, the percentage of the milk produced nearest to metropolitan New York-New Jersey which is used for fluid purposes is higher than the percentage of more distant production which is used in fluid form. * * * Nearby producers have been able to get a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. When milk is pooled on a marketwide basis, the nearby producer is paid on the basis of the average utilization of all milk in the milkshed *rather than according to the utilization of his milk.* Together with *equalization,* however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and is protected to some extent from

> the loss of a market because of competition of cheap milk from more distant sources. The distant producer also benefits from an established Class I price, and in addition gains a larger share of the fluid market than is likely without equalization. * * * ".[44]

The foregoing findings openly admit that the nearby differential is a device to apportion the fluid milk market and price to nearby producers and that it is violative of the uniformity of price irrespective of use required under marketwide equalization pooling and the Act. The statute clearly provides, in 608c(5)(B)ii) authorizing marketwide pooling, "for the payment to *all* producers and associations of producers delivering milk to *all* handlers of *uniform* prices for *all* milk so delivered, *irrespective of the uses made of such milk by the individual to whom it is delivered.*" No exemption is provided in the Act for nearby producers or any other group of producers, and no exceptions are made for nearby milk or for the payment of "historical" rather than uniform prices. The Secretary's rationale in promulgating the present Order in 1964 is also consistently violative of the statute, in that he merely reaffirmed his position when he stated at 29 Fed. Reg. 11213:

> "Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values,

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[44] The Act's provision for uniform *minimum* prices to producers irrespective of use of milk prevents the Secretary from substituting his formula and use rationale for that of the Congress. H.R. Rep. No. 1241, 74th Cong., 1st Sess. 10 (1935); S. Rep. No. 1011, 74th Cong., 1st Sess. 10-11 (1935); *Blair v. Freeman,* 370 F.2d 229.

above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant area as of the milkshed."

After diligent study[45] of the extensive testimony and evidence relating to the nearby differential of the New York-New Jersey milk order, compiled from a 15,000-page administrative record with hundreds of exhibits in which every aspect of the nearby differential was explored and examined, the *Blair* court made the following observation that is equally applicable to the above finding of the Secretary:

"We are aware that the Secretary's findings state that nearby producers have always been able to obtain a premium, over the price paid more distant producers, higher than can be accounted for in terms of cost of transportation to market. 22 Fed. Reg. 4213 (1957). If this history has any current significance, if the milk has greater "value" to the handler for reasons other than quality and location of delivery, it may be a reason for the producer to receive out of the handler's own pocket a premium above the minimum price, but it would not be a justification permitted by law for a diversion from appellants of their equal

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[45] *Blair v. Freeman,* 370 F.2d at 230. The Court of Appeals considered the case for 7 months before issuing its opinion which has been recognized as one of the most astute expositions on this subject that has ever been handed down by a court of law. A re-reading of the decision emphasizes not only the depth but the breadth of that well reasoned decision that has been accepted by every segment of the industry except those few seeking to preserve a basic illegality in any manner.

share of the blended uniform minimum price adjusted only for the statutory differentials."

Both the *Blair* and *Allen* courts also noted that a consideration involving compensation of nearby producers for the loss of their alleged special share of the fluid milk market "is not affirmatively authorized by this statute which precisely circumscribes the power of the Secretary of Agriculture. On the contrary, this is exactly the approach the Congress intended to prohibit." Clearly, it is no answer to say that nearby producers received higher prices at some time prior to the Act, for the acceptance of petitioners' contentions that such producers should retain the allegedly higher prices would rewrite the Act to substitute a lack of uniformity for the specified uniform price requirement. The statute provides for uniform minimum prices, not for varying non-uniform "historical" prices, and any argument concerning preservation of the "status quo" in such regard would nullify the uniform price requirement of the Act even if consideration of the use of a producer's milk did not formulate the basis for the nearby differential.

Moreover, the acceptance of the petitioners' argument would actually result in the non-nearby producers receiving a surplus or Class II "historical" price for their milk, in that it is an indisputable fact that all producers were receiving depressed prices at the time of the passage of the Act, this being the very factor that led to its enactment. The petitioners' citation of "historical" prices for a period long prior to the Act and before various technological and transportation improvements made inroads upon protected markets are obviously irrelevant to the situation existing at the time of the emergency legislation. Indeed, even in his recent decisions extending federal regulation and the nearby differential to the markets adjacent to that embraced in the Greater Boston milk order, the Secretary has consistently found that it was the nearby

producer who clamored for a federal order because he was losing his market to more distant dairymen and the local milk was often disposed of as manufactured or surplus milk at Class II prices.[46]

Thus, the plain and mandatory language of the Act is deliberately ignored in violating the very purpose of the legislation, for the Secretary's findings acknowledge not only the exception to the required uniformity of price but grounds it upon the prohibited consideration of use of a producer's or group of producers' milk. Further, at the same time that the Act is intentionally violated in its most fundamental and mandatory provision, the Secretary also indicates an awareness of the reasons that gave rise to such uniform price requirement and the need for federal regulation, in that his findings acknowledge that under a regulated market the nearby producer "obtains the benefit of an established Class I price which may be higher than in the absence of regulation and has the assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources." Indeed, the Secretary stated as follows concerning the nearby milk in his Southeastern New England decision that sets forth his rationale for violating the Act in favor of producers "in the States of Massachusetts, Rhode Island and Connecticut":

> "More than one-third of the fluid requirements for the Southeastern New England area originates from sources outside the States of Massachusetts, Connecticut and Rhode Island. (A. 340) . . . Less than one-third of the fluid requirements of Rhode Island dealers are supplied by Rhode Island dairy farmers. An additional forty-five percent is supplied by dairy farmers located in nearby

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[46] 23 Fed. Reg. 8226-27; 14 Fed. Reg. 7085; 14 Fed. Reg. 7098 and 29 Fed. Reg. 11208.

Massachusetts and Connecticut and the remainder is secured from other sources, primarily from the States of Vermont and New York. (A. 342)... Relatively large quantities of local producer milk were dropped during the latter months of 1957 and early 1958; in some cases entire pickup routes were dropped at one time. (A. 342)... Registered Rhode Island producers have enjoyed a preferential market over an extended period of years. The allocation program and the procedure employed by the responsible officials of the State in issuing permits for importation of non-registered milk have tended to maintain such preferential market to the detriment of other dairy farmers whose production is an essential part of the market supply. (A. 343) . . . The overall Class II utilization for the market is only 5.8 percent of the total market utilization and less than 10 percent of receipts from registered producers which, from experience in other federally regulated fluid markets, is substantially less than the necessary reserve which a market such as Rhode Island must carry to assure a continuing adequate supply to meet daily and seasonal fluctuations in supply and demand. Hence, the market relies primarily on up-country unregulated supplies and surrounding Federal order markets to provide the necessary reserves. (A. 343) . . . The Southeastern New England market is a deficit market and must rely on sources of supply in northern New England and New York to supplement the local supply. (A. 344) . . . The marketing situation as it now exists constitutes a serious and continuing threat to the stable and orderly marketing of milk and to the maintenance of an adequate supply of pure and wholesome milk for the Southeastern New England marketing area. (A. 345) . . . "

In respect to the Massachusetts producers located in the Southeastern New England area, the Secretary also found in his 1958 decision that, "Much of this milk is sold at manufacturing milk prices even though the local milk supply is inadequate to meet market demands." (A. 341).

The same findings were made by the Secretary in 1949 in issuing a Federal Order and a nearby differential for the Springfield, Mass., marketing area. Approximately 40 percent of the producers regularly serving that market were located outside of the state of Massachusetts (A. 331), and "the sources of milk supply for the various cities and towns in the proposed marketing area overlap and are intermingled to such an extent that the general supply area may be considered as one milkshed for the entire marketing area." (A. 333). In spite of the preferential prices which handlers were *required* to pay to local producers under regulations of the Massachusetts Milk Control Board (A. 332), the Secretary found that:

> " * * * The evidence in this record shows the need for Federal regulation of all the sources of milk supplies for the Springfield market in order to give Massachusetts producers who are now supplying the market an opportunity to retain the market *on an equal basis* with out-of-state producers. (A. 331) . . . The record shows that conditions exist in the Springfield market which have resulted in a loss of market for several producers. (A. 331) . . . the lack of a uniform marketwide price plan for all producers supplying the market is a disrupting factor. (A. 333). . . . The lack of price regulation effective with respect to all of the sources of fluid milk for the Springfield market and the absence of a uniform pricing method are contributing to the growth of an unstable milk market in this area. A marketing order is needed to assure producers of a market

for their milk at reasonable and uniform prices." (A. 333). 14 Fed. Reg. 7085, Nov. 23, 1949.

Virtually identical findings were made by the Secretary in his decision, 14 Fed. Reg. 9097, of the same date, November 23, 1949, promulgating a Federal order and nearby differential for the Worcester, Mass., marketing area. (A. 336-39).

The Secretary's decision, 29 Fed. Reg. 11205, of August 4, 1964, consolidating the aforesaid three milk orders with the Boston order to form the Massachusetts-Rhode Island Order[47] stated that "distinguishable markets for milk in most of eastern Massachusetts and Rhode Island no longer exist (A. 346) . . . It is clear that a single marketing area has developed where previously separate markets existed. Under this circumstance, the economic stresses, marketing instability and price uncertainties which have developed and persisted must be eliminated by the adoption of a single milk order with a single marketwide pool." (A. 347)

The Secretary's decision further noted that "recently much of the locally-produced milk has had to be disposed of in manufacturing channels." (29 Fed. Reg. at 11208, 3rd column, 1st para.)

Although the Connecticut Order was not consolidated into the present Order in 1964, the Secretary's decision of February 11, 1959, 24 Fed. Reg. 1049, promulgating the Connecticut Order and nearby differential contained very similar findings. 24 Fed. Reg. 1050.

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[47] Mergers of milk marketing areas and orders are becoming commonplace as the population increases and the suburbs expand. The Eastern Ohio-Western Penna. Order was merged with the Clarksburg W.Va., order on May 1, 1969. Merger of the Philadelphia Order with two other orders is presently under consideration by the USDA.

All of the foregoing findings relating to the loss of a market by nearby producers and the use of their milk for Class II or manufacturing purposes are not only inconsistent with the issuance of any price preference to nearby producers, particularly on the basis of the use of their milk for fluid purposes, but are also indicative of the reason for referring to the "historical" use of nearby milk in issuing a nearby differential. However, as the *Blair* court correctly noted, the Act does not allow payment of non-uniform "historical" prices to certain producers on the basis of the "historical" use of their milk but, indeed, requires the payment of uniform prices to all producers irrespective of the use of their milk historically or potentially.

Moreover, even if a few producers did receive a higher price for their milk long prior to the Act or federal regulation of a particular market, they certainly had no lien or property right to the fluid milk market. Whether nearby or non-nearby producers, they obviously could not corner it and hold it either against other producers or the power of the Congress to control the industry as it affects interstate commerce and the public interest.[48] Nor could the handlers with fluid milk outlets make a similar claim of a monopoly over the fluid milk sales. It must also be remembered that many non-nearby dairy farmers possessed preferential price positions over other producers by virtue of fluid milk outlets and they *opposed* federal regulation for this reason. Some served the same handlers as the nearby producers, and other non-nearby producers in various parts of the milkshed had made heavy investments to acquire a fluid outlet for their milk.

For instance, the Bellows Falls Cooperative Creamery of Bellows Falls, Vermont, composed of non-nearby producers,

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[48] Secs. 601; 602; 608c(5)(B), (D) and (G).

was *opposed* to marketwide pooling unless its producers would get the benefit of base-rating reflecting their lack of surplus. This organization had a direct outlet for its members' milk with stores in Boston, and it took care of any surplus by selling it as cream through such outlet.[49] The association maintained that the property interests of its members would be jeopardized by marketwide pooling wherein the surplus of other groups would simply be borne by the pool rather than the producer himself or his association. The Milton Cooperative Creamery of Milton, Vermont, was of the same view, for this association also owned its own country plant facilities.[50] Moreover, its members had bought an interest in a business in Boston through which their milk was marketed. Instead of selling milk to dealers, the association marketed its milk through a city distributing plant of which its members were part owners. The Secretary acknowledges that the Congress did not write the legislation to retain the historical preferential price position of these producers or groups of producers over others in the milkshed, and it is equally clear that the Congress did not engraft any exception of this nature in favor of a particular group of "nearby" producers who were benefitted by the Act and federal regulation as much, if not more, than any other producers.

The correctness of the holding of the court below in both *Allen* and *Blair* concerning the Secretary's inability to amend the Act by giving consideration to "historical" price relationships or preservation of the "status quo" in favor of certain producers is illustrated by the case of *H.P. Hood & Sons v. United States,* 26 F. Supp. 672,

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[49] Report of the FTC on the Distribution of Sale of Milk and Milk Products, Boston, Baltimore, Cincinnatti and St. Louis, H.R. Doc. 501, 74th Cong., 2nd Sess. (June 4, 1936), p. 27.

[50] *Ibid.*, p. 22.

affirmed 307 U.S. 588 (1939). The district court in the *Hood* case allowed a producer to intervene for his class on the side of the handler, Hood & Sons, and a second producer was allowed to intervene on the side of the Whiting Milk Company, a handler that was also sued by the United States to enforce the Greater Boston milk order, 21 F. Supp. 321 (D.C. Mass. 1937), the said cases having been consolidated subsequent to the latter decision. The intervening producers maintained that their respective handler had a higher Class I utilization than the average of the other handlers in the market, and both the handlers and the producers challenged the marketwide equalization pool which resulted in a lower price to such producers than that which they had received prior to the Act.

The intervening producers' arguments concerning entitlement to such "historical" prices were fully considered by the district court, and its excellent opinion noted that their rights to such prices were contingent upon the unconstitutionality of the Act.

Of especial significance is the fact that the intervening producers in the *Hood* case were non-nearby producers, the main intervener being from the State of Vermont, and this clearly indicates that many non-nearby producers also possessed preferential fluid milk outlets and "historical" higher prices prior to the Act. The "nearby" producers plainly have no greater right to the retention of a preferential price position than do non-nearby producers. Moreover, said intervening producers continued in the *Hood* case when it was presented to this Court, and their arguments were summarily rejected by this Court with the terse comment:

> "Other contentions are made which have been considered but which do not seem to require any statement. Affirmed."

This Court also rejected the analogous arguments of the handlers that the payment of the excess of their sales over and above the uniform blended price into the marketwide equalization pool or producer settlement fund for transfer over to other handlers *and the latter's producers* violated the constitutional rights of the handlers *who disposed of their milk for Class I or fluid use.* The Supreme Court noted the obvious fact that such handlers were required to pay only *minimum* prices according to the nature of their sales, and that they had no interest in the pool or fund to question disbursements therefrom. If handlers with a high fluid utilization could not pay their own producers on the basis of the excess of their sales over the uniform blended price, then it is clear the producers with such "historical" fluid milk outlets may not demand payment on such basis through a differential deduction from the equalization pool prior to computation of the uniform blended price. If a differential may be employed to obtain or retain a larger share of the fluid milk market and price for certain producers, then it is evident that such a differential predominates over not only the uniform price requirement but the Act itself.

It is important to realize that the arguments of handlers and those producers who received higher prices *prior to the Act* were in opposition to the equalization and uniformity required by the Act, whereas the arguments of these ineligible or non-nearby producers concerning violation of their statutory and constitutional rights are grounded *upon the Act.* The respondents acknowledge the constitutionality of the Act and its fundamental purpose to secure to all producers "the right to be paid a minimum price." *Stark v. Wickard,* 321 U.S. 288 (1944). Indeed, respondents maintain that nearby producers have no standing to intervene herein to either claim a payment over the minimum price or to oppose lawful competition under a government program.

Additionally, it is evident that price is also contingent upon the use made of the milk.[51] and any attempted justification on the "historical" higher-price theory would necessarily constitute an impermissible use criterion condemned by the Act. This relationship of price to use is acknowledged by the Secretary's finding in promulgating the very first Boston milk order on February 9, 1936, when nearby producers were given a fluid or Class I price for all of their base milk because of "the greater availability of their milk for Class I use" (A. 224), the non-nearby producers being forced to accept a composite or blended price that carried the surplus of the market under a clearly illegal "base-rating" plan.[52] The only finding made is issuing the first nearby differential provision in the Greater Boston milk order of August 1, 1937, indicates that the Secretary did not deviate from the illegal use criterion, in that he merely substituted the nearby differential provision for the Class I base-rating previously awarded to the preferred nearby producers. (A. 224).

When the issuance of the nearby differential that varies the uniform minimum price is grounded on the past use of the milk of certain producers, it is clear that the illegal result has been obtained on an equally illegal basis. Even the price statistics cited by the petitioners are not only irrelevant for the reasons heretofore related but are also invalid as evidence because of their admitted relationship to the fluid use of nearby milk.[53] Nor may the Secretary preserve such relationship by artificial regulations and then cite such resulting statistics as continuing justification for the differential.

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51 *United States v. Rock Royal,* 307 U.S. 533.

52 608c(5)(B)(ii)(d).

53 *H. P. Hood & Sons v. United States,* 26 F. Supp. 672, *affirmed,* 307 U.S. 588.

Clearly, the consideration of such past price preferences and the use of milk of a certain producer or group of producers may no more be a valid justification for a variance from the uniform price required by the Act than can the present or future use of milk of certain producers:

> "We hold that, irrespective of motive, the Act forbids consideration of the use to which the milk of a particular producer or class of producers is put, historically or potentially, in adjusting the uniform minimum price to be paid to such producers."[54]

Moreover, the operation of the nearby differential of this milk order is geared to the use of milk and the Class I price in the same manner as the nearby differential of the N.Y.-N.J. Order invalidated in *Blair*. However, its financial impact on the non-nearby producer is far more discriminatory and vicious than the one in *Blair* where the nearby differential rates were subject to a formula which reduced the rate of payment to nearby producers when they increased their production by a specified amount. Also, the nearby differential payments were not made in any amount under the N.Y.-N.J. Order when fluid utilization in the milkshed reach 80 percent of the total regulated milk. Although the amount of the nearby differential payments under the Mass.-R.I. Order vary inversely with the fluid utilization in the market, being paid at the rate of 46 cents per cwt. *or such lesser amount as will equal the Class I price,* the differential payments would

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[54] *Blair v. Freeman,* 370 F.2d 229 (1966) at p. 236; *Freeman v. Allen,* 402 F.2d 660 (1968).

not be terminated when fluid utilization reaches 80 percent of the total milk but would be paid in successively decreasing amounts until there was 100 percent fluid utilization in the market. Further, the nearby producers' production and rate of differential payment are not contingent upon each other, and the nearby producer may increase his production at will, for his rate of nearby differential payments is higher when the surplus in the market is the greatest. The non-nearby producer is thus protected least when the need therefor is the greatest and has no protection against an increased surplus in the market, whether brought on by increased production of nearby producers or enlargement of their numbers. The non-nearby producers must bear an additional part of the surplus of the market by virtue of this aspect of the nearby differential which burdens him with the normal surplus of the market by its existence and operation.

As in *Blair*, such deduction of the nearby differential payments from the marketwide equalization pool reduces the uniform price and diverts a part thereof from the non-nearby producers who are supposed to receive a uniform minimum price without a prior deduction constituting an apportionment of the use value of the marketwide equalization pool. Contrary to the prohibition expressed in the Act, the nearby differential either perpetuates or creates payment based on use of milk of nearby producers. It accords to them the Class I or fluid milk price, or a larger share of the same, rather than a uniform minimum price, and to the non-nearby producers the burden of carrying the surplus of the market through a non-uniform price. The petitioners contend that the unauthorized nearby differential takes precedence over the requirement of a uniform price to all producers for all milk delivered to all handlers irrespective of the use of a particular producer's or group of producers' milk. The respondents maintain that the entire rule and command of uniformity is devoured by the exception thereto, and that

the Congressional intent and purpose is completely frustrated and violated by the nearby differential provision.

If the petitioners' contentions are properly understood, it would appear that they maintain that the "irrespective of use" language of the Act serves merely to distinguish between an individual-handler pool and the marketwide equalization pool and does not constitute any prohibition against considering the use which is made of the milk of a particular producer in paying him the "uniform" price under marketwide pooling of milk. This contention, of course, is a complete inconsistency and obvious self-contradiction, for one can hardly pay a uniform price and at the same time a price that is based on use made of the milk of the particular producer. It is tantamount to saying that a producer may be paid on the basis of the use made of his milk and thus need not be paid the uniform price required by the Act under marketwide pooling.

In a futile attempt to extricate themselves from the plain language of the Act, the petitioners argue backwards that, since the "irrespective of the use of such milk by the handlers" does not appear in Section 8c(5)(B)(i) describing individual-handler pooling, "the absence of that verbiage with respect to an individual-handler pool would dictate that no such strict price uniformity is required for producers covered under such a pool." (Brief of Zuber, page 38). However, petitioners conveniently overlook the fact that no such language is required in the individual-handler pooling provision because it specifically provides "for the payment to all producers and associations of producers delivering milk to the *same* handler of uniform prices for all milk delivered by them." In other words, each producer serving the same handler is paid a uniform price based upon the average use made of the milk of all producers serving such handler, and this elementary fact was acknowledged in the Secretary's brief filed in the *Blair* case:

> "Under a marketing order providing for 'handler pools' rather than marketwide pools, the utilization value of the milk disposed of by each handler is computed separately. The producer's minimum return is based on his own handler's average uses rather than the average uses of the market as a whole. This form of regulation does not involve a producer settlement fund since the individual handler's uniform minimum payments to his producers will coincide with the total utilization value of the milk received from them." (Brief of Secretary, p. 13, ft. 13, in *Blair*, filed as exhibit below).

Followed to its illogical conclusion, the petitioners' contention appears to be that under marketwide equalization pooling the Secretary may not consider the average use made of milk by the individual handlers in computing the average or uniform marketwide price because of the "irrespective of the uses made of such milk by the handlers" language, but that he may consider the use made of the milk of the individual producers in making payment of "uniform" prices to them. The situation is actually just the reverse, however, and petitioners understandably suggest no other basis for computing the marketwide uniform price and, indeed, their contentions embody a nullification of the language of the Act providing for uniform prices and the complete elimination of at least that part of the Act providing for marketwide equalization pooling of milk.

The petitioners' contentions also appear to embrace a repeal of the individual-handler pooling provision of the Act since there would be no reason therefor if each producer could be paid on the basis of the use of his particular milk rather than on the basis of the average use made of all of the milk of all producers serving the same handler.

Recognizing their dilemma in this respect, the petitioners are then forced to argue, although completely irrelevant to the issue of uniform prices under marketwide equalization pooling of milk, that the Secretary has the power, never exercised, to authorize payment to producers based upon the use of their milk under Section 8c(5)(A) of the Act. That provision, however, authorizes the Secretary to classify milk according to the form in which or the purpose for which it is used and to fix, or provide a method of fixing, minimum prices for each use classification which all handlers shall pay for milk purchased from producers and associations of producers. If this complementing provision was not in the Act, there would be no way to effectuate Section 8c(5)(B) of the Act which is conditioned upon (A) in providing for the two alternative methods of payment to producers. ("(B) Providing: (i) . . . ; or (ii) . . . "). Further, the introductory language of Section 8c(5) says that orders issued pursuant to this section shall contain "one or more of the following terms *and* conditions, and (except as provided in subsection (7) of this section) no others." The quoted language does not say, as petitioners would have it, "one or more of the following terms *or* conditions", and the Secretary is clearly authorized to include in an Order one or more terms and one or more conditions. Moreover, the words "one or more" were inserted before "of the following" in order to negate any possible interpretation that an Order had to contain all of the terms and conditions of Section 8c(5). Significantly, the petitioners admit that the Secretary has never acted in conformity with such a contention which is advanced for the first time in this Court. Although the point is an irrelevancy, we are unaware of any instance wherein the Secretary's interpretation of his own power and the Act have not been in disharmony with the present contention.

It is also significant that the Congressional reports speak of only two alternative methods of payment to

producers, that of marketwide equalization pooling and individual-handler pooling of milk. Although the price paid by different handlers may vary somewhat under individual-handler pools, it is crystal clear that the Congress was still motivated by principles of uniformity in authorizing such method of pooling. Individual-handler pooling of milk requires *individual* approval by at least *three-fourths* of the region's producers in a referendum *on this issue alone,* but marketwide equalization pooling may be approved by only two-thirds of the producers and their votes are cast for them by their cooperative associations on that provision and the milk order as a whole. It would be a complete inconsistency for the Congress to include such limitations in regard to individual-handler pooling that are "intended to safeguard the exercise of and prevent abuses in the application of the regulatory power conferred upon the Secretary"[55] and at the same time deprive the producers of all protection by giving the Secretary unbridled power to authorize payment based upon the use of their particular milk by the handler. If the petitioners' contentions were not meant to go this far and they mean that each producer serving a particular handler would be paid an average or uniform price under the alleged authority of Section 8c(5)(A), then it is plain such method is duplicative of that provided for in Section 8c(5)(B)(i) relating to individual handler pooling and that the Secretary may not deprive producers of their statutory rights and the protection specifically provided for by the Congress in order to insure the principle of uniformity of price irrespective of use of milk.[56]

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[55] H.R. Rep. No. 1241, p. 2; S. Rep. No. 1011, p. 3.

[56] The Secretary also has a third option under Section 8c(7)(A) which authorizes him to stabilize the prices of milk in regulating handlers by "(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof."

It might also be mentioned that the Secretary's decision promulgating this Order recognizes the uniformity contemplated even under individual-handler pooling in stating that, "Individual-handler pools generally are more practicable for markets where milk supplies are short and where reserve supplies are distributed rather evenly among all handlers serving the market." (A. 358-59).

The respondents submit that petitioners' contentions are thus not only irrelevant but also totally unsound, irrational, inconsistent and self-contradictory. They would amount to not only a nullification of Section 8c(5)(B) but of the Act itself. They would revive all of the self-defeating competition among producers and facilitate a situation wherein the Secretary would be additionally prevailed upon to foster monopolies over the fluid milk market with resultant injury to most producers and the higher prices for consumers that inevitably accompany such monopolies. Most handlers and producers would be driven from the market in short order, and it is clear that the Congress did not intend to preserve the unstable marketing and demoralized prices that petitioners' contentions would revive by attributing such power to the Secretary and such intention to the Congress. The judicial validation of the nearby differential would constitute judicial legislation and undo the work of the Congress. It would open the floodgates to the issuance of similar discriminatory differentials in virtually every milk order across the country and encourage its insertion in orders relating to other commodities. The uniformity and stability envisioned by the Act would be replaced by non-uniformity and disorderly marketing resulting from political expediency and group pressures for similar preferential price treatment, a fact that is evidenced by its insertion into other milk orders because it existed in the Boston milk order on a supposedly temporary basis. Discontent and unrest among producers would prevent harmonious relationships and preserve the jealousies, rivalries, and differences

that currently exist among various cooperative associations that inure to the producer's common disadvantage.[57] The issuance of similar discriminatory price concessions would engulf the producers in widespread and costly litigation.[58] The lack of uniformity and resultant failure to share the burden of surplus necessary to an adequate supply of milk would precipitate cut-throat competition leading to disorderly marketing.[59] Plainly, the Congress acted to put an end to such unsettling conditions and competition that plagued the markets and which would be revived by validation of a differential that gives a competitive advantage to the most influential group of producers:

> "The short answer is that Congress was well aware of the 'competitive conditions' in this industry, and clearly intended to override them. For the general welfare of all, it decreed that some producers might have to forsake their peculiar advantages, by requiring that uniform prices be paid to all producers, *subject only to a few narrow and well defined adjustments.*"[60]

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[57] Some cooperative association employees and officials favor the nearby differential for the reason that its termination might result in a loss of some of their members to other associations and a loss of dues income to the association.

[58] Petitioners Zuber, *et al.*, actually admitted this obvious fact in attempting to rebut the same with an inaccurate citation of one case that has nothing to do with this litigation.

[59] *Blair v. Freeman,* 370 F.2d 229. Compare *Cranston v. Freeman,* 290 F. Supp. 785, which appears to proceed on the basis that the Congress authorized a monopoly over the fluid market for one group of producers in order to eliminate competition by other producers who regularly supply the market's needs.

[60] *Blair v. Freeman, supra.*

2. The nearby differential is not an authorized adjustment to the uniform price.

> "MR. JONES: *The provision with reference to orders plainly states that in the case of milk and its products orders may contain the following conditions and none other. I think that is just as clear as it can be.*" (79 C.R. 9572).

After concluding that the Congress, as well as this Court and every other court except the *Cranston* court, was in error and that the plain language of the Act does not really mean what it says concerning uniformity of price irrespective of use of a producer's milk, the petitioners then acknowledge that they still must find a specifically authorized basis for the promulgation of the nearby farm location differential.

Section 8c(5)(B)(i) and (ii) of the Act provide that the uniform price under both individual handler and market-wide pooling of milk is subject, "in *either* case, *only* to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year . . . "

A proper understanding of the *authorized* differentials or adjustments reveals that they strengthen and underscore the requirement of uniformity of price irrespective of the use of a producer's milk.

The authorized adjustment in subsection (b) for the grade or quality of the milk delivered is reflected in the butterfat differential of the milk order,[61] and it is significant that any dairy farmer is free to improve the grade or quality of his milk in order to obtain a higher return therefor through the butterfat differential. All milk in the milkshed is subject to the same high sanitary health standards, and it is therefore available for fluid use irrespective of the situs of production, a fact which is apparent from the limited supply produced in the nearby areas. It is clear that the nearby differential may not be predicated on such basis, and an excellent article by the Assistant General Counsel, USDA, entitled "*The Pricing of Milk Under Federal Marketing Orders*", 26 G.W. Law Review 180 (1958), states in part as follows:

> "The entire supply of milk which is approved by the health authorities for fluid use in a particular marketing area is fungible and homogenous. There is no discernable basis for selecting out of the approved supply one producer's milk rather than that of another for sale on the fluid market, and also a particular producer's milk cannot be distinguished in a milk plant from that of another. All of the milk approved by the health authorities for the fluid use in a particular marketing area is available for disposition on the fluid milk market. A satisfactory stabilization of prices for

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61 7 C.F.R. 1001.71

fluid milk requires that the burden of surplus milk be shared equally by all producers and distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor."

The adjustment authorized under subsection (c) for "the locations at which delivery of such milk is made" clearly refers to the transportation costs[62] involved in hauling the milk from the place where it is delivered to the handler to the city distribution or processing plant. The cost of transporting milk necessarily enters into the price thereof, and the transportation differential is found in Section 1001.62 of the Order where it is combined with the market differential and collectively designated as the plant zone differential. As previously explained, all milk in the milkshed is produced for the fluid market, and the cost of transporting the milk is thus based on the mileage from the receiving handler or plant at which the milk is delivered to the principal consumption center for the regional marketing area.

Although promulgated as a "location" differential, the farm location differential is certainly not authorized under subsection (c) as an adjustment to the uniform price for "the locations at which delivery of such milk is made." The nearby and the non-nearby producers may deliver their milk to the identical spot, but only the nearby producer receives the differential payments, and this varying price treatment clearly evidences that the nearby differential payments are not based on the place at which delivery of milk is made as required by the statute.

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62 "Minimum prices fixed in such orders are required to be uniform as to all handlers, subject to adjustments for differentials in the grade and quality of the milk delivered, *for differences in transportation costs from the place at which delivery is made to the handlers to the distributing* or porcessing plant, and . . . ." H.R. Rep. No. 1241, 74th Cong., 2nd Sess. (1935).

Moreover, the nearby producer may deliver his milk any place in the milkshed and still receive the nearby differential payments, such blanket eligibility for the differential payments hardly being related or based on the different locations at which delivery of milk is made as contemplated by the Act. Such an interpretation obviously gives no consideration to the locations of delivery and is totally inconsistent with the defined differential because it is concerned only with the identity of the recipient of the differential payments and not the locations where he and other producers deliver their milk. Indeed, the nearby producer receives such differential payments even if he delivers his milk 200 miles from the city market,[63] whereas the non-nearby producer is not eligible therefor even when he delivers his milk to the market center. Instead, he must dig down and pay a part of his uniform minimum price to the nearby producer. Clearly, the nearby producer need do nothing to receive the differential payments and the non-nearby producer can do nothing to acquire the same or to avoid such exaction from his milk price, other than to move the location of his farm. He is thus effectively precluded from ever obtaining or avoiding the nearby differential payments, irrespective of where he or the nearby producer deliver their milk. The lower court correctly noted

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63 "(Reginald) Bird pointed out that no matter what radius was selected, there would always be nearby producers who would be delivering to handler's plants located outside the official market area. . . " (A. 631); "Deliveries to plants located within the zone was omitted as a condition and the differential was thereby converted into one depending solely on farm location. These producers could deliver to more distant plants and still receive the differential , . . . " (A. 635); see also testimony at A. 237 relating to non-delivery by nearby producers and real reason for preference by AAA in 1935, as well as A. 633, 698.

that the gearing of the differential to the situs of production rather than to the place at which delivery of the milk is made would forever fasten such tribute payments upon the non-nearby producer.

Nor may petitioners seriously contend that the nearby differential qualifies as the location differential authorized "for the locations at which delivery of such milk is made" because delivery has always taken place at the farm. This would allow a double or duplicate payment on the basis of the same factor, for the authorized location adjustment is already in the Order as the transportation differential that compensates the nearby producer for the location value of his milk. The place of delivery, moreover, is determined under the location differential of the Order with reference to the location of the *plant* in the freight zone at which the milk is delivered[64] and not in respect to the location of a producer's farm. Significantly, the non-nearby producer still could not receive the nearby differential payments and would have to pay the same to nearby producers even if he delivered his milk to the same handler and plant or at a location adjacent to the nearby producer's farm, this fact conclusively demonstrating that the receipt of the differential payments is dependent upon the identity of the producer rather than on the locations at which the milk is delivered.

The fact that milk is now delivered long distances in refrigerated tank trucks over superhighways and the industry has otherwise progressed over the past 30 years indicates the inapplicability of petitioners' contention

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64 7 C.F.R. 1001.62: "Zone Differentials. The class prices and blended prices computed under 1001.60, 1001.61, and 1001.64 shall be subject to zone differentials based upon the zone location of the plant at which producer milk is received . . . "

that the differential can be justified because delivery takes place at the farm. The exclusion of non-nearby producers on such basis is even more inappropriate at this time because many non-nearby producers deliver their milk direct to the market center in order to receive the zone differential for transportation and direct delivery of milk, and they would also like to receive the nearby differential payments denied to them and which they are forced to pay to an illegally preferred group of producers in order to market their needed milk.

Although petitioners maintain that the farm was regarded as the place of delivery when the subsection was inserted into the Act on August 24, 1935, it is apparent that this contention is totally lacking in merit. The Congress could not have been thinking in such limited terms when it passed the 1935 Act for it also provided therein for the market differential that was paid to a producer for the direct-delivery of milk to a city market. If delivery was limited to the farm at that time, the Congress would not have provided for the market differential that recognizes a saving in handling costs when milk is delivered directly to a city market or plant rather than initially to a country plant for reshipment to the city market.

In apparent acknowledgement of the defects in their contentions, the petitioners then maintain that, as a practical matter, only the nearby producers could deliver to the city market in 1937 when the nearby farm location differential was first inserted into the Boston Order. Of course, the petitioners not only attempt to rewrite the Act by such a contention but also fail to recognize that the material cited by them makes reference to a much earlier period.[65] In fact, the first Greater Boston Order,

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[65] Much of the material cited was either printed, compiled or related to a period prior to the passage of the 1935 Act and is also irrelevant and inaccurately or selectively cited by petitioners.

effective February 9, 1936, included a differential of 21 cents per cwt. for delivery of milk within 40 miles of Boston by producers whose farms were located *more* than 40 miles from Boston. The 1937 Boston Order reduced this differential to 18 cents per cwt. but nonnearby producers were still able to obtain such differential by the direct delivery of their milk to a plant within 40 miles of Boston. The petitioners thus attribute a superfluous or ulterior action to the Secretary in promulgating the 1936 and 1937 market differential that included the non-nearby producers within its terms in respect to payment for direct delivery of milk, and it is clear that the Secretary may not disavow or discredit his own regulations 30 years after the fact. His own action in promulgating the market or direct-delivery differential in the various milk orders, including those for secondary markets, indicates agreement with the Congress that the farm is not in any way related to the location at which delivery of milk is made.

Nor does reference to the old New York federal order of 1938 assist petitioners. The differential there was not only distinct from the present one but was also grounded upon *delivery* of milk to *plants* within the designated area. Article VII, Section 2, of the 1938 New York Order, reproduced in footnote 14 of the Court's opinion in *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939), is entitled "Minimum Prices" and specifically states that, "Payment of the minimum prices for milk received *direct* from producers shall be in accordance with Article VII. That Article provided for payment of the differential "in the case of *plants* located in the counties listed in paragraph 8 of section 1 of Article VI", and the latter provision referred to "*all* net pooled milk received from *producers at plants* in the counties or portions of counties listed below in this section."

Even as early as 1931, long before the first Act was passed and six years before the issuance of the first nearby farm location differential in the Boston Order of August 1, 1937, much of the milk for the fluid market was shipped by tank truck, and this mode of transportation offered decided economies and advantages over shipment in cans or by rail. The percentage of milk shipped in such manner had steadily increased by 1937, and it was apparent that a differential based on the place at which the delivery of the milk was made offered no possibility of preserving the local monopoly or preferred price position of nearby producers over the fluid milk market that existed in the 1920's.[66] Further, Congress certainly recognized this fact and never intended to turn back the clock and progress for the sole benefit of the nearby producers, a fact which is aptly evidenced by the many provisions in the 1935 Act pertaining to uniformity, delivery, and the entry of new producers and production areas into a market.

The petitioners, however, attempt to avoid these obvious and admitted facts by attacking the lower court's statement that, "not until bulk tank trucking thereafter made it economically feasible for distant farmers to deliver in the city did the nearby farmers, for self-protection, insist that the nearby differential be based solely on farm location." But the petitioners understandably offer nothing to contradict this basic fact, for it would be irrational to contend that improvements in transportation and distribution of milk did not take place during the 1930's. Indeed, the petitioners clearly confuse bulk tank *trucking* to the city plant with the more modern practice

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[66] See Barriers To Internal Trade In Farm Products, A Special Report to the Secretary of Agriculture by the Bureau of Agricultural Economics, USDA, (USGPO-1935), p. 14, and quotation therefrom at pp. 19-20 of this brief regarding shipments by tank truck.

of installing a bulk tank right on the farm and with other technological improvements in bulk tank hauling of milk.[67] A 1936 Report of the Federal Trade Commission to the Congress, H.R. Doc. 501,[68] cited by petitioners, clearly discloses the correctness of the lower court's observation concerning milk shipments in tanks instead of cans and by truck rather than by rail during the period 1920-1931 for the Philadelphia milkshed, the below-listed table of tank truck shipments being taken from the publication of The National Milk Producers' Federation, History Series No. 3, October 1, 1932, p. 31:

> "When country receiving stations were first introduced, milk was shipped to city processing plants in milk cans. The mechanical or physical loss, caused by milk adhering to the inside of the can and by spillage, was considerable but unavoidable.

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[67] The country milk, like the nearby milk, was originally delivered to the city market in cans which were iced to preserve the milk. The nearby milk could be delivered by truck and the country milk was usually shipped by rail. Tanks later replaced the cans in shipping non-nearby milk to the city, both by rail and by truck, and the milk was preserved by refrigeration. Farmers could band together to ship their milk by tank truck instead of delivering to a country plant where it would be reshipped by the handler by tank truck to the city market. Later, as petitioners note, bulk tanks to receive the milk were installed on farms and the cans were unnecessary for any purpose. The conversion to bulk tank storage on the farm is virtually 100 percent for the Mass.-R.I. market and 70 percent for the N.Y.-N.J. market, petitioners' federal register citation also referring to the R. I. market instead of this market.

[68] Report of the FTC on the Sale and Distribution of Milk and Milk Products for Boston, Baltimore, Cincinnati and St. Louis, H.R. Doc. 501 (1936).

"By far the major part of the shipments went via railroad refrigerator cars.

The development of *milk tanks* for railroad cars *and later for motor trucks, as good roads became more common,* decreased the mechanical loss in shipping milk, as less surface was exposed to the milk. In addition, the cost of washing the tanks was much less than washing the number of milk cans necessary to hold corresponding quantities of milk.

Milk shipped via railroad is unloaded at city railroad terminals and hauled by truck to the city processing plants. Milk shipped from the country station by motor truck, however, is unloaded directly at the city processing plants, and terminal costs, of course, are eliminated.

The introduction of milk tanks and the improvement of roads have made it possible for those Philadelphia distributors using them to decrease their costs of hauling milk from country receiving stations to city processing plants. The increase in use of motor trucks for hauling milk into Philadelphia and the decrease in use of railroads for this purpose since 1920 are clearly shown by the following tabulations:[68a]

[68a] Petitioners place great emphasis in alleging error upon a sentence in the lower court's opinion to the effect that "the differential was never one paid over and above the transportation differential available *to distant producers* who delivered to a nearby zone." Although the matter is of no great moment, the petitioners misinterpret the meaning expressed in such sentence by the lower court. The court simply stated that the distant producers who delivered to the nearby area never received any nearby differential, although they did receive the transportation differential, and the petitioners mistakenly enlarge the lower court's statement in alleging nonexistent error.

Trend of milk shipments into Philadelphia[1] 1920–31

Year	Percentage by trucks	Percentage by railroad	Year	Percentage by trucks	Percentage by railroad
1920	2.1	97.9	1926	29.7	70.3
1921	9.6	90.4	1927	38.6	61.4
1922	14.1	85.9	1928	50.7	49.3
1923	20.1	79.9	1929	51.4	48.6
1924	23.2	76.7	1930	51.7	48.3
1925	26.6	73.4	1931	55.3	44.7

"

Such improvements in transportation and other advances resulted in a much larger or alternative supply of milk being available to the handler, a situation which lessened the bargaining position of nearby producers. The differential for the direct delivery of milk was obviously not the type of differential that would result in a permanent return of any great extent and would actually encourage the elimination of any monopoly position enjoyed by nearby producers. As the amount of the market differential shrunk because of economies and improvements and as more distant producers were able to deliver their milk directly to the city markets, the nearby differential based on the location of the farm became the dominant differential provision. Handlers simply would not pay a large direct delivery differential when alternative supplies of milk were readily available, and the nearby differential was therefore fastened on the non-nearby producers by an influential group of producers located near the city who were backed by the Massachusetts Milk Control Board in refusing to equalize their production or to

otherwise enforce the federal program in a demoralized market. (A. 237, 405, 633, 675, 684).

It is apparent that the market differential for direct-delivery of milk provides no legal basis for the nearby differential. "The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant."[69] The direct delivery of milk to a city market rather than initially to a country receiving plant where the milk is cooled, tested, weighed, etc., and then shipped to the city plant or market, provides a service for which producers should be compensated. The double handling costs to the handler are thereby eliminated, and such market differential also tends to maintain uniformity among handlers as well as producers, in that it cancels out the added cost incurred by those handlers who maintain the country receiving plants for the actual benefit of the entire market and all handlers. Under the New York-New Jersey Order, this market differential is specifically referred to as a "direct delivery" differential. 7 C.F.R. 1002.71(c). Under other milk orders, such as the present one and the Connecticut Order, it is combined with the transportation differential and termed "plant zone differentials." 7 C.F.R. 1001.62, 1015.62.

The market or direct-delivery differential provides a service that is not limited to the primary market, and it was paid both prior and subsequent to federal regulation in many secondary markets. The fatal error of the *Cranston* district court decision is that it actually fails to realize that the Congressionally authorized and defined market differential is already in the Connecticut Order.[70] In fact,

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[69] H.R. Rep. No. 1241, p. 10; Sen. R. No. 1011, p. 10.

[70] See 29 Fed. Reg. 11211 wherein the Secretary discusses such differential in respect to both the Mass.-R.I. and the Connecticut

(cont'd)

this "customary market differential" was paid both before and after federal regulation was extended to the Troy and Albany, N.Y., area, the very area in which the *Cranston* court sat. 22 Fed. Reg. 4215 (1957). In spite of such fact, the *Cranston* decision omits the market differential in enumerating the differentials found in the Connecticut Order, and the Court thought that the plant zone differential of the Orders embraced only the transportation differential. Its decision presumably rests upon the testimony of witnesses who stated that such a market differential as was defined in the Congressional reports never existed in secondary markets. Of course, these witnesses could hardly admit the existence of the Congressionally authorized and defined market differential in the very area in which they testified or in respect to the Order there involved if their only hope of prevailing in that case lay in discrediting the Congressional definition in order to accommodate the nearby differential as the market differential.[71]

There is nothing in the Congressional definition of the market differential that limits it to the secondary markets, and it is now relegated to the primary market under federal regulation because of the factors of administrative

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70 (cont'd) Orders and explains that it refers to "the difference between costs incurred in the assembly of producer milk at country plants for transfer to city plants and cost incurred in receiving milk directly from producers."

71 The plaintiffs' attorney in *Cranston* filed a brief in the 1956 N.Y.-N.J. promulgation hearings for 24 dealers from the Troy-Albany, N.Y., area, and such brief dealt exclusively with the payments for direct-delivery in many secondary cities or markets in Upstate New York. Such brief, however, was never presented to that Court to rebut the testimony of witnesses that the defined market differential had never been paid in secondary markets.

convenience, ability of the handler to pay such differential over the minimum price as a premium without providing for the same in the regulations, improvements in distribution that have resulted from the closing of country plants and the lowering of the differential because of economies in operation, enforcement problems that would result from varying alternative supplies of milk available in different secondary markets, and the refusal of handlers to pay the differential under such conditions.

The nearby producer may deliver his milk to a country plant and still receive the nearby differential, and it is clear that such differential is not compatible with the market differential defined by the Congress and repeatedly recognized by the Secretary for the delivery of milk to a city market. Moreover, the non-nearby producers may not receive the nearby differential even when he delivers his milk to the center of the city market, for the nearby differential is based on the location of the farm rather than on the nature of the market to which a producer delivers his milk. The distinguishment between the two differentials could not be more apparent, particularly when each exists as a separate differential in the Order. 7 C.F.R. 1001.62, 1001.72.

Significantly, the Secretary's brief in the *Blair* case actually quoted the definition of the market differential contained in the Congressional Reports to show that the nearby differential could not be authorized under (a) as a market differential but only under (c) relating to the locations at which delivery of the milk is made. He there admitted that he had never promulgated any nearby differential under (a) as a market differential and even referred to the Boston Order nearby differential to substantiate his statements. The Secretary also admitted that the added value of nearby milk was attributable to fluid use of such milk, and the following excerpts from his brief are relevant hereto:

'Authorization for the promulgation of *location* differentials had its inception in the 1935 amendments to the Agricultural Adjustment Act of 1933. See 49 Stat. 750, 753. *By way of explanation,* the Committee Reports state:

> 'The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets. (H. Rept. No. 1241, 74th Cong., 1st Sess., p. 10; S. Rept. No. 1011, 74th Cong., 1st Sess., p. 10. See Rep. No. 1011, p. 10).'

"*From the foregoing we think it evident that Congress intended* by *location* differentials to compensate producers for the added value of their milk which is attributable to his 'distance from a primary market'. That, precisely, is the objective of the 'nearby differential' . . . Nearby differentials were considered justified principally because nearby producers historically enjoyed a greater percentage of the marketwide Class I sales (*hence they received more for their milk than did producers located more distant to the center of consumption*); . . . 7 U.S.C. 608c(5)(B)(c) was first enacted in 1935 by amendment to the Agricultural Adjustment Act of 1933 . . .

"The New York Milk Marketing Order, notwithstanding its early vintage, was not the first to recognize the need for nearby differentials; such adjustments were incorporated in the first Greater Boston Marketing Order promulgated on February

> 7, 1936 – less than six months after the enactment of the amendments to the Agricultural Adjustment Act which permitted adjustments for *'the locations at which delivery of such milk is made'*. See 2 F.R. 1331 . . . Indeed, the nearby differential provisions of the 1936[72] Boston and 1957 New York-New Jersey orders are, in substance, *identical in purpose and effect . . . Thus, dating almost to the very enactment of* 7 U.S.C. 608c(5)(B)(c) the Secretary has construed *that* provision as permitting the very type of nearby differential which the appellants would have this Court declare unauthorized. *It is, of course, axiomatic that such a long-standing contemporaneous administrative construction of the Section by the official charged with its administration is entitled to great weight ....* Finally, while we think that 7 U.S.C. 608c(5)(B)(c) plainly permits differential payments to nearby producers, the authority to promulgate such differentials is certainly to be found in 7 U.S.C. 608c(7)(D), which authorizes such other terms and conditions in addition to those expressly stated as are 'incidental to, and not inconsistent with the terms and conditions specified in subsections (5)-(7) . . .' As we have shown, the nearby differential provided for in the 1957 New York Order, in substance, is *identical* to a similar provision in the 1936 Boston Order – *both provisions were promulgated on the basis of the same statutory provision; . . .*

The fact that the nearby differential existed in a few orders because of its unauthorized inclusion in the 1937 Boston Order might have resulted in its being referred to on occasion as a "market" differential, but this did not make it the market differential authorized by the Act.

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[72] The Secretary's brief apparently refers to the 1936 Boston Order in error, for 2 F.R. 1331 relates to the first nearby differential promulgated on August 1, 1937 *after* the re-enactment of the Act. They appear to repeat this error in their brief filed in this Court.

The Secretary's "long-standing contemporaneous administrative construction" of provision (c) makes this crystal clear. Moreover, it is a legal impossibility for interested witnesses to reject, rewrite or replace the Congressional legislation and reports, the decisions of the Secretary, the admissions made in his aforesaid brief, or the testimony and other evidence in administrative proceedings upon which the Secretary acted in promulgating the nearby differential. "The administrative findings should be tested by evidence the administrator heard, not by *de novo* proceedings in a reviewing court." *Brannan v. Stark*, 342 U.S. 451. The *Cranston* court committed clear error in admitting the testimony of interested witnesses to overcome or replace the administrative record, and the general rule is also stated in *Wawa Dairy Farms v. Wickard*, 56 F. Supp. 67:

> " . . . the determination whether the Secretary's ruling is in accordance with law is based upon the record before him rather than upon a trial *de novo*. If the motion for summary judgment were denied and the case proceeded to trial, the identical record would then be before the court and nothing else."[73]

Additionally, the very fact that provision (a) refers to three different differentials discloses the irrationality of maintaining that the market differential definition in the Congressional reports is illustrative in nature and that such differential was meant to embrace any differential in any market. If this was intended there would be no necessity for enumerating and defining the other specific differentials.

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[73] As to the appropriateness of summary judgment concerning a question of statutory authority of the Secretary, see *Lehigh Valley v. United States*, 307 U.S. 76, *Knudsen Bros. Dairy v. Freeman*, (2 C. 1962), 303 F.2d 886, *N.Y. Guernsey Co-op. v. Wallace*, (D.C. N.Y.) 28 F. Supp. 590, *Blair v. Freeman*, 370 F.2d 229, all of which were heard on motions for summary judgment.

In spite of these elementary facts, the *Cranston* court did hold that the market differential was meant to embrace any type of differential, basing its decision on the testimony of an interested attorney, Reuben Hall, associate counsel in *Blair* and this case with petitioners' attorneys. Attorney Hall and one Donald Kane, former attorney for the National Cooperative Milk Producers Federation of Washington, D.C., in the 1930's, testified that they drafted the 1935 Act by submitting a draft in the name of the NCMPF to the Agricultural Adjustment Administration for transmission to the House Agricultural Committee. However, no documentary evidence of any nature, not one shred of paper, was produced to substantiate their contentions, although the draft to which they referred in their testimony was available if they desired to produce it for the court.

The NCMPF draft to which they referred in their testimony but understandably never produced in corroboration thereof actually distinguishes the market differential even more than does the Act, if that is possible, for it included the language, "volume, market or production differentials *or other differentials* customarily used in the market covered by the order." The Congress refused to authorize "other differentials" in limiting adjustments to *only* those enumerated and *no others.* Moreover, an examination of said draft discloses that it provided for the elimination of the individual-handler pooling provision which the Congress has included in the Act, a fact that would also cast some doubt on the testimony of witness Hall that he, rather than the Congress, "drafted" the 1935 Act and that his intent should predominate over that expressed in unambiguous terms by the House and Senate. Said witnesses also testified that they came up with the "market differential" language "on the last day", June 14, 1935, and that it was included in the draft and introduced the next day by Representative Jones, the witnesses then contending that the Congressional reports were

"hastily prepared" and that the definition of the market differential was erroneous for this reason.[74] However, the NCMPF draft which proposes revisions to an existing draft is dated June 5, 1935, and other inconsistencies abound in the draft. Not only is the testimony of these two witnesses rebutted by the documents alluded to as the basis for their testimony and which they understandably failed to produce to support the same, but the names of these two "drafters" of the 1935 Act never appear in any Congressional reports or records, a fact which would obviously preclude the admissibility of any testimony from them to contradict or supplant the Congressional intent that is clearly spelled out in the Act and Reports.

The witness Hall also failed to produce any documentary evidence to support his testimony that the cooperative associations applied a nearby differential prior to federal regulation, although he has been associated with the largest New England association for fifty years. Significantly, the economist for this association, James Lee, as well as other economists for nearby organizations who did not appear in *Cranston*, testified during the administrative hearings that there was no nearby differential as such prior to federal regulation (A. 371, 440, 580, 572, 541-42, 652, 666, 698) and that the higher prices received by nearby producers were attributable to the use of their milk for fluid purposes. (A. 400, 405, 536, 543, 557, 560, 570, 652, 662-68, 678, 681, 690, 703). Attorney Hall appeared in said administrative hearings, and his testimony in *Cranston* was necessary to replace that in the administrative record because the Act refers to "volume, market, and production differentials *customarily applied by the handlers*" prior to the Act.

The other witness, Donald Kane, actually confused the nearby differential with the authorized market differential

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[74] The witnesses did not explain why the later Senate Report No. 1011 contained the same definition or why it had never been disputed or corrected.

relating to direct-delivery and savings in handling costs, but this obvious error was not brought out by plaintiffs on cross-examination after the witness testified as follows on direct in *Cranston*:

> "Q. Now what types of provisions could you recall were generally included in these various licenses that you actually worked on relative to the distribution of the proceeds from milk? . . .
> A. . . . in practically every market by reason of economics there was a nearby differential, because the nearby farmer's production was more even; *he delivered usually to the dealer's plant* or the dealer came out to his farm and picked up his milk. *It didn't have to go to a cooling station or receiving station and he cooled and then re-transported* . . .
>
> Q. But these differentials *that you have been describing* to the court here were included in licenses that you helped to prepare, is that right?
> A. That's right.
>
> Q. And these included the differential between farmers in that particular marketing area that had to do with this relative nearness to the market *beyond the cost of transportation*?
> A. That's right."

As in *Cranston* upon which they so strongly rely, petitioners attempt to find an ambiguity where none exists and they presume to contradict a Congress that was foresighted enough to anticipate the very contentions made by them. Their claim that Congress did not know what it was doing or saying when it wrote the 1935 Act and Reports, even though Congress specifically stated to the contrary, reflects a quarrel with the Congress rather than with non-nearby producers. The contention that Congress made a mistake because of a hasty drafting of the Act and Reports is made in the wrong forum, for no court has the power to amend the Act or entertain such contention

that necessarily admits that there is no ambiguity. It is only where Congressional intent and statutory language are ambiguous that interpretation and construction are warranted. *Alaska S.S. Co. v. United States,* 290 U.S. 256. Interested attorneys may not resort to their own testimony as an "interpretative aid" to amend the Act and rewrite the Committee Reports that they contend are erroneous. Nor does such a power over that possessed by the Congress exist in the Secretary, and a contention of this nature also violates the rule in *Schechter* that the Congress rather than the Secretary is to define the statutory power delegated under the Act. The nearby differential is not enumerated in the Act and is entirely inconsistent therewith, and it could be an absurdity to contend that Congress intended such a dominant and inconsistent differential without specifically providing for the same in clear and unmistakeable language. As stated by this Court in respect to this very Act, it is doubtful if Congress would hang the main gear on the tailpipe, its opinion in *Brannan v. Stark,* 342 U.S. at 465-66 also stating that:

> "Without support in the words of the statute the challenged provisions must fall, for neither legislative history nor administrative construction offers any cogent reasons for a contrary result. . . . Nor have provisions bearing substantial similarity to those before us since been included in other milk orders so frequently as to amount to an administrative interpretation of import in construing the Act."

Of course, there may be members of the Congress who are uncertain of the meaning of some part of a statute, or there may be some whose opinions on the meaning of an Act sincerely conflict with the reports concerning the legislation, but these factors are not persuasive of the *Congressional* purpose and cannot be utilized to thwart

the same if democratic government is to exist. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110. Nor can one word or phrase of a statute predominate over the whole Act and its purpose and policy, a result which is manifest in the *Cranston* court's judicial legislation on the basis of the private testimony of non-members of the Congress.[75] Far from being authority for petitioners, the case of *Chicago v. Acme Freight*, 336 U.S. 465, actually supports the respondents. No person has questioned the accuracy of the Committee reports here involved for 32 years, and attorney Hall, associate counsel of petitioners' attorneys in *Blair* and this case, can hardly stand in the shoes of the Congressional member mentioned in *Acme Freight* whose contemporaneous statements included a section-by-section analysis that was accepted over language in a House report that would otherwise serve no purpose whatsoever. In fact, the situation here is just the reverse, for the entire Act would be nullified by an interpretation that is completely devoid of any record support in the Congress. Moreover, the statements of Representative Wolverton were open, accurate, and unchallenged, whereas those made in the *Cranston* case were just the opposite.[76] Respondents also submit that petitioners'

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75 Attorney Hall is unknown to members of the 1935 staff and House Committee who have been consulted by respondents.

76 The plaintiff, Cranston, who sold his cows shortly after the *Cranston* trial and retired, admitted that he had advised only one dairy farmer (other than the individual plaintiffs) of the suit. Two others listed as plaintiffs were unaware of such fact and had never authorized the use of their names as plaintiffs. The plaintiffs' attorney had never contacted these two plaintiffs concerning the suit but advised the court that their absence from the trial was due to illness, one of the so-called plaintiffs testifying at the collusion hearings that he did not even know Cranston's attorney.

(cont'd)

other case, *United States v. Amer. Trucking Assoc.*, 310 U.S. 534, is authority for the principle that where acceptance of the literal meaning of words in a statute leads to results which are absurd or futile or plainly at variance with the policy of the Act, as would be the case if the "market" differential authorized any type differential in the milk markets, the legislative purpose will be followed. Not only are the facts distinct where a new program was instituted by the Congress in 1933 and 1935, but there is no reason for going beyond the Committee Reports of the House and Senate in this instance. Moreover, the interpretation claimed by petitioners would, if accepted, amount to an unconstitutional discrimination against respondents, but the respondents' contention

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76 (cont'd) Attorney Hall, who admittedly fails to consult his association's members concerning matters that affect their very livelihood before stating their position in administrative hearings (A. 725-27) admitted during the *Cranston* collusion hearings that he had not told NEMPA members that he testified as the main witness in *Cranston* after promising members who objected to his undisclosed participation in this case that he and the NEMPA would take no further part in nearby differential litigation on the side of nearby producers:

> "Q. Now, you, I believe, testified that producers are aware of the fact that you have not participated further in the *Allen* case. * * *?
> A. I have stated publicly to producers' meetings held in various states in New England, among others, Vermont, Massachusetts, New Hampshire that, with the denial of the petition to intervene in the *Allen* case, there was no further participation by me in the *Allen* case proceedings and would not be.
>
> Q. Now, have you stated publicly to those same producers that you have testified in these proceedings?
> A. No, sir."

would not constitute any discrimination of any nature against nearby producers who may obtain any premium over the minimum uniform price from handlers if entitled thereto. (A. 692). Clearly, there is no ambiguity in respect to the market differential authorized by the Act and included in the zone differential of the Order. Further, the petitioners can no more attack the market differential under which they accept payments for their milk than the Secretary can disavow his own action in recognizing the correctness of the Congressional definition. "The market differential rationale is plainly not a tenable basis for the nearby differential." *Blair v. Freeman,* 370 F.2d 229.

The petitioners mention two cases, other than *Cranston,* in claimed support of the all-inclusive nature of the market differential but these cases have only an apparent application to their arguments. One is *Green Valley Creamery v. United States,* 108 F.2d 342 (1939), and the other is *Brannan v. Stark,* 185 F.2d 871, *affirmed,* 342 U.S. 451.

The *Green Valley* case authorized a differential between the price received by cooperative associations and producers who were not members thereof, the difference in price being authorized under the Boston order on the basis of the marketing services performed by the cooperative associations. This Court in the *Stark* case, also dealing with a cooperative differential under a later Boston Order, did note that *Green Valley* had approved the cooperative differential under Subsection 8c(5)(A) as a "market differential." This was possible because of the marketing services then performed by certain cooperatives, and the definition of the market differential as set forth in the Reports was not thereby violated. The market differential, as previously stated, normally represented the difference between the costs of receiving the milk at the city market or plant and at a country plant where the milk was weighed, tested, cooled, etc. and reshipped to the city

market. If the cooperative association performed such marketing services for its producers, it would be entitled to a part of the difference in costs incurred under the market differential definition. Moreover, the Act specifically authorizes payment to all producers "and associations of producers", and Subsection 8c(5)(E) authorizes appropriate deductions for the verification of weights, sampling and testing of milk, even when such marketing services are not performed by cooperative associations. All that need be noted here is that some cooperative associations perform certain marketing functions in handling their members' milk, services that were performed in some instances at country receiving plants or that must otherwise be performed upon receipt of the milk at the city plant. Consequently, it is entirely proper to refer to the added payment to the cooperative association as a market differential, for this differential is concerned with handling costs as previously explained. This in no way provides a basis for extending the market differential beyond its normal meaning in order to accommodate it as a nearby differential based upon the location of a producer's farm and the fluid use of his milk.

The *Stark* case thus does not support petitioners in any manner and, indeed, this Court there noted that with the *Schechter* and *Panama Refining Co.* cases "specifically in mind, Congress set forth with deliberate *particularity and completeness* the terms which the Secretary might include in marketing orders. H. R. Rep. No. 1241, 74th Cong., 1st Sess. 8; S. Rep. No. 1011, 74th Cong., 1st Sess. 8." In *Stark* there was some question as to the discriminatory effect of the regulation and the reduction resulting to non-members of the cooperatives, but in this case the discrimination is without even apparent justification in diverting a part of non-nearby producers' price and property to those who admittedly provide no value or service therefor. The analogy of the *Stark* case is thus particularly applicable here:

> "The payments to cooperatives are inconsistent with § 8c(5)(A), which provides that all handlers shall pay uniform prices for each class of milk, subject to certain adjustments of no concern here. The discriminatory effect of the payments becomes the more evident when they are considered in context with the reduction in the uniform allowance to all handlers on the price of Class II milk. That reduction is simultaneous with the establishment of the system of payments to be made to cooperatives only and to be funded by deductions from prices paid all producers. The result would have been substantially similar if the allowance to proprietary handlers had been reduced while the allowance to cooperatives had been permitted to remain at its previous higher level. Such a lack of uniformity in prices paid by handlers would clearly have contravened § 8c(5)(A)."

Although petitioners totally fail to establish that the nearby differential is authorized under the Act, they maintain that nearby producers are entitled to a part of the non-nearby producers' uniform price because of the "availability" and "inherent value" of nearby milk. The short answer to this is that the Act does not authorize a diversion of price on either basis. As the Court below recognized, the availability factor referred to the 1930's, and the Secretary admittedly related this factor to the fluid use of nearby milk, the 1936 Boston Order specifically stating "availability for Class I use." (A. 224). Even if such a finding could be divorced from the illegal criterion of payment based on use of nearby milk, it is clear that the uniform price could not be reduced by virtue of the alleged inherent value or availability of nearby milk. The Secretary specifically rejected the issuance of a nearby differential on such basis in his 1957 decision when he found that "the *inherent value* of nearby milk

to the market because of its *availability* and the high quality of such milk" are factors which, "to the extent that they are valid, are related to the extra value of such milk to the *handler* who buys it rather than to the producer generally and are, therefore, appropriate for consideration with direct-delivery differentials *payable by handlers rather than out of the pool.*" 22 Fed. Reg. 4213; *Blair v. Freeman,* 370 F.2d 229.

The increased frequency of voluntary sales of nearby farms for housing subdivisions or commercial development hardly denotes reliability or availability of supply. Petitioner's reference to the accessibility of nearby milk to small handlers is also lacking in merit, in that such dealers were able to procure any required supply from more distant areas at the time of passage of the Act. This Court has also noted that it was usually the small dealer who undercut the producers' milk price and failed to bear his proper share of the burden of surplus in the market. *Nebbia v. New York, supra.* It cannot be seriously contended that respondents must subsidize such "small dealers" as well as the larger nearby producers, particularly when they both refuse to bear their share of the burden of surplus of the market. Moreover, high-cost handlers, whether large or small, certainly do not promote competition or discourage monopolies. The only real competition is between large dealers, a handful having dominated the markets for the past 35 years,[77] and any contention that the nearby producers

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[77] Marketing Economics Div., USDA, *Nature of Competition In Fluid Milk Markets* (Agric. Econ. Rep. No. 67, 1965).

can enter the retail city market under present day conditions and thereby lower the blend price by removal of Class I sales from the pool is simply unrealistic because of the prohibitive costs involved and dealer concentration (A. 309-310).

Petitioners rely heavily on the *dictum* in *Green Valley v. United States*, 108 F.2d 342 (1st Cir. 1939) which offered some gratuitous comments concerning the "location differential" of the Greater Boston milk order of August 1, 1937. This case was thoroughly considered in both *Blair* and this action, and it should be noted that the a action was one by the United States against handlers for enforcement of the milk order provisions. *No producers were involved in that case,* and the Court itself belatedly acknowledged that the handler had no standing to question disbursements from the marketwide pool or producer settlement fund. Nevertheless, the Court did make the gratuitous comment that the nearby differential was authorized under the Act as a location and market differential and stated as follows:

> "*Whatever the explanation,* this group of producers in fact commanded somewhat more favorable prices for their *fluid* milk as against producers more remotely located. The differentials now objected to were inserted in the Order *so as not to disturb the status quo in this respect.*"

Initially, the plaintiffs make the point that the validity of the nearby differential was not before the Court, and the Secretary can hardly contend otherwise when the Court itself accepted the Secretary's argument to this effect. Furthermore, it is difficult to comprehend how the

Secretary has "relied" over the years upon such case as sustaining the validity of the nearby differential when that case actually accepted the Secretary's contention that the question involved herein was not before that court.

The Court stated that the differentials were "largely undefined" but this is obviously incorrect, for the entire Act and Congressional reports reflect the care and caution used in drafting the legislation because of the then recent cases of *Schechter Poultry Corp. v. United States,* 295 U.S. 495, and *Panama Refining Co. v. Ryan,* 293 U.S. 388.

The *Green Valley* court apparently failed to realize that *all* producers were receiving depressed prices prior to the Act and that "preservation of the status quo" would relegate nearby producers to surplus prices. It failed to realize that the "historical-higher price" argument was rejected in *Hood* when non-nearby producers sought to preserve their historically higher prices and status quo in relationship to other producers. It failed to realize that such contentions would nullify the uniformity of price required by the Act and that the provision concerning free entry of all producers into a marketing on equal terms after two months regular delivery was in opposition to such concepts. It failed to realize that the Act brought higher prices to all producers and that no preference was engrafted thereon in favor of any group of producers. It failed to consider the prohibitions of the Act concerning payment based on use of milk and many other relevant arguments.

The reason for such failure is clear when one considers that the *dictum* in *Green Valley* concerning the nearby differential rested on an acknowledged presumption concerning delivery of nearby milk to city markets which excluded the non-nearby producers without explanation or

comment. Plainly, the court was unaware that the authorized market differential for direct-delivery of milk to the city market was already in the Order. This is why the Court regarded the nearby differential as the market differential, for it would hardly approve two differentials for the same service. The fact that non-nearby producers were not embraced within the Court's presumption, although included in the market differential of the Boston Order, also demonstrates that the *Green Valley* court was unaware of the existence of the authorized market differential in the Order. Its realization that direct-delivery was deserving of reward was the dominant consideration in the Court's thinking and explains why the aforementioned matters were not considered by the Court.

However, even if this analysis of the Court's *dictum* is disputed, the fact still remains that it was erroneous for the previously stated reasons and because the presumption on which it acted was incorrect. The Court presumed that all nearby producers delivered directly to market but this was never established in the record (A. 237) and was actually contrary to fact (A. 631, 635, 698). Indeed, the Secretary had to amend the nearby differential provision as recently as 1946 because "nearby" producers were delivering to country plants and receiving a price in some instances that exceeded the Class I price at the particular plant zone at which their milk was delivered. The nearby producers in the 23-cents zone were being paid the blended price plus 23 cents or such fraction thereof as equaled the Class I price, rather than the Class I price effective at the particular plant where their milk was received (A. 638-39). Consequently, this part of the differential provision was amended on June 1, 1946, 11 Fed. Reg. 3607 at 3612:

"(15) *Price to producers within the 80-mile zone.* The order provides that the Class I price at city

> plants shall be the maximum required price to producers whose farms are located within 80 miles of Boston. This maximum prevents producers delivering to city plants from receiving credit from the pool at more than the Class I price for their milk after the addition of the location differential but it has not prevented producers in the 41-80-mile zone *delivering to country plants* from receiving credit from the pool in certain months at more than the Class I price in effect at the plants to which they deliver . . . "

In all fairness to *Green Valley,* however, it is noted that it was decided almost 30 years ago, and the court's superficial examination of the matter was attributable to the very fact that the validity of the Boston nearby differential was not before the court as an issue in the case. The Secretary and the nearby producers, however, would cite such dictum as binding precedent, even though it would preclude a small dairy farmer from having his day in court, would deprive him of his right to make appropriate claims and defenses concerning the taking of his property and violation of his constitutional rights, and would also prevent him from questioning the present applicability of conditions that existed 30 years ago. The respondents submit that the inaccurate citation of arguments and briefs of parties whose interests are adverse to those of respondents or who are opposing parties herein can scarcely bind the respondents and particularly when non-nearby producers were either not parties or adequately represented in such cases as *Green Valley, Rock Royal* and *Cranston.*

In spite of all the foregoing, the petitioners and the *Cranston* court attempt to find support for the legality of the nearby differential in the *Green Valley* language that "similar differentials" in favor of nearby producers

had existed under the base-rating provisions of the licenses and the 1936 Boston Order prior to the inclusion of the nearby differential in the Boston Order on August 1, 1937. Initially it must be acknowledged that "base-rating" or "base-excess" plans are authorized under 8c(5)(B)(ii)(d) of the Act, and this very fact indicates that it is separate and distinct from the market differential authorized under provision (a) of that subsection. Neither constitutes a proper ground for issuance of the nearby differential and the repetitive usage of the term "similar differentials" to equate such early base-rating with the nearby differential not only confuses two different things but actually constitutes an admission of the illegality of the nearby differential. The illegality of the early base-rating whereby nearby producers were paid a Class I or fluid milk price for their base milk and the non-nearby producers a composite or blend price that carried the surplus of the market is pointed up by the 1965 amendments to the Act. The Act clearly requires that all producers be paid a Class I price for their base milk, and their bases are computed in relation to their marketings over a representative period of time. Producers may produce more than their "base" under a Class I base-rating or base-excess plan, but they receive the Class II or surplus price for such excess over their base. The purpose of the plan is to bring production within the needs of the market and to thereby eliminate unnecessary surplus. It is in no way comparable to the nearby differential, for it applies to all individual producers, not to groups or classes of producers. Secondly, it must be separately approved in a referendum among individual producers on this question alone, not in connection with bloc voting by an association for its membership on a milk order as a whole. Thirdly, it is a method for seasonal adjustment of production to control unnecessary surplus, not for the apportionment of the fluid market to one group of producers in a particular

area of the milkshed and the necessary surplus to the remainder in another area without consideration of the individual variations among each group and area. Fourth, the Secretary specifically found in his 1964 decision, 29 Fed. Reg. at 11225, that a base-rating or base-excess plan was inappropriate for the New England markets. (A. 359-60). Moreover, the New England orders already include a seasonal incentive plan to reward evenness of production. 32 Fed. Reg. 5288.[78]

Additionally, the reliance of the petitioners and the *Cranston* decision on the early base-rating provisions in the Greater Boston licenses is clearly misplaced, both in respect to justification for awarding a larger share of the fluid milk market to nearby producers through the nearby differential and in respect to Congressional ratification of such allegedly "similar differentials" by the 1937 re-enactment of the Act. In allotting preferential bases under License 15 in 1933, the License specified three exceptions to the general method of awarding bases. One related to producers whose milk on September 1, 1933,

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[78] In respect to the chart concerning seasonality on page 71 of the Zuber brief, we note that the same report, *Producer Delivery Patterns in The New England Markets,* specifically states in its Summary that, "Among all sizes of farms in both the distant and nearby areas there was a great variation in the shape of seasonal patterns. In other words, even though a group of farms in an area may have had an average seasonal pattern of a particular shape, the average was actually made up of patterns of many different shapes." Although the matter is irrelevant because of the special provision in the Order for rewarding evenness of production, it is noted that this factor varies from farm to farm and that non-nearby farms have a more uniform delivery pattern than nearby producers if other criteria is used for determining this factor. See A. 307, 314-16, 326, Exhibit 20 at 328, 428).

was being trucked *directly* from farms to plants located in the marketing area.[79] The second related to country producers delivering milk under a base-rating plan in effect on said date, and the third exception was in favor of the Guernsey producers who received bases equal to the average daily sales of Golden Guernsey milk in the market as Grade A fluid milk or under the Golden Guernsey trade name during the general base period.

However, the "similar differentials," prior "preferential bases", and "ratification" arguments did not enable Golden Guernsey producers to obtain an added differential for their milk under the New York federal order when they argued that the butterfat differential did not adequately compensate them for the greater marketability of their milk for fluid use or for their additional production costs. *N.Y. State Guernsey Breeders Co-op v. Wickard,* (CAA 2, 1944) 141 F.2d 805, *cert. denied,* 323 U.S. 725 (1944). Although the Guernsey producers were able to show that they had been able "to secure a higher-than-average Class I (fluid milk) utilization for the milk of their members" prior to regulation, the Second Circuit still held that they were not entitled to a differential over the uniform minimum price:

> "This finally is the ultimate issue in the case – one, of course, of outstanding importance in milk regulation. It seems to us that the Secretary has correctly construed the law, and that production costs or marketability are not in themselves factors to influence minimum milk

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[79] This is the market or direct delivery differential specifically authorized by the 1935 amendments to the Act, and it was the "practice of business" referred to in the Congressional Reports and Record.

> prices. For such prices it hardly seems pertinent that special allowances should be made for milk more expensively produced, or more extensively and successfully advertised, but not better in grade or quality. In a purely competitive industry factors of this kind may well affect the market price, *but when regulation by way of minimum price is substituted by reason of the very disorder of the market and its effect in impairing farmer purchasing power* (Sec. 1, 7 U.S.C.A. 601), *it is not surprising to discover no allowance for them in the governing authority.*"

Moreover, the Second Circuit noted that the high fluid utilization rate and resultant higher prices might have been due to extensive advertising, superior selling practices, *or proximity to fluid markets,* the specific inclusion of the latter factor indicating that the Second Circuit did not view such proximity to fluid milk markets, or any previous higher-than-average Class I or fluid utilization as a result of such location of certain producers, as a valid reason for special treatment of such "nearby" producers. Significantly, Circuit Judge Frank was a member of the panel that rendered this unanimous decision, and he obviously did not regard the Secretary as having unfettered discretion under the Act, although he naturally recognized that the Secretary had considerable discretion under the Act in respect to the authority granted him by the Congress.[80]

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80 Details of administration of the orders and Congressional program are left to the Secretary, but the extent of his statutory power is prescribed by the Act and determined by the judiciary under Art. III of the Constitution. *Stark v. Wickard,* 321 U.S. 288, 310.

The respondents respectfully submit that petitioners acknowledge the illegality of the nearby farm location differential when they equate the same with the 1936 Greater Boston milk order provision which provided for the payment of the Class I or fluid milk price of $3.30 per hundredweight for the base milk of "nearby" producers and the payment of a composite or blend price to the non-nearby producers who shouldered the surplus of the market in such manner. Article IV of said Order, entitled "Minimum Prices", provided that the Class I minimum price was $3.30 per cwt. for milk delivered within 40 miles of Boston, and the respondents maintain that the Act clearly forbids the payment of the Class I or fluid milk price to a preferred group of producers for any reason, and particularly on the ground that such producers had received higher prices prior to the Act because of the fluid use of their milk. Although the petitioners attempt to maintain that nearby producers were paid a "nearby differential" of 44¢ under the 1936 Boston Order by reason of the fact that their milk price exceeded that of other producers by such amount, the simple fact remains that nearby producers were paid the Class I or fluid milk price of $3.30 per cwt. and not a nearby differential as such. The petitioners neglect to explain that the $3.30 was the Class I price, and the reason for such omission is an evident awareness that such payment for the use of milk is a fundamental violation of the Act.

In respect to basing the nearby differentials on allegedly higher production costs, the Second Circuit not only agreed with the Secretary that the Golden Guernsey producers could not be awarded a differential on such basis but also stated that:

> "[5] The declaration of the policy of Congress in §8c(18), 7 U.S.C.A. § 608c(18), that the *level of prices* should be 'such level as will reflect the price of feeds, the available supply of feeds, and

> other economic conditions which affect market supply and demand' obviously refers to the general price level for producers, not to differentials among producers."

In this connection, it should be noted that petitioners not only *falsely* state that the elimination of the N.Y.-N.J. nearby differential and the suspension of the Mass.-R.I. differential necessitated "emergency price expedients . . . 33 Fed. Reg. 9502, 12849 (1968)", but that these false *in terrorem* citations also illustrate that such costs of production, etc., are considered on a *regional* basis and that the nearby differential may not be grounded on allegedly higher production costs. One of the Secretary's decisions cited by petitioners refers to drought conditions in Vermont that necessitated an increase in the Class I price. However, the nearby producers also received such *regional* increase and actively supported the same for that reason. The other cited decision refers to an increase in the Class I price for all of the Northeast markets which was necessitated in order to bring such prices in alignment with those in the Midwest markets where the Class I price had been raised by the Secretary. Neither decision has the slightest thing to do with the termination or suspension of the nearby differentials, and the citations are simply illustrative of the innumerable misstatements that characterize petitioners' briefs and prior statements to the lower courts.

Interestingly, we noted that petitioners abandoned the "cost of production" contention before the Court of Appeals, and we also note that the Secretary rejected that factor as a justification for the differential in his 1957 decision:

> "Cost of production is a criterion for establishing prices under an order only to the extent that it affects the supply of milk for the market.

> Orders do not guarantee a price equal to or exceeding the cost of production, and therefore, producers generally should not be required to pay a minority an increased return because of high production costs. Accordingly, it is concluded that factor (1) above does not provide a legitimate basis for nearby location differentials." (22 Fed. Reg. 4213).

Further, the deductions made by the Order for transportation and handling charges enter into the non-nearby producers' cost of production and many other factors are presently involved that were non-existent in the period prior to the Act. In any event, prices are computed on a *regional* basis. The foregoing also illustrates the inability of the petitioners Zuber, et al., to rewrite the production differential to embrace production costs. Although irrelevant to the present case, the production differential refers to the fact that milk produced for manufacturing use was not subject to the same high sanitary standards as all milk in the milkshed is today. Many producers were reluctant to make the investment necessary for the production of fluid milk, and the Congress included this provision in the public interest in order to assure an adequate supply of milk. There were severe shortages of milk during periods of military warfare,[81] and the Act provided that new producers were entitled to only the lowest use classification price for the first two months of delivery. The production differential could be used as a temporary measure to encourage fringe producers to change over to meet the nation's milk needs, and many producers had been reluctant to make such investment because others who had done so had been dropped by handlers shortly after the emergency passed and their milk was no longer

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81 See USDA, *Information for Increasing Milk Production for War Needs* (1943).

needed. Additionally, the Congress was aware that those producers who were already within a milkshed and receiving the uniform price would need an inducement to cause them to make the investment for production of fluid milk, and the production differential was a temporary payment to assure the change-over.

The volume differential has already been noted as having been employed by the Dairymen's League, largest of the cooperative associations with many thousands of members, and USDA experts have recognized the propriety of such a differential. Both this differential and the production differential would be received only by so-called non-nearby producers and neither constitutes even a remote basis for the nearby differential. Individual-handler pooling could not be a substitute for the nearby differential for the simple reason that the uniform price under such type of pooling is also subject to all authorized adjustments or differentials. Moreover, the Secretary found such type of pooling to be injurious to producers and consumers in New England. (A. 358-59).

The Act states that the uniform price is subject *only* to the enumerated adjustments, and it is abundantly clear that the nearby differential is not among them and that it is violative of the statute. The petitioners themselves acknowledge this obvious fact when they vainly attempt to bring it within some hopefully permissible definition and authorization by a scatter-shot approach which finally admits the failure of the statutory safari, their "conglomerate" differential rationale being without foundation or existence in either the Act or any decision of the Secretary. Succinctly put, the petitioners attempt to amend the Act by repealing the specifically authorized differential adjustments and replacing them with a "conglomerate" differential embodying those supposed aspects of each adjustment that might provide some basis, however implausible, for the nearby differential. Such circular and

inconsistent reasoning should hardly be attributed to a Congress that recognized not only the great importance and need of the legislation, but also the danger attendant to this very type of "conglomerate" approach that had been condemned in *Schechter* and in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

3. The Act Provides for Certain Authorized Adjustments Customarily Applied By Handlers, Not Producers

The Act provides that the uniform price is subject to adjustment for the volume, market, and production differentials "customarily applied by handlers", and there is no provision in the Act which would authorize or justify the transfer of responsibility for such payments from handlers to producers, let alone to a group of producers whose farms are located in the non-nearby area of the milkshed. Payment from out of the marketwide pool is clearly not authorized because marketwide pooling did not even exist in the Boston milkshed or in any of the secondary markets prior to the Act or federal regulation, and it would have been an impossibility for handlers to "customarily" apply the differential from such nonexistent source. It is also clear that handlers could not "customarily" apply the nearby differential under individual-handler pooling because the nearby producers constituted only about 5 percent of the producers serving the Boston market prior to the Act. (A. 633).

Moreover the 1963 administrative hearing record for the present Order reflects that no nearby differential as such was ever applied by handlers prior to the Act, and the following testimony of economists for nearby associations discloses that the price statistics cited by the petitioners refer only to the prices paid for fluid milk and not to any nearby differential:

(a) **From testimony of James Lee, economist for N.E.M.P.A. and former official of Administrator's Office For Greater Boston milk order.**

CROSS-EXAMINATION

By Mr. Tipton:

"Q. I am sure you are very familiar with Exhibit 24, which contains an article on farm location differentials. In this article you portray or make a statement as to what testimony was entered at a hearing prior to the issuance of the order in 1937, which happens to correspond with the differential rate that was put into effect in 1937.

That differential, or the testimony that was given, closely related to the 46 cent differential, did it not? A. Yes.

Q. Now, can you tell me: Who paid that differential? I do not mean by name, but as a group. A. *Who paid the differential? There was no differential.*

Q. Did the handlers pay the differential? A. The handlers paid the producers who delivered the milk at the city plants a level of prices which was in relation to the up-country prices as the evidence in the hearing record at that time, which is quoted in the article, explains." (A. 371-77).

* * *

"Such payments have been justified over the years as a recognition of the historical pattern of prices which existed prior to regulation, or as compensating nearby producers for sharing a part of the fluid milk market which they formerly enjoyed, with producers more distant from the market. * * *" (R. 3393, Mass.-R.I. hearings); see also, A. 400, 405, 536, 543, 560, 570, 645, 652, 662-68, 678, 681, 690, 703.

The said economist, James Lee, also admitted during the 1963 administrative hearings that no premium was presently being paid by handlers to nearby producers (A. 375-76):

"Q. Do you know of any handlers in the nearby area that are paying in addition to the blend price a premium?

A. I don't of my own knowledge known any handlers who are now, but if and said and did know that these are such, your next question would be, 'Who are they,' and just have the feeling that there are some –

EXAMINER HOLSTEIN: Let's not anticipate what Mr. Tipton's next question will be. This question is: Do you know of any? If you can answer that, do so; then when he asks his next question we will decide on that.

THE WITNESS: I don't know the names of handlers paying premiums."

(b) From brief of Mass. Coop. Milk Producers Federation:

> "The higher rate per hundredweight was not arrived at by milk dealers then through the process of computing a distant price and adding thereto a premium or differential in order to arrive at a final figure. * * * There was no evidence then, nor has there been any new concrete evidence developed, that what became a 'farm location differential' in the New England orders was ever paid to nearby milk producers by the handlers themselves, except as an inseparable component of a higher going price for milk. . ." (A. 652)

(c) **From testimony of Christopher B. Sykes, official of nearby organization:**

CROSS-EXAMINATION

By Mr. Tipton:

"Q. I am asking though what contributed to this higher price being paid? A. I have not made any statement that I know of about that . . .

Q. Well, in the next sentence you say, '*This higher rate per hundredweight was not arrived at by milk dealers then through the process of computing a distant price and adding thereto a premium or differential in order to arrive at a final figure.*' Now I think that statement probably stands correct. However, did not these handlers arrive at the price at which they were willing to pay for the nearby milk by comparing that to a price at some other source? A. I think undoubtedly being big men they assessed the economic situation, yes, if that is what you mean.

Q. And they paid a higher price for milk from nearby sources as compared to milk from more distant sources for some reason, is that right? A. They must have had some reason, yes.

Q. Well, can you tell me some of the reasons you think it might have contributed to that higher payment? . . . A. No, I have no knowledge of the individual reasons that each individual handler might have used in arriving at this price. I make no assertion that I do know. . .

Q. Who paid the differential prior to Federal regulation, producers or – A. If you read my direct testimony or heard me give it, Mr. Tipton, you know I have adopted the position that *it never was in fact paid by handlers to producers by such at all.*" (A. 579-80, 593)

(d) **From testimony of Dr. David Clark, economist for nearby organizations:**

By Mr. Tipton:

"Q. My last question was: What do you imply by the last portion of the sentence that I was referring to, on page 20? A. And the question is the one that reads: "These differentials *developed* in response to the need for some compensation to induce local producers to accept the provisions and consequences of marketwide pooling."

Well, what I had in mind here is that apparently historically producers located relatively close to the market had generally enjoyed a higher percentage of Class I utilization, either because of favorable relationships with local distributors or alternatively because of the fact that they were possibly in a better position to go into a producer-dealer type of operation, and thereby increase their Class I utilization.

Now, this particular advantage, under marketwide pooling – they were more or less asked to relinquish, *and as a compensation for relinquishing this advantage, the differentials were encompassed in the order.* This is my understanding of the material quoted at the hearing." (A. 542-43, 551).

(e) **From testimony of William J. Newman, Official of a nearby R.I. organization:**

"Q. Just one question, Mr. Newman. In the time in the southeast area prior to the promulgation of the marketwide pool order, were these higher prices that were being received by local producers the result of any computation of distant prices *and then the adding of some amount to it* or was this just the product of Class I utilization in a handler's plant and reflected in the prices received by the producer shipping to him? A. Prior to the southeast order nearby farmers got returns that reflected

the use value of that milk and we feel again that the nearby differential despite the arguments that were given for discontinuance does reflect the added use value of nearby milk over distant milk and it should be continued.

Q. Let me ask one further question then. These handlers that were paying these prices as a result of higher utilization, they did not arrive at the final pay price to producers, did they, by any computation of any other price then the adding to it of a set figure like a differential? A. *No, that is right.* (A. 486).

(f) From the Federal Milk Order Study Report (Nourse Committee), Dec., 1962, introduced into evidence at the Mass.-R.I. hearing:

"However, the major *purpose* of nearby differentials apparently has been to compensate nearby producers for sharing market Class I sales with more distant producers in a marketwide pool. This principle seemingly was *founded* on the belief that in the absence of regulation, a higher percentage of nearby milk would be sold for fluid use." (A. 450-52).

(g) From the testimony of Irving E. Sutin, General Ice Cream Co., during 1949 administrative hearings on Springfield, Mass., milk order:

"It does seem that the 46-cents and 23-cents farm differential of the NEMPA would be illegal since it is contrary to the AAA of 1937. The Act provides for differentials 'customarily applied by handlers subject to such order'. *No farm differentials had ever been paid in the Springfield market.*" (A. 695-98)

The above testimony was replaced in *Cranston* with that of attorney Hall, who testified that the differential was customarily applied prior to the Act.

It is crystal clear that petitioners would not have to cite such artificial, inaccurate and illegal price statistics if any nearby differential actually existed prior to federal regulation. No price study would have been necessary to determine an appropriate differential if it had been customarily applied by handlers prior to regulation. The price statistics refer only to the prices paid for milk for fluid use and not to any nearby differential as such, and any difference in the price of nearby producers, other than the well-known and specific amounts for transportation, handling, rental of cans, tax, etc., was necessarily attributable to the use of the milk and not the location of the farm. Such price statistics are clearly an illegal criterion for the issuance of the nearby differential since the effect thereof is simply to continue payment based on the use of milk. The only difference under the nearby differential is that smaller producers from less populous and influential areas are forced to pay such nearby differential because handlers would not do so and would have the financial resources to prevent such a basic illegality.

The respondents respectfully submit that the nearby differential is unauthorized under the Act as a volume, market, or production differential because it was never customarily applied by handlers, and they also maintain that there is no authorization in the Act for requiring producers, rather than handlers, to make the nearby diffederential payments in any event. Consequently, the nearby differential violates subsection 8c(5)(B)(ii)(a) of the Act.

4. The Nearby Differential Violates Section 8c(5)(D) of the Act.

The Act's command of a uniform price to each dairy farmer irrespective of the use made of his milk is subject to but one exception, in that subsection 8c(5)(D) of the Act requires that a new producer be paid during the first two months of regular delivery "at the price for the lowest use classification specified in such order." After the expiration of this time limitation he must be paid the uniform price, and this provision is thus also concerned with uniformity among producers. It strikes a balance by the Congress concerning its intention that all producers shall have free access to every market, but that the regular suppliers of the regional market shall likewise be protected from the sporadic marketings of those who would otherwise choose to market their milk only at opportune times in order to avoid sharing the surplus of the market and any responsibility for furnishing an adequate milk supply on a regular basis.

Significantly, the payment of the lowest price to new producers is also subject to all of the enumerated differentials or adjustments, including those for butterfat content, direct-delivery and transportation. However, if the nearby differential is an authorized differential, it would result in the new producer being paid a nearby differential by non-nearby regular producers because of the fluid use of his milk at historically-higher prices at the very time that he is receiving a surplus milk price because of his failure to previously supply the market. Such a double inconsistency can hardly be attributed to the Congress rather than to the petitioners, and it is manifest that these contentions are irrational in this regard. The Congressional command is simple, clear and unambiguous. It is grounded in reason. It reflects an awareness of the problem and a balanced solution for the same. The Secretary has no power to repeal or amend the work of the Congress, and the nearby differential is a flagrant violation of subsection 8c(5)(D) of the Act.

5. The Nearby Differential is a Trade Barrier Which Burdens Interstate Commerce and Interferes with the Free Flow of Milk in Violation of Subsection 8c(5)(G) of the Act

The preferential price treatment accorded by paternalistic States to their own citizens has consistently been held to be violative of the Constitution. Indeed, this was the foremost factor that led to the drafting of that document, the first convention of the States of the Confederacy being held at Annapolis, Maryland, in 1786 for the primary purpose of dealing with the numerous self-defeating duties and taxes levied by the States upon the products and inhabitants of other States and which inured eventually to their total disadvantage. The respondents maintain that the Secretary was not delegated any power to impose a discriminatory duty or tax upon their production for the benefit of other illegally preferred producers, and that Sec. 8c(5)(G) was specifically inserted into the Act to prevent the Secretary from arbitrarily preferring one group of producers or production area over another. The Supreme Court stated as follows in *Polar Co. v. Andrews,* 375 U.S. 361 (1964):

> "The power which we deny to Florida is reserved to Congress under the Commerce clause, * * * . This provision, as the Court explained in *Lehigh Valley Farmers Co-op, Inc. v. United States,* 370 U.S. 76, was intended to prevent the Secretary of Agriculture from setting up trade barriers to the importation of milk from other production areas in the United States. We seriously doubt that Congress, *in denying the power to the Secretary,* thereby granted it to the States." (emphasis added).

The Secretary may fix prices, but he may not fix them illegally or in violation of either the Act or the

Constitution. Nor may a State or any group validly propose the exercise of such non-existent power by the Secretary, and they most certainly may not claim that such authority resides in themselves. *Baldwin v. Seelig,* 294 U.S. 511 (1935); *Dean Milk Co. v. Madison,* 340 U.S. 349; *Hood & Sons v. Dumond,* 336 U.S. 525 (1948).

The Secretary himself noted in promulgating the nearby differentials that various programs of State milk control boards were designed to assure a market for nearby or local producers, and that this was one of the reasons for the "higher prices" cited by nearby producers:

> "Registered Rhode Island producers have enjoyed a preferential market over an extended period of years. The allocation program and the procedure employed by the responsible officials of the State in issuing permits for importation of non-registered milk have tended to maintain such preferential market to the detriment of other dairy farmers whose production is an essential part of the market supply. * * * . (A. 343). And see A. 331, 336, 347 for other orders and pp. 64-67 of this brief, *supra.*

The Secretary found that federal regulation with the uniform prices provided by a marketwide pool were necessary "in order to give Massachusetts producers who are now supplying the market an opportunity to retain the market *on an equal basis* with out-of-state producers." Nevertheless, he succumbed to the demands for preferential treatment by those who needed the stabilizing influence of a marketwide equalization pool to receive any reasonable price for their milk. This is not a situation where the health of the inhabitants of a State is affected by unpure milk or where local producers are denied an opportunity to compete on an equal basis. It is simply a case where local producers largely preempt the higher priced fluid milk market by collecting a penalty or tax

on out-of-state producers, the inclusion of 58 out of 4,300 Vermont dairy farmers in the "nearby" area plainly not concealing or legitimatizing the intent to illegally prefer producers located in Massachusetts, Connecticut, and Rhode Island – the latter State contributing but about 1 percent of the market's milk supply and Connecticut only 4 percent thereof (A. 74, 55).

In the *Lehigh Valley* case, *supra,* the Supreme Court declared illegal the "compensatory payments" provision of a milk order which required a handler to make such payments into the Producers Settlement Fund when he brought "outside" milk into the region for sale as Class I or fluid use. The payments in *Lehigh* were made by *handlers* for the *laudable* purpose of protecting *all* producers whose milk was regulated under the regional order, and the payments were required only in those months in which surplus milk exceeded 15 percent of the total pool milk. The nearby differential payments, however, benefit only a minority of producers and constitute an injury to the majority of regular suppliers of the market who must bear the burden of surplus through such device. The non-nearby milk is being used to subsidize nearby milk, and the nearby producer is insulated from competition for the fluid milk market by virtue of the nearby differential payments. They constitute a burden on interstate commerce, interfere with the free flow of commerce between States, and amount to an illegal duty or tax on every hundredweight of milk produced and sold by Northern New England dairymen, the economic market barrier erected thereby being equal in degree to such tax or subsidy.

The *Lehigh Valley* case reviewed much of the legislative history relating to this provision, and the Court there recognized the care and caution exercised by the Congress in order to assure that the 1935 Act would withstand

judicial review. The original House Amendment of June 18, 1935, provided that, "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit the marketing in that area of any milk or product thereof produced in any production area in the United States."

When attempts were made to amend the amendment to substitute the words "limit or tend to limit" (instead of "prohibit"), the proposed change was defeated. 79 C.R. 9987. Those in charge of the legislation were fearful that such language could be construed to invalidate the entire Act and program, in that provisions therein for price-fixing, etc., were obvious limitations on the marketing of milk and the suggested change of language might be interpreted as embracing those implied but necessary limitations on marketing of milk. However, the language was changed to read as follows at the insistance of members of Congress from dairy states:

> "(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

The key language here, which the *Cranston* court and petitioners overlook, is not "limit", but the words "in any manner." This latter phrase clearly spells out the Congressional intent that the Secretary may not *in any manner* limit the marketing of milk products from any production area, and it also indicates that a milk order may limit the marketing of milk only to the extent provided for in the Act. Thus the Congress solved the dilemma posed by the suggested amendment which would have merely restated the Congressional intent to place

no barriers in the flow of milk and which would also have placed the entire Act and program in jeopardy by a judicial misinterpretation of such amendatory language. Any doubt as to the Congressional intent is resolved by the following language from the Congressional Record:

> "MR. SNELL: . . . . I do not understand exactly what this means. "No marketing agreement or order applicable to milk and its products', and so forth. MR. JONES: That simply applies to fluid milk. You cannot make any limitation *at all* on the amount of butter or cheese or milk products that are shipped from one production area to another, *and the limitation that may be applied on milk is only such limitation as puts each area on an equality with the other areas after a certain period of about 2½ months.*" (79 C.R. 13022).[82]

This clear intent was reiterated by the Chairman of the House Agriculture Committee on other occasions, including the following:

> "MR. BOILEAU: . . . Mr. Chairman, I should like to ask the distinguished chairman of the Committee if in his opinion there is anything in this bill that gives to the Secretary of Agriculture or to anyone else any power to restrict the free flow of milk or any other commodity between the various States?
>
> MR. JONES: No; there is nothing in it that will do that. The only tendency is to make all sections comply with the same rules." 79 C.R. 9572.

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[82] Subsection 8c(5)(D) of the Act relating to new producers.

Additionally, the record herein and the Secretary's 1936 Greater Boston order reflects that 90.8 percent of the milk sold in 1934 in the Greater Boston marketing area originated in States other than Massachusetts, almost 60 percent of the same coming from the State of Vermont and only 9.2 percent from Massachusetts producers. (A. 223, 674). After institution of regulations favorable to Massachusetts producers, however, the 1937 Boston hearing disclosed that their supply increased to 13.4 percent and that of Vermont producers declined to 52 percent. (A. 678, 697-80). In 1965, Massachusetts producers supplied 17.8 percent of the milk for the Massachusetts-Rhode Island marketing area, the Vermont supply being 49.4 percent. (A. 74). In addition to causing a substantial and progressive decline in the percentage of milk supplied by non-nearby producers, the nearby differential has caused thousands of such dairy farmers to abandon their vocation as the differential has continued to increase in amount along with the number of nearby producers. Intitally, at least 15,000 dairy farmers contributed to the nearby differential payments at a cost of 3 cents per cwt. of milk. (A. 451, 597). Now, however, the cost is at least 13 cents and the 6,500 non-nearby producers pay at least $3 million to nearby producers. (A. 55, 83, 240, 438, 609). See also, 307-310, 314, 432, 439, 451-52, 464, 518, 560, 669. As to the effect of the nearby differentials on distant dairymen, see illustrative protests filed by dairy farmers at A. 172, 178, 182, 184, 185, 166. See A. 176 for objections of Vermont Grange and A. 173 for that of Vermont Federation of Sportmen's Clubs, Inc., an affiliate of the National Wildlife Federation concerned with conservation of Vermont resources and dairy farms.

Moreover, the contention that respondents do not have standing to contest such economic trade barriers which they are forced to subsidize by a diversion of their uniform price is totally without merit,[83] and the cases cited by petitioners specifically distinguish the situation there

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[83] Respondents also rely on the Administrative Procedure Act.

present from that here and in *Stark v. Wickard*, 321 U.S. 2 which held that producers had the right to challenge such versions even if they could market their milk elsewhere:[84]

> "It is apparent that serious inequities as among producers might arise if the prices each received depended upon the use the handler happened to make of his milk; accordingly, Sec. 8c(5)(B) authorizes provision to be made for the payment of a uniform price to producers for the milk delivered irrespective of the use to which the milk is put by the individual handler. * * * The statute and Order create a right in the producer to avail himself of the protection of a minimum price afforded by Governmental action. Such a right created by statute is mandatory in character and obviously capable of judicial enforcement. For example, the Order could not bar any qualified producers in the milkshed from selling to area handlers. * * * It cannot be fairly said that because producers may choose not to sell in the area, those who do choose to sell there necessarily must sell, without a right of challenge, in accordance with lawful requirements of administration. Upon purchase of his milk by a handler, the statute endows the producers with other rights, *e.g.*, the right to be paid a minimum price."

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84 On January 1, 1964, prior to consolidation of the orders on Oct. 1, 1964, there were 692 nearby and 7,317 non-nearby producers under the Boston Order. Only 67.9% of the nearby milk was assigned to Class I use, the "distant" percentages varying from 79.1% in zones 9-15, 84.1% in zones 16-17, 70.7% in zone 18, and 90.5% in zones 19-20 or 200 miles from Boston. In January, 1966, the non-nearby producers numbered 7,696 but their number decreased to 6,706 on January 1, 1966, a loss of almost one thousand distant producers in the first year following consolidation of the orders. Nearby producers numbered 2,620 in January, 1965. *Milk Market Statistics*, Market Administrator's Office, Mass.-R.I. Order.

The nearby differential is clearly a barrier (A. 314) to the free flow of milk which unduly burdens interstate commerce, and a Report[85] of the USDA itself has cited the 40-mile zone surrounding Massachusetts cities as being one of the restrictive measures to which the federal government was strongly opposed. The Report further stated as follows:

> "A number of bills have been urged in Congress by which the Agricultural Adjustment Administration would be empowered to adopt policies that would place restrictions on the free flow of dairy products in interstate trade. None of these bills has been adopted. None had the support of the Agricultural Adjustment Administration. In opposing an act of this nature – a shipment permit proposed in 1934 (H.R. 8988) – the Adminis-tion took the position that:
>
> . . . Use of governmental powers to discriminate as between different groups of farmers has seemed to this Administration undemocratic and unjustifiable. The erection of 'tariff walls' around milksheds, creation of monopoly for farmers within, the exclusion by law of those outside, have the same unfortunate effects inside this country as erection of international trade barriers has upon world commerce. They lead to retaliatory action, which is injurious to the farmers and the public because it interrupts the economic flow of commerce."

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85 *Barriers To Internal Trade In Farm Products*, a Special Report to the Secretary of Agriculture by the Bureau of Agricultural Economics, USDA, March 1939). See also the excerpts from the Report of the Federal milk order study committee (1962) set forth in the Appendix to respondents' brief in opposition to brief *amicus curiae* of the State of Connecticut filed in No. 861 in connection with petitions for certiorari, pp. 25e-29e, as well as the testimony of

(cont'd)

6. The Differential has not been Ratified or Approved by Congress.

The Congress could not "approve" by silent acquiescence the nearby differential or the concept embodied therein without at the same time "repealing" Section 672 and the entire statute by such inaction, for the differential destroys the very purpose and policy of the Act.

The petitioners also failed to note that the first nearby differential was not promulgated until August 1, 1937 in the Greater Boston milk order, whereas the 1937 re-enactment of the marketing provisions of the Adjustment Act occurred on June 3, 1937. The main concern of the government at that time revolved around the fact that the production control provisions had been declared unconstitutional and that the processing taxes collected by the government might have to be refunded under certain lower court decisions. A number of district courts had enjoined the collection of such taxes, and the possibility of being forced to refund millions of dollars would not only drastically affect the economy of the country but also possibly bankrupt the national treasury. Hence, the Congress found it imperative to include the provision in the re-enactment concerning legalization and ratification of prior milk orders.

Moreover, this entire matter was carefully explained by Congress in the pertinent Committee reports and for the very reason of precluding the misconstrual concerning re-enactment of the statute that forms the basis of the Secretary's argument. The Congress was also concerned with the possibility that the *entire program* of marketing agreements and orders, as distinguished from the production controls and processing tax of the initial statute, would also be regarded by lower courts as invalidated under the Supreme Court's ruling in *United States v. Butler*, 297 U.S. 1 (1936). It did not want farmers to be injured by the delay attendant to a review of such decisions by the Supreme

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[85] (cont'd) economist Stuart Johnson at pp. 19e-25e which indicates that such restrictive measures may also result in the lowering of health standards within the protected supply area.

Court, and it did not wish them or the AAA to be faced with the necessity of reissuing all milk orders. Therefore, it re-enacted this part of the initial legislation, but the Congress was also concerned that such re-enactment might be construed as Congressional invalidation or doubt concerning agreements and orders issued theretofore, a fact which is specifically stated in the introductory sentence of Sec. 672. Hence, the Congress inserted Sec. 672 into the Act to preclude "technical abatements", and this did not constitute approval of every administrative action under the prior statute or authorize the incorporation of such provisions in future orders. Nor did the Congress intend thereby to legalize illegality or usurp the function of the judiciary. The Congressional intent and purpose is as clear in respect to Sec. 672 as it is to the remainder of the carefully drawn statute, and the reason for such re-enactment is shown by the statements of the Congress in *H.R. Rep. No. 468,* 75th Cong., 1st Sess. 2, and *Sen. Rep. No. 565,* 75th Cong., 1st Sess. 2, 3 (1937), as well as by the limiting language used in Sec. 672(b). A contention that Congress ratified and legalized the invalid base-rating plan of the 1936 Boston order under which nearby producers were given a Class I price for their milk and the other producers the surplus is too lacking in substance to require extended discussion, not only because this would violate the Act of 1937 but also because the 1965 amendment clearly indicates that Congress did not intend any such inconsistency.

Even the lower court in *Green Valley, supra,* recognized the inapplicability of the ratification argument in respect to the 1937 Greater Boston milk order, noting that the milk order had been issued subsequent to the 1937 re-enactment of the Act. This matter is laid to rest by the Supreme Court, however, for it specifically rejected such argument in *Brannan v. Stark,* 342 U.S. at 465-66.:

"Approval of the payments by Congress cannot be inferred from its ratification, upon passage of the Agricultural Marketing Agreement Act of 1937, of marketing orders previously issued under the Agricultural Adjustment Act."

Moreover, the current Order and differential provision was not promulgated until 1964 and requires the payment of over $3 million per year by respondents' class of about 6600 dairy farmers. The base-rating plan to which petitioners refer embraced less than 5 percent of the 15,000 producers then serving the Boston market, the total and individual payments or loss being much less at that time. (A. 240, 431, 438, 451, 458, 633, 312).

As the court below correctly noted, the nearby differential issued on August 1, 1937, did not require *delivery* to the marketing area as did the preferential and illegal base-rating provisions of the 1936 Boston Order. Hence, the 1936 Order provisions were even different in that respect and may not be equated with the nearby differential issued after the re-enactment of the Act. Further, such 1936 preferential price treatment and 1937 differential were not issued *under* the Act as required by the statute in order to be legalized and ratified thereby. In view of the illegible printing of the pertinent Congressional Reports set forth in the appendix and designated by respondents (A. 705, 708), the respondents find it necessary to set forth at least one excerpt from one of said Reports in order that it may be read by the Court:[86]

"NECESSITY FOR RE-ENACTMENT OF THE MARKETING AGREEMENT AND ORDER PROVISIONS.

Certain District Courts have interpreted the Hoosac Mills decision, which invalidated the processing tax

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[86] We note that the excerpts in the brief of petitioners Zuber et al. that allegedly support their position is legible.

"and production control provisions of the Agricultural Adjustment Act, as also rendering the marketing agreement and order provisions of the Act invalid. * * * While to date the question of the constitutionality of such regulation of interstate commerce has not been considered by the Supreme Court, the interpretation placed upon Hoosac Mills decision by certain lower courts has rendered such programs temporarily ineffective in the districts to which such decisions apply; because these courts maintained that the Hoosac Mills decision invalidated the entire Act, including this type of regulation in spite of the fact that the present Act contains a separability provision. The immediate re-enactment of the marketing agreement and order provisions of the Agricultural Adjustment Act would remove the technical basis upon which such adverse decisions rest and enable producers to receive the benefits of such programs without the necessity of waiting until these cases have been finally acted upon by the Supreme Court."

Although petitioners cite the cases set forth in the Congressional report and relied on in the *Cranston* case in respect to ratification and legalization of the nearby differential, it is abvious that those cases are not applicable when a particular provision did not exist prior to the 1937 re-enactment or was clearly illegal and contrary to the Congressional statute. The Secretary himself has terminated various order provisions that existed prior to 1937 because they did not comply with the Act, and he is is obligated by the statute to terminate an order provision when it no longer tends to effectuate the purpose of the Act. It would be a strange situation if the Secretary was obliged by Congressional mandate to follow an invalid provision that frustrated the very purpose and policy of

the Act. It would also be a strange situation if the Congress was obliged to rush through a clarifying amendment every time a witness testifying before a Congressional committee enunciated some erroneous conception of the law.

Respondents note that the Cranston court also relied on the testimony of attorney Reuben Hall that he "drafted" this provision of the 1937 Act, but the following correspondence in 1937 between attorney Hall and a USDA official appears to contradict his own testimony in the *Cranston* case concerning the purpose and effect of Section 672 of the 1937 Act and evidences that he was unaware of the effect of the provision that he allegedly drafted:

* * *

HARDY, HALL & IDDINGS
COUNSELLORS AT LAW
75 FEDERAL STREET
BOSTON

TELEPHONE
LIBERTY 5797

May 10, 1937

Joseph Blandi, Esquire
Solicitor's Office, Department of Agriculture
Washington, D.C.

Dear Mr. Blandi:

I would appreciate having you send me a copy of the Bill now pending before the Senate Agricultural Committee pertaining to the proposed amendments to the Agricultural Adjustment Act respecting Marketing Agreements and Orders.

Question has been presented to me as to whether, assuming that these proposed amendments are enacted into law, the present Order No. 4 covering the Boston Market, could be revived without the necessity for a new application under the new amendments to the A.A.A.

As I understand the situation, Order No. 4 was suspended about August 1, 1936 following the decision

of Judge Brewster in the Buttrick case. If the proposed amendments become law, can the order of suspension be revoked and the order be made effective without a new application and the other formalities attendant thereon?

I would appreciate your giving this matter some study and giving me the benefit of your views with respect thereto.

Very truly yours,

/s/ Reuben Hall

* * * *

RECEIVED: May 13, 1937

* * * * * * *

JB:MM:fe
5–18–37

Reuben Hall, Esquire,
76 Federal Street,
Boston, Massachusetts.

Dear Mr. Hall:

Mr. Blandi referred to me your letter to him, dated May 10, 1937, in which you inquire regarding the possibility of reviving Boston Milk Order No. 4, if and when the amendments to the Agricultural Adjustment Act now pending in Congress are passed.

It is my understanding that a statute which is reenacted and amended may be construed as a continuation of the original statute unless the amendments make substantial changes in the act. In my opinion, the proposed changes in the Agricultural Adjustment Act, insofar as it pertains to milk orders, are so substantial as to prevent revival of Order No. 4.

Very truly yours,

/s/ E. W. Gaumnitz,
E. W. Gaumnitz,
Chief, Dairy Section.

B. THE NEARBY DIFFERENTIAL CONSTITUTES AN ILLEGAL DISCRIMINATION AGAINST NON-NEARBY PRODUCERS AND VIOLATES THEIR CONSTITUTIONAL RIGHTS.

Much of the foregoing reflects that the operation of the nearby differential constitutes an illegal discrimination against the respondents' class, and petitioners have been totally unable to suggest any valid justification for the differential or for the payment thereof by the respondent rather than by handlers. The Secretary has disaffirmed the nebulous claims of "inherent" or extra value of nearby milk and payment for the same by fellow producers. He has rejected cost of production and other like factors as an authorized basis for a nearby differential to a minority of producers. The record discloses that nearby producers had to dispose of their milk for manufacturing use and that handlers are unwilling to pay any premium for milk of the same quality at the same location. If we go back prior to regulation, we find that conditions were such that virtually all farmers were receiving a price that equaled or fell below that of surplus or manufactured milk, due to the excess of supply over demand for fluid milk and the operation of the basic laws of economics in this regard. (28 Fed. Reg. 11957). *Not only is there no basis for differentiation between producers, but the discrimination is compounded by forcing respondents to provide the monies for the discriminatory price preference.* There is no reason for distinguishing the milk of respondents, either by the handler or the consumer, and it is an impossibility when the milk is intermingled and sold with the nearby milk. Clearly then, the nearby differential rests upon the identity of the producers, as determined by farm location, and a price preference on such a basis for an identical product is illegally discriminatory and violative of the petitioners' constitutional rights to equal protection of law

and due process of law.[86a] The Secretary has no authority or right to take the property of the respondents and give it to nearby farmers, and the latter have no right of any nature to either claim or receive the same, these principles being so clear and basic that argument to the contrary would outrage not only the Constitution and a host of cases but constitute an unbelievable affront to right and reason.

The extent of the discrimination is even more apparent when one considers that the nearby producer also receives a zone differential of 47 cents per cwt. over the uniform price announced for the base or middle zone of the milkshed, designated as 201-210 miles from Boston, no zone differential being payable for milk delivered at such base or middle zone.

Respondents again say that petitioners are not representative of the class of nearby producers, but merely of the few in any program who seek favored treatment at the expense of those who automatically assume that fair play and impartiality – as well as legality – will prevail under any government sponsored program. The regulations are complicated and beyond the understanding of the average dairy farmer, who must therefore rely upon his Government and his cooperative association representatives to protect his interests in a fair and decent manner. The deductions for the nearby differential payments do not show on the producers' monthly milk checks, and few dairy farmers in non-nearby areas were even aware

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86a See *Railway Express v. New York*, 336 U.S. 106, 112 (1949); *Pfeiffer Brewing Co. v. Bowles*, 146 F.2d 1006 (1945), *cert. denied* 324 U.S. 865; *Hawaii Brewing Corp. v. Bowles*, 148 F.2d 846, and on the principles enunciated in *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Mayflower Farms v. Ten Eyck*, 297 U.S. 266 (1936); *Yick Ho v. Hopkins*, 118 U.S. 356; *Maxwell v. Best*, 311 U.S. 454.

of their existence. They have little opportunity to protect themselves from such discriminatory devices under such circumstances, *Stark v. Wickard,* 321 U.S. 559, 569-70, and the Secretary's responsibility and duty to administer the law impartially is commensurately increased for that very reason. When he appears to have failed that trust, the courts have that same duty and must "jealously scrutinize" any charge that the Secretary has diverted a part of the required uniform price from respondents and their class. *Brannan v. Stark,* 87 App. D.C. 388, 185 F.2d 871; *Blair v. Freeman,* 370 F.2d 229 (1966).

The petitioners' citations of selective excerpts from the *Rock Royal* decision provide no support for their contentions, and *there were no producers before the Court in that case.* As in the *Hood* case decided the same day, the Court there upheld the marketwide pooling of milk over the objections of handlers who claimed that the pooling provisions were discriminatory and violative of their constitutional rights under the Fifth and Fourteenth Amendments because they were required to pay the excess over and above the marketwide blend price to the pool or settlement fund for distribution to the producers who served competing handlers. The involved handlers maintained that they should be able to pay such excess over the marketwide price to their own producers rather than into the equalization pool, and it is apparent that the petitioners are making the identical claim in contending that their handler may withhold the nearby differential in making payment to the pool in order to pay his producers the nearby differential. The *Rock Royal* case is thus clear authority for the respondents rather than for the petitioners who attempt to rewrite the Court's decision by substituting the government's brief in *Rock Royal* for this Court's decision. The respondents may not be saddled with the inaccurate and miscited excerpts from

an adverse party's brief that presumes to replace this Court's decision, and this is particularly true when the petitioners have sought to evade the clear admissions made in their *Blair* briefs concerning the similar findings and identical purpose and effect of this nearby differential with that ruled illegal in the *Blair* case.[87]

In *Rock Royal*, this Court stated that, "The results of the use of the device of an *equalization* pool is that *each producer*, dealing with a proprietary handler, gets a *uniform* or weighted average price for his milk, with differentials for quality, location, or other *usual* market variations *irrespective of the manner of its use.*"[88] (Emphasis supplied. In commenting on the handlers' objections to the equalization pool, the Court noted that "this argument assumes the validity of price regulation, as such, but denies the constitutionality of the pooling arrangements *because handlers are not at liberty to pay the producer in accordance with the use of the producer's milk*, but must distribute the surplus to others whose milk was resold less advantagously." The petitioners Zuber, *et al.*, understandably omit this language that immediately precedes the quotation set forth at page 35 of their brief, and they also fail to note that this Court distinguished other pooling cases which were violative of due process "because the burdens . . were not equalized with the benefits."

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87 We note, however, that the briefs of the parties in the *Cranston* district court were as unavailable and private as the record in that selective proceeding.

88 This identical language was used by the Court below in the *Blair* decision in referring to adjustments to the uniform price but petitioners overlook such fact in contending that the lower court failed to note this Court's phraseology. They also overlook the fact that *Rock Royal* referred to *usual* differentials and not to a differential that exists in but one other order out of about 75 in the United States.

As previously stated, the differential of the old New York Order involved in *Rock Royal* required *delivery* of milk within a designated area, and part of the differential was paid by handlers[89] and the balance from out of the pool. Although the Court did not find it necessary to analyze the differential from the standpoint of producers because only handlers were before the Court and they had no standing to question disbursements from out of the pool, the Court did state as follows in holding that the differential was not discriminatory against handlers but authorized under Subsection 8c(5)(A) pertaining to payments by handlers: "This was found discriminatory *as between producers* by the District Court but there was no finding or conclusion of law as to any discrimination against *defendants.*"

The defendants in *Rock Royal* were all handlers, both proprietary and cooperative, and this Court reiterated the said finding of the district court in *Rock Royal* where it rejected the argument of a cooperative handler, Central Cooperative, that a cooperative, unlike a proprietary handler, is not required to pay its excess sales over the uniform blended price into the equalization pool or fund but may pay its members on the basis of the use made of their milk: "If the cooperative members were freed of the burden of carrying their proportion of milk going to manufacturing use, *the discrimination in their favor would be the most strongly marked.*" Additionally, the Court refused to prefer certain producers in this regard by differentiating between different types of cooperatives after noting that neither the reports on the bill or the debates in Congress show any effort to

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[89] This part of the New York differential was the market differential paid for the direct-delivery of milk to a city market.

differentiate: "The statutory provisions for equalization of the burdens of surplus *would be rendered nugatory* by the exception of "agency" cooperatives." (Emphasis supplied; see pages 579-80).

In view of the foregoing, it is difficult to perceive any logic or rationality, or the benefits that would accrue, in petitioners' footnoted attempt[90] to rewrite the *Rock Royal* opinion to conform to their contention that a cooperative is not to be regarded a handler but as a group of producers. The petitioners apparently miss the point of the Court's decision and the entire Act in failing to understand that handlers are regulated under the Orders for the benefit of *all* producers. Plainly, the petitioners may not equate producers with handlers in order to transform Subsection 8c(5)(B) into 8c(5)(A) which would authorize a handler, rather than a producer, to pay a differential for delivery of milk within a certain area. Although respondents have no objection to handlers paying any appropriate differential to nearby producers, there clearly is no authorization for the payment of a nearby differential to nearby producers by the respondents under Subsection 8c(5)(B) and least of all on the basis of the use made of nearby milk. This contention for differentiation among producers and exemption of nearby producers from equalization and marketwide pooling would nullify the primary purpose of the Act and such type pooling.

The petitioners further attempt to exempt cooperative associations from the definition of handlers is not only contrary to the Act and Orders but the very opposite of this Court's holding in the *Rock Royal*

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90 *Zuber* brief, page 55, ft. 92.

case,[91] and petitioners also overlook the fact that such cooperative handlers were refusing to comply with the Act and Order in *Rock Royal.* The respondents respectfully submit that *Rock Royal simply points* up the discrimination against non-nearby producers and that it is by no stretch of the imagination authority in support of the petitioners. Their resort to outmoded arguments, such as that a range of mountains prevented delivery by non-nearby producers,[92] is simply illustrative of the lack of any rational basis for defending the discriminatory nearby differential in fact or in law.

The case of *Secy. of Agric. v. Central Roig Co.,* 70 S.Ct. 403 has no applicability here.[93] That case involved a different statute which authorized a quota system on a historical basis. This Act circumscribes the power of the Secretary and provides for the entry of new producers into a market, assignment of "bases" according to current marketings, and other provisions of similar nature. Respondents do not claim that the Act is discriminatory but only that the Order provision is illegally discriminatory on the principle enunciated in *Baldwin v. Seelig,* 294 U.S. 511, a case that was specifically referred to in the Congressional Reports relating to the 1935 Act.

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91 "Each defendant is a dealer handling milk moving in interstate commerce (p. 540)... A handler is a person engaged in the handling of milk or cream received at an approved plant for similar sale. 'Handler' includes cooperative associations. (p. 554)... The Government makes the point that none of the defendants, all handlers, can object to the terms of the Order. (p. 560)... Whether cooperative or not, the defendant corporations have no interest in the producer settlement fund. (p. 561)... The administrative construction has been to include such cooperatives as handlers. With this we agree. (580)."

92 See testimony of Dr. John D. Black, author of *The Dairy Industry and the AAA* (extensively cited by petitioners), during administrative hearings for the N.Y.-N.J. Order at pp. 4455-58 concerning rail shipments of milk from south of Canadian border in 1909 to New York City.

93 See *Fleming v. Moberly Milk Products Co.,* 82 U.S. App. D.C. 16. 160 F.2d 259 *cert. dismissed* 331 U.S. 786.

C. THE SECRETARY'S FINDINGS ARE DEFICIENT AND INCONSISTENT AND UNSUPPORTED BY VALID AND SUBSTANTIAL EVIDENCE, AND HIS CONCLUSIONS AND DECISIONS ARE IRRATIONAL, INCONSISTENT AND ARBITRARY

The Secretary has found in each of his decisions promulgating a nearby differential, including that for the N.Y.-N.J. and Connecticut Orders, that the nearby producers were losing their markets to non-nearby producers; that much of the nearby milk had to be disposed of for manufacturing use, and that federal regulation and a marketwide pool were necessary to give the nearby producer an opportunity to retain his market on an equal basis with out-of-state producers. He has found that the nearby producer receives a protected market and a higher Class I price than he would in the absence of regulation, and the record discloses not only repeated admissions in this regard but that nearby producers admitted in 1937 prior to issuance of the first nearby differential that their prices were higher by 64 cents per cwt. under Federal regulation. These findings are totally inconsistent with his findings that nearby producers have always been able to get a higher price for their milk, that the nearby producer has always been able to dispose of his milk for fluid use at Class I prices because of his proximity to fluid consumption centers, and that such "historical price relationship by location" justifies the issuance of a discriminatory differential. Although respondents supply the great bulk of the fluid milk market, he has inconsistently forced them to pay $3 million per year to nearby producers because of the fluid use of the latter's milk. He has found that handlers would not pay nearby producers a premium of 7 cents per cwt. for their milk, and that handlers preferred to purchase their milk from non-nearby producers because the handlers could save such amount

under the zone differential that exceeded actual costs to the handler by 7 cents prior to 1964:

> " . . . city plant operators often have preferred to purchase milk from country sources rather than from local producers. The situation is, in fact, one of the major marketing problems dealt with in this decision because recently much of the locally produced milk has had to be disposed of in manufacturing channels." 29 FR 11208.

In spite of the foregoing, he has promulgated a differential awarding an extra payment of 46 and 23 cents to nearby producers, payable by non-nearby producers, and he has inconsistently and irrationally referred to the comparative value of nearby and non-nearby milk without ever specifying any value for nearby milk except that pertaining to illegal fluid use considerations. Moreover, he has constantly referred to "historical" values in obvious recognition of the lack of any current basis for the nearby differential, and he has repeatedly ignored the factor of direct-delivery of milk and resultant savings in handling costs in finding that the nearby producer historically received a higher price for his milk over and above transportation costs. He has illogically found that a nearby differential was appropriate in certain markets and orders because the Boston Order contained a nearby differential. He has found that the factors of "availability" and "inherent value" of nearby milk should be compensated by handlers and not producers, and that it was inappropriate to reward evenness of production on a group basis because of individual variations within every section of the milkshed. All of these findings are inconsistent with the awarding of a price preference to nearby producers through the differential provision of the Order, and the Secretary has even admitted that the awarding of such a differential is contrary to and inconsistent with marketwide equalization pooling of milk. He has found that varying

prices among producers were responsible for the disorderly marketing conditions that brought about the need for federal regulation and consolidation of the present Order. He has found that nearby producers under such secondary markets depended upon the non-nearby Boston producers to assure them of an adequate reserve and that this was one of the reasons for higher prices in the secondary markets where the fluid milk utilization rate was higher because of such failure to share the burden of surplus associated with the secondary markets. He has found that allocation programs of State milk control boards were responsible for the "higher" prices to nearby producers and that such programs could not assure a market for nearby milk. Nevertheless, he has persistently referred to the higher prices of nearby producers without recognizing such fact or his admissions that all milk would be priced at surplus in an unregulated market if the stability of an adjacent federal order was not present. He recognized that over 60 percent of the milk was delivered directly to market in 1964 and promulgated a differential that pertained to non-nearby producers delivering in such manner in 1936, but he illogically dropped such a condition in 1937 in order to award a prohibited subsidy to nearby producers based upon the location of their farms. He has continued the Connecticut nearby differential which causes the intermediate nearby producers to sustain a loss of 17 cents instead of a gain of 23 cents because of the fluid use of their milk and the higher prices received by them prior to federal regulation. He has continued that differential when it costs the non-nearby producer 44 cents in order to market his milk and when the nearby producer is benefitted by but one or two cents by the Connecticut differential, although he has admitted that prices to Connecticut producers would be about the same in the absence of a differential. He has designated national thruways as "historical" boundaries and thereby caused producers on one side of the highway to be "nearby"

producers and those on the other side who are served by the same pick-up truck to be "non-nearby" producers. The respondents respectfully submit that these and other findings and conclusions of the Secretary are totally inconsistent, irrational and arbitrary.

Further, as the Court below correctly noted, every witness in the administrative hearings justified the nearby differential on the illegal basis of the fluid use of nearby milk, and the economists for nearby-dominated associations could not even suggest any current basis for the nearby differential's existence.

If a differential of this nature has no current validity and must therefore be justified on a "historical" basis, it is evident that no amount of evidence could result in its elimination through administrative proceedings. Indeed, this is the very reason why the present action was instituted. Furthermore, the Secretary found in 1964 that although "considerable testimony in support of removal of the provisions was received, it was not established that the farm location differential provisions are resulting in unstable or disruptive marketing conditions which warrant their deletion from the orders at this time." This finding is totally deficient, for the Secretary is required to find that all of the terms and conditions will tend to effectuate the declared policy of the Act to establish orderly marketing conditions. Many things might not result in unstable or disruptive marketing conditions, but this does not warrant their insertion into the order under the finding that must be made by the Secretary. Moreover, it is difficult to comprehend why it is so difficult to enumerate the specific reasons for the differential, other than to refer to "somewhat higher values" or "for whatever reasons" in discussing the basis for its existence, since it does not appear to be at all plausible that the reasons for the differential could be so nebulous if the payment of it by handlers was so prevalent and "customary."

It should also be noted that the Secretary acknowledged in his 1957 New York Decision that "a history of paying nearby differentials has merit only if the historical basis for such differentials is found to be sound". In view of the lack of certainty concerning the basis for such differential and the acknowledgment that the factors that were initially suggested for its issuance are not applicable today, it is submitted that there is no justification for the differential on this basis. Indeed, the Secretary stated in his brief filed in the 1937 Boston Order hearings that "the history of the Boston milkshed has shown that no group of producers can be kept from participating in the fluid milk market." (A. 672). The reason for the differential has disappeared, if in fact it ever existed, but the differential remains. This is irrational, inconsistent and arbitrary action by the Secretary. Moreover, many producers who presently receive the nearby differential never received a higher price for their milk, and many producers in non-nearby areas who formerly received such "historically higher-price" because of a fluid outlet for their milk are not eligible for the differential. Even the "history" is inconsistently applied by the Secretary. (A. 609, 696-99).

The respondents not only contend that the Secretary may not consider the use to which a producer's milk is put, historically or potentially, in promulgating the nearby differential and thereby apportioning the fluid milk market to nearby producers, but that the very statistics upon which such findings and conclusions rest are also invalid "evidence" because they relate to the use of milk of a producer or group of producers. In view of the invalidity of the Secretary's findings, there is no reason to review such "evidence", and it should be noted that the price statistics compiled under artificial Federal regulation[94] or preferential State programs are also incompetent as evidence.

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[94] Both petitioners make reference to the Phildelphia (Delaware Valley) Order in this connection but neglect to mention that individual-

(cont'd)

Moreover, we note in examining the administrative record of the 1937 hearings for the Greater Boston Order that John Carten, spokesman for the Nearby Producers Association, purported to justify his demand for an illegal tax on the basis of threats to disrupt the market[95] and the alleged price paid to but *one* producer out of approximately 20,000 supplying the market at that time:

> "MR. CARTEN: . . . we have figures here from *one* of our producers from 1920 to 1930 for the price received for milk shipped to Salem, Massachusetts, to the H.P. Hood Company and they averaged – it is hard to average them exactly,

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[94] (cont'd) handler pooling was replaced in that Order because of the disorderly marketings and price-cutting resulting from varying prices. Over 90% of the Philadelphia Order producers voted for a marketwide pool, and the prices received in that market were lower than in adjoining markets because of the chaotic conditions and toll taken by the varying prices and resulant self-defeating competition. (31 F.R. 15670). That Order is presently being considered for merger with two adjoining orders.

[95] "MR. CARTEN: * * * and the local producers, – there is always a row in the market unless they are compensated in some way." (A. 269); " * * * most of us are in a position to retail milk with the added confusion to the market caused by a large number of small distributors trying to squeeze into Class I sales * * *" (A. 280); "* * * we might be tempted to sell to local dealers not complying with the license." (A. 280). The brief of the Nearby Producers Association stated that unless they received the 46¢ per cwt. instead of 36¢ per cwt., they "will swarm to the Office of the Market Administrator to remind him of it and demand an adjustment." (A. 687). Charles E. Shepard, President of the Federated Dairy Association of Massachusetts testified in the 1935 hearings for the 1936 Boston Order that one of the reasons for giving a preference to nearby producers was their intention of "becoming a menace to the enforcement of the agreement." (A. 675).

> because in all cases the butterfat wasn't given, but it was between – somewhere between $1.20 and $1.30 over the NEMPA price in the 191-mile zone. We should have at least a cent a quart over the equalized price to be protected. That would be 46¢ instead of 36¢ wouldn't it, Mr. Alpin?" (A. 266, 283-85).

W. A. Bronson, economist for the NEMPA, testified in favor of the nearby differential in the 1937 hearing and referred to prices allegedly paid to a few producers delivering to but two of the many handlers in the Boston market. (A. 263, 687). His figures were admittedly subect to correction, related to *direct-delivered* milk (277-78), and conflicted with prices submitted in a nearby brief (A. 299) for two producers who delivered to one of the handlers mentioned by Mr. Bronson. Moreover, this witness admitted that nearby producers had received $3.10 per cwt. under the 1936 Boston Order and only $2.46, or 64 cents less, during the period in 1936-37 when the Order was suspended. (A. 264). He testified as to the *necessity* of a Federal order for nearby producers and also stated that, "There appears to be no question that *based upon past history* a Federal Order can give the Massachusetts producers more money for their milk than a Milk Control Board Order without assistance from the Federal Government * * * ." (A. 264-65).

The limited price figures cited by Mr. Carten and Mr. Bronson were without any real supporting foundation, in that the identity of the few producers involved was not furnished nor was there any explanation of the effect on such alleged prices of butterfat content, transportation, rebates, kickbacks to handlers, etc. Mr. Bronson had testified in the December 10-12, 1935, hearings that handlers who are able to dispose of their milk for fluid use force producers to give rebates, etc. (A. 674-75), and

the price figures were presented primarily in the briefs and not subject to cross-examination. Significantly, the Market Administrator himself admitted during the 1936 Order hearings that, " * * * we have to confess to you that there is no one who has any accurate figure computed on just how much more these Massachusetts producers should receive for their milk. (A. 244) * * * It is different from what they have demanded. They have demanded, through their representative, that every drop of milk they make should be paid for at the Class I price." (A. 245).

Although a study had purportedly been conducted prior to this time in respect to the differences in prices received by nearby producers from 1926 to 1934, it is clear that such statistics are irrelevant as well as inaccurate and illegal for reasons heretofore related. It has also been noted that both the AAA and the Department of Justice acknowledged that many producers did not receive bases under the licenses and that the blended price had been computed on the basis of conjecture because of incomplete price information, a fact that would eliminate the price figures for the period when the licenses were in existence and further reflect on the accuracy on the alleged price study. Indeed, the official of the USDA who testified in the *Cranston* case that he had conducted the study[96] for the Boston market in 1934 was involved in the capitulation of the AAA to the nearby producers and the Massachusetts Milk Control Board, and it is elementary that some plausible justification for such a concession would have to be presented after the passage of of the 1935 Act which spelled out the necessity for equalization and the illegality of such price preferences that

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[96] No study was produced or offered in evidence in the *Cranston* case in spite of such testimony. But see A. 628-29, including footnote 8.

burdened interstate commerce under the revised language of the 1935 legislation. Moreover, that witness made the following obviously contradictory statement during the 1937 Boston Order hearings:

> "MR. ALPIN: You have heard the testimony here that these producer associations have nothing to say about the price of milk. When we were operating in Boston we were continually told by the dealers, the large dealers, that they had to own their milk as cheap as their competitors, and that they intended to own their milk as cheap as their competitors. That being their policy, and *it has been their policy for years,* and they admitted under their testimony yesterday that the dealer sets the price and the producers have nothing to say about it. I think that you have very little assurance as to what the price will be without a Federal order . . ." (A. 683).[97]

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97 The testimony of this witness in *Cranston* did not include any mention of the supposedly temporary concession to the Massachusetts Milk Control Board as the main reason for the awarding of the higher bases and Class I prices to nearby producers under the licenses. Nor did he refer to the fact that the nearby producers' monopoly over the fluid milk markets disappeared with the advent of tank trucks, refrigeration, etc. In fact, this witness affirmatively stated that the market differential defined in the Congressional Reports never existed in secondary markets in attempting to discredit the Congressional definition and replace it with that proffered by petitioners. Of course, such Congressionally defined market differential existed both prior and subsequent to federal regulation in the Troy and Albany, N.Y., area in which the witness testified and it was paid in virtually all secondary markets in New England as well.

Findings without supporting and legal evidence are arbitrary and baseless, and it is clear that the findings made in promulgating the nearby differential of the 1937 Boston Order and the present differential of the Massachusetts-Rhode Island milk order were by administrative fiat. Such authority, however beneficially exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation as an arbitrary exercise of power and violation of due process. *I.C.C. v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913). None of the other 75 milk orders except the Connecticut Order contains such an illegal and discriminatory differential, and it is as "vital" to orderly marketing as a racist poll tax is to good government. Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. It is also basic that an administrative order may not be upheld unless the ground upon which the agency acted in exercising its powers are those upon which its action can be sustained. *SEC v. Chenery Corp.*, 332 U.S. 194, 318, U.S. 80.[98]

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[98] An extremely clear and informative article concerning the proper role of the administrative process and the courts by Dean Robert Kramer, George Washington University Law School, former Asst. Atty. General, appears in *The George Washington University Magazine*, Fall 1965, and is entitled *The Administrative Process and the Courts*. See also *Parker v. Lester*, 112 F. Supp. 433; *Phillips v. Fidalgo Island Packing Co.*, 230 F.2d 638; *Sunshine Dairy v. Peterson*, 193 P.2d 543, 560; *Skinner-Eddy Corp. v. United States*, 249 U.S. 557; *Varney v. Warehime*, 147 F.2d 238; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254; *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 283; *Union Producing Co. v. FPC*, 127 F.Supp. 88.

D. THERE IS NO PROPER BASIS OR PURPOSE FOR REMAND OF ANY NATURE

1. Summary Judgment Was Proper In This Case

The Secretary's brief does not even raise the question of remand and the petitioners Zuber, *et al.*, have totally failed to even suggest a proper basis or purpose for any type of remand. The latter actually have no standing in law or fact to question the record below or the adequacy of representation in the District Court because (1) they were given repeated opportunities to present any claim or defense to the District Court over a period of six months (A. 111, 125, 657-58); (2) they submitted a brief *amicus curiae* in the name of the Commonwealth of Massachusetts which set forth all of their claims and defenses (A. 125, 732); (3) the District Court fully considered their arguments and those of all applicants for intervention (A. 121, 124-25, 127); (4) they worked hand in glove with the government from the very beginning of the case and actually dominated the government's strategy (A. 36, 37, 58); and (5) they represented to the Court of Appeals that they chose to abandon their appeal concerning denial of intervention in order to intervene for the sole purpose of prosecuting an appeal from the judgment of the District Court (A. 129-31).

Nevertheless, they attempt to have the better part of two worlds at respondents' expense by pursuing an appeal concerning denial of intervention which they voluntarily abandoned in the lower court because they did not believe it would succeed. (A. 130).[99] That issue is not

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[99] The identical tactic was employed in respect to the modification of the preliminary injunction which allowed nearby producers (cont'd)

properly before this Court and said petitioners may not justify a specific misrepresentation to the Court of Appeals and a violation of its Order by claiming that it committed "egregious error" after they accepted the benefits of said Order and refused to test such alleged Order at the proper time and in an appropriate manner.[100]

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[99] (cont'd) to obtain their monies from the escrow fund and a full uniform price without escrowing of the part of the nearby differential attributable to their marketings of milk. Although it was the specific understanding of all counsel that the non-nearby producers would receive their escrowed monies if they prevailed in the case, the petitioners now maintain that the nearby producers are entitled to all of the non-nearby producers' escrowed monies even if the nearby differential is illegal.

[100] Nor do respondents believe that petitioners may nullify or justify persistent improprieties by referring to "acrimonious and intemperate correspondence, copies of which have been directed to the Clerk of this Court". (Zuber brief, p. 83). Petitioners not only initiated such practice but also forced respondents to reply thereto if they were not to be regarded as admitting the various misstatements therein. Respondents also repeatedly requested petitioners Zuber, et al., to refrain from such unnecessary practice and could not perceive any proper reason therefor. After certain misstatements in said letters, respondents regrettably found it necessary to employ a court reporter to record a conference between counsel concerning preparation of the joint appendix and the identity of the issues before this Court in order to prevent further misstatements concerning such matters. The Court is urged to examine the transcript of said conference, presently filed in the District Court, in which petitioners Zuber, *et al.*, repeatedly evaded answering two simple questions concerning whether petitioners regarded the abandoned appeals of Zuber, *et al.*, and that of the NEMPA and the CMPA to be within the issues before this Court. Respondents did not designate any material relative thereto because they were informed after said conference that petitioners did not intend to argue such matters because they were not properly before this Court.

Moreover, the attack of petitioners Zuber, *et al.*, on the record below is totally lacking in merit. Although petitioners maintain that all of the administrative records were not before the District Court and quote from the government's papers filed on March 20, 1967, both petitioners are fully aware of the fact that said statements were made for the sole purpose of delay because petitioners anticipated an adverse decision from the motion's judge whose term was due to expire in a short time. Significantly, the government's papers were filed two months before the hearing on summary judgment, and neither petitioner filed any additional administrative records after succeeding in delaying the hearing until the expiration of said judge's term in motion's court.

Further, the government counsel, with the approval of counsel for Zuber, *et al.*, informed the District Court on January 11, 1967, over five months before the hearing on summary judgment, that they would file cross-motions for summary judgment on January 27, 1967 (A. 57) and they proposed February 8, 1967 as the hearing date. The Court was advised that the administrative record was no problem at that time, and respondents note that their counsel was able to review all of the administrative records. The same is equally true of the government and of the large law firm that represents Zuber, *et al.*, particularly as they have been involved in the nearby differential litigation since February 1, 1965, and referred at that time in the *Blair* case to the administrative hearings and decisions involved in this present case.

Although the administrative records for the secondary milk orders consolidated into the present Order are not actually necessary for a determination as to the validity of the nearby differential of the consolidated Order, the petitioners are aware of the fact that they chose not to furnish such records to the District Court after the respondents filed and served summaries of said records.

(A. 120, 660-61). Petitioners had six months to produce the records which they initially admitted were readily available within one month, and such records most assuredly would have been produced if they benefited petitioners in any substantial sense or if the respondents' summaries (A. 661-704) of such records were unfactual in any manner. Now, however, petitioners attempt to take advantage of their own carefully conceived omissions by claiming that the material they refused to furnish because it was unnecessary or unfavorable is suddenly and unexplainably transformed into material that should have been before the District Court. This tactic, of course, is also intended to indirectly attack the accuracy of the summaries submitted by respondents, and petitioners Zuber, et al., utilize the same tactic in claiming that respondents refused to consent to the presentation of one secondary administrative record to this Court.[101]

In reaching for another last-straw "argument", the petitioners attempt to convince this Court that the "excerpts"

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101 A similar representation was made by government counsel in *Lewes Dairy v. Freeman,* 260 F. Supp. 921 (1966), concerning the relevancy of records not before the Court. Moreover, the petitioners' real complaint is that they could not produce such unnecessary records at the last minute and misstate their contents. One example of this practice is set forth at page 68 of the appendix wherein government counsel attempts to convince the Court that the present suit should not be authorized as a class action and misrepresents for an immediate purpose that the *Blair* case was not prosecuted as a class action. The same government counsel was fully aware that the government's Statement of Facts as to which there was no dispute and many other papers in *Blair* set forth that said case was a class action. Indeed, government counsel had written to the Blair counsel and suggested adding a couple of additional plaintiffs to better show that it was a class suit.

from the administrative record for the 1964 Order before the District Court denotes a deficiency of some nature. However, every page reference except one that benefitted the petitioners was filed in the District Court, and it would be an obvious disservice to that court to burden it with a 5,000 page record that had no possible bearing on the issues before the court. Moreover, the petitioners fail to inform this Court that the parties "excerpted" the administrative record for the court in the *Cranston* case and that the administrative records for the secondary orders were not filed in that case. Additionally, the administrative records for the Boston licenses and Orders were not filed in that case, and the petitioners' complaints are not only unfactual but without merit.[102]

The additional contentions of Zuber, et al., that all of the matters raised by the respondents were not presented in administrative proceedings is also simply untrue. Indeed, most of such arguments were presented in the 1936 and 1937 administrative hearings and in those for the secondary orders as well. (A. 243, 272-73, 681-82, 684, 685, 691-92, 698). All of the arguments were also presented in the 1963 hearings, and such fact may be illustrated by the testimony of one witness (A. 440) without even referring to the briefs filed in said hearing. Significantly, it was the NEMPA counsel, Reuben Hall, petitioners' associate counsel, who attempted to prevent such testimony concerning the illegal aspect of the nearby differential in the administrative hearings. The nearby differential was one of the main issues at said hearing (A. 644) and every

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102 Respondents note that the plaintiffs' "approved" attorney in *Cranston* admitted that he had not even read the administrative records before the so-called trial in the *Cranston* case, but the government counsel and associate counsel of Zuber's attorneys did not regard such fact to be significant in respect to adequacy of representation of plaintiffs' class in that case.

aspect of such differential was explored at the 1963 hearings as evidenced by the size of the record below.[103]

The petitioners Zuber, et al., also attempt to distinguish the *Blair* case by maintaining that it involved far different and very limited findings by the Secretary not present in his decision regarding the Massachusetts-Rhode Island or predecessor orders." This statement is also inaccurate, and the Court is respectfully requested to compare the findings for all of the main orders that are set forth at pages 17e-18e of the appendix of the brief of respondents in opposition to the brief *amicus curiae* of the State of Connecticut filed in No. 861, October Term, 1968, in connection with the petitions for certiorari. The petitioners presumably make such representation regarding the Secretary's findings in issuing the N.Y.-N.J. nearby differential in order to avoid an inquiry as to why that case was disposed of on cross-motions for summary judgment if it is allegedly inappropriate to dispose of this case in such manner. The Court is respectfully requested to consult the Secretary's decision for the N.Y.-N.J. nearby differential, 22 Fed. Reg. 4212-16, to observe the extensive findings and discussion of the nearby differential by the Secretary.

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103 The petitioners maintain that yet another study should be made of the nearby differential but neglect to inform that this technique has been consistently utilized to avoid the termination of the differential. (A. 316). Moreover, committees of experts of national stature have condemned the nearby differential as an "impediment to intermarket relationships." USDA, *Federal Milk Order Study*, 1962. Contrary to the statements of petitioners, only one member of the committee dissented from this particular part of the Report and he was an economist for the NEMPA who had previously admitted that, "Unless a means can be developed to regulate all the milk on a uniform basis, the price structure will collapse, and local producers will be left without a market." (A. 694).

Petitioners also attempt to distinguish the *Blair* case by maintaining that the entire State of New Jersey was included in the first nearby differential zone under the N.Y.-N.J. Order and that a comparable provision does not exist in the present Order. However, petitioners are well aware of the fact that all of the State of Rhode Island and all of the State of Massachusetts except Berkshire County is included in the first nearby differential zone of the Order involved in this case. Further, those producers more than 40 or 80 miles from Boston were designated as "nearby" producers in 1964 when the said States were classified as "nearby" under the consolidated Order. The nearby differential areas that previously existed under the secondary orders were also expanded at that time to embrace producers whose farms had never been classified as "nearby" under any of the orders, and all of the previous producers classified as nearby producers were regarded as eligible for the differential payments under the Consolidated Order irrespective of where his milk was delivered and regardless of the fact that he might not have a "historical" association with the new markets. (A. 651, 609, 696-97)

The petitioners also maintain that summary judgment was inappropriate because factual questions existed in respect to "the existence of customary trade practices both before and after the passage of the 1935 Amendments", but they fail to advise that this subject was fully covered in the administrative record and that such records disclosed that any differences in price between producers was attributable to the use of their milk for fluid purposes. The "affidavit"of associate counsel Reuben Hall did not carry a notary seal and was obviously unable to raise any genuine issue of fact. The testimony of such witness in *Cranston* can hardly replace the testimony in the 1963 administrative record or constitute evidence relating to the 1936 and 1937 Boston hearing records, and we have previously noted that the testimony of said

witness was not corroborated by any documentary evidence of any nature.

The District Court also gave full consideration to the questions of primary jurisdiction and exhaustion of administrative remedies, and these defenses were raised below for the sole purpose of delay for the reasons aforesaid. The nearby differential challenged by respondents had been promulgated in 1964 and was causing irreparable injury. Only a question of law was involved and the pertinent cases were set forth by respondents in the District Court. (A. 87).

The petitioners also allege that the order for summary judgment was signed by the District Court without change, but they fail to advise that the bulk of said Order consists of prior orders entered by the court in the action and which were prepared by the court. Further, petitioners fail to inform that objections were filed to the Order as well as to all other orders entered by the Court (A. 165, 728). These objections were intentionally filed and made a matter of record by the presiding judge, and his familiarity with every aspect of the proceedings is the real complaint of the petitioners. (A. 150). The respondents agree that a judge should not mechanically sign orders presented by counsel but they maintain that there is no reason for not signing such an order when it has been fully debated and considered by the Court and is in agreement with the facts.

Finally, respondents note that petitioners place heavy reliance on a book written by Dr. John Black entitled *The Dairy Industry And the AAA*, but they fail to note that Dr. Black's book was published just one month after the 1935 Act and that he took no exception to the Congressional definitions of the differentials in setting them forth at page 340 of his book. Moreover, Dr. Black was honest enough to acknowledge during the 1956 administrative hearings for the N.Y.-N.J. Order that he initially

favored the nearby differential for the following reason (R. 4446):

> "Q. And you don't believe that nearby milk has any further value than indicated by that principle?
>
> A. That involves the question of the 40-mile zone which you had up earlier before, and I begged off on answering that one because, frankly, I haven't studied that one in the different markets. I have sat in on the discussions of it when they first set up the Boston milk order. *I had a personal interest in it because it happens that a brother of mine has a dairy farm a few rods short of 40 miles from the State House in Boston.* He gets the 46 cents premium on his milk because he is there. The justification for it in those days may be different from the justification for it now. * * * "

Dr. Black further testified against the "un-American" exclusion of "distant" dairy farmers from sharing in the fluid milk markets; the inability to "defend present arrangements or future arrangements too much on the long distant past"; the failure of the Connecticut market to carry its fair share of surplus because of "the administrators in Washington"; and the fact that nearby milk in non-federal markets would be priced at virtually manufacturing milk prices except for the stabilizing effect of the federal orders in adjacent markets. Dr. Black also rejected the view of some nearby producers that if a particular area does not produce as much milk as it consumes, the prices to producers in that area should be raised high enough to induce the extra production or a large part of it. This policy, detrimental to consumers and the producers, is pursued with governmental approval at the insistence of politically influential groups, and petitioners fail to cite Dr. Black's testimony in 1956 concerning

such an un-American and monopolistic approach which also injures "outside" dairy farmers by the exaction of the subsidy payments:

> "This is of course contrary to the whole conception and principle of free trade among the states upon which our republic was founded. That principle says that all milk of the same quality moving to one market shall sell at the same price delivered in that market, but that the price received for it at the farm will decrease with distance from this market strictly in line with the increase in transport and related handling costs. Furthermore, milk will move to this market from points outward from the market till a point is reached where the milk will net more if shipped to some other market or put to some other use * * * ."

2. There Is No Reason For Remand To The Secretary

The Secretary simply terminated the nearby differential of the N.Y.-N.J. Order after it was declared illegal, and no question was raised concerning the necessity for remand or in respect to the separability of the Order provisions.[104] The District Court fully considered this question (A. 127), and this simply is not the key provision that petitioners claim, a fact that is abundantly clear by

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104 The petitioners cite the percentage of producers in the milkshed that favor federal regulation, not the nearby differential. Producers have never been able to vote on this separate provision, and their votes are cast for them by their cooperative associations on the milk order as a whole. The NEMPA, largest of the associations, votes for many of the non-nearby producers and its counsel favors the nearby differential. Moreover, the district and appellate courts both noted that the Act and Order have separability clauses.

virtue of its existence in but one other milk order and the Secretary's admission that it is not necessary therein. The cases cited by petitioners relating to remand are totally inapplicable to the present situation. The case of *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, involved a situation where a license was issued upon certain conditions by the the FPC, and such conditions were declared invalid by the Court of Appeals. Instead of remanding the case to the FPC for a determination as to whether the license would be issued in the absence of such conditions, the appellate court presumed to decide this question by its own action, a procedure that was doubly incorrect because such conditions were held to be within the power of the agency under the statute. That situation is totally different from the present case, a fact that is evidenced by the Secretary's action in *Blair* in terminating that nearby differential after it had been declared illegal. The absurdity of contending that the nearby differential is a key provision is aptly illustrated by the testimony of a nearby producer in the Cranston case that he made an investment of over $100,000 in sole reliance on receiving a nearby differential that averages $12.50 per month under that Order.

The termination of the nearby differential in *Blair* did not result in any disorderly marketing and, indeed, milk is now delivered to the appropriate market in the most economical manner when the nearby differential is not present to dictate the movement of the milk to an improper market. (A. 601-03, 606, 456-58)

The case of *Addison v. Holly Hill*, 322 U.S. 607, is likewise inapplicable here, except as to its holding that the administrator is not the arbiter of the extent of his own statutory authority and particularly under an Act that details and enumerates his statutory powers. In *Addison*, the court was concerned with the fact that invalidation of a part of the regulation there involved would result in a different meaning being given to the remaining

portion of the regulation that was offensive to the Congressional purpose. In view of this fact and the acknowledged discretion in the administrator to act within statutory bounds by revising the offending definition to effectuate the Congressional purpose, this Court decided that remand for retrospective action was preferable to the mischief of producing a result which was contrary to the statutory design. The same principle was involved in *Morgan v. United States,* 307 U.S. 183, where the Court allowed retroactive administrative action to preclude the awarding of funds collected during the action to those not equitably entitled thereto. There had been no decision on the merits in that case, and the Secretary merely failed to follow the proper procedure in issuing a reduced rate schedule for stockyard patrons. This Court held that the dealers were not entitled to such funds that emanated from patrons, and that the Secretary should have an opportunity to follow the appropriate procedure in effectuating the rate schedule in order that a decision might be had on the merits. That situation is not present here, and the lower court has correctly concluded that the USDA has already demonstrated by its recommended decision and other action that it would disburse respondents' monies to the preferred nearby producers. This procedure would be particularly unfair when it is considered that the Secretary announced that respondents would receive their escrowed monies if the nearby differential was declared illegal:

> "If the finding of the District Court that the farm location differentials are invalid is eventually upheld, the nearby and intermediate producers would receive no money from the escrow fund. It would be distributed pro rata to distant producers on milk received at Massachusetts-Rhode Island pool plants in the months beginning with December 1966, after deduction of any expenses

of the litigation that might be determined as appropriate by the court."[105]

The respondents are of the respectful opinion that the *Morgan* case is authority for the disbursement of the escrowed monies to non-nearby producers, and to like effect are *Brannan v. Stark*, 342 U.S. 451, *Inland Steel Co. v. United States*, 306 U.S. 153, and *Richert Rice Mills v. Fontenot*, 297 U.S. 110. Indeed, the respondents believe that they are entitled in law and equity to the monies awarded to nearby producers by the Court of Appeals under the authority of the aforesaid cases. The granting of the unconscionable demand of petitioners Zuber, et al., for all of the respondents escrowed monies would reward those who propose an illegality and penalize those who rectify it. It would cause virtually every farmer, non-nearby and nearby, to question the workings of the law, for it is an accepted fact among both groups that the escrowed monies would be returned to the non-nearby producers if the differential was ruled illegal. (A. 710)

The respondents maintain that the lower court correctly ruled that the Secretary did not have the statutory power to issue the nearby differential, and the language of the court in *Hood & Sons v. DuMond* is pertinent: "Our system fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the nation, that no home embargoes will withhold his exports, and no foreign state will by custom duties or regulations exclude them."

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105 Market Administrator's Bulletin for the Mass.-R.I. Milk Marketing Area, July, 1967.

And the words of Justice Cardozo in *Baldwin v. Seelig* seem especially appropriate:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if custom duties, *equal to the price differential,* had been laid upon the thing transported. * * * To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not in division."

The respondents suggest to the Court that the Congress was guided by these same principles of uniformity in enacting the Agricultural Marketing Agreement Act of 1935 and 1937.

CONCLUSION

The judgment of the lower court should be affirmed and the escrow fund distributed in full to the nonnearby producers under the direction of the District Court with costs against the petitioners in any event.

Respectfully submitted,

CHARLES P. RYAN
EDWARD J. RYAN
JOHN J. SIMARD

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IN THE

Supreme Court of the United States

October Term, 1969

FILED
SEP 17 1969
JOHN F. DAVIS, CLERK

No. 25

FREDERICK T. ZUBER, *et al.*,
Petitioners,

v.

RUSSELL ALLEN, *et al.*,
Respondents.

No. 52

CLIFFORD M. HARDIN, Secretary of Agriculture,
Petitioner,

v.

RUSSELL ALLEN, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO JOINT BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERALS OF MASSACHUSETTS, RHODE ISLAND AND CONNECTICUT

CHARLES P. RYAN
EDWARD J. RYAN
JOHN J. SIMARD
400 Prudential Building
Washington, D. C. 20005

Attorneys for Respondents

CASILLAS PRESS, INC. – 1717 K Street, N. W. – Washington, D. C. 20006

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SUMMARY OF ARGUMENT

The Act provides only for the payment of a *minimum* price, as this Court and many lower courts have noted on many occasions, and there is nothing in the Act or order that precludes the handler from paying an identical differential to the nearby producers if their milk actually does have any extra value. *Consequently, petitioners would suffer no financial injury if their claims are sound.* Any contrary contention or insistence that smaller dairy farmers pay the differential is an admission of the lack

of merit in their claim of extra value for their milk, and the grounding of such differential on historical use prices is also an admission that no current justification exists for the nearby differential payments.

The growth or spread of the nearby differential clearly indicates that the Secretary is unable to resist the political pressures of those few who seek an illegal preference, and this Court must act to prevent the regulatory program from becoming a national grab-bag based on political expediency. The administrative record for the 1964 Order discloses that the varying prices to producers resulting from the nearby differential actually predominated over all other factors in determining the movement of milk to market, a practice that occasioned uneconomical distribution and higher prices for consumers. These disorderly marketing conditions actually necessitated the merger of the Orders but the nearby differential was enlarged instead of eliminated in typical bureaucratic response to a politically sensitive problem. (A. 351-52, 354, 456-57, 601-03, 606).

I. NO LOSS CAN RESULT TO NEARBY PRODUCERS FROM THE TERMINATION OF THE NEARBY DIFFERENTIAL THAT CONTINUES TO CAUSE DISORDERLY MARKETING AND INJURY TO NON-NEARBY PRODUCERS AND CONSUMERS

On January 1, 1964, prior to consolidation of the milk orders on Oct. 1, 1964, there were 692 nearby producers and 7,371 non-nearby producers under the Greater Boston order, and only 67.9% of the nearby milk was assigned to Class I use. The percentages were higher for all zones out to the middle of the milk shed, varying from 79.1% in zones 9-15, 84.1% in zones 16-17, 70.7% in zone 18, and 90.5% in zones 19-20 of the milkshed or 200 miles from Boston. In January, 1965, after consolidation of the orders, the non-nearby producers numbered 7,696, but the nearby producers jumped to 2,620 and increased the nearby differential payments over four-fold. The

official reports of the market administrator disclose that the 7,696 non-nearby dairy farmers under the order on January 1, 1965 decreased to 6,706 on January 1, 1966, *a loss of almost one thousand distant producers in the first year following consolidation* of the Greater Boston order with the secondary market orders of Worcester, Springfield and Southeastern New England. The nearby producers under the order decreased by but 299 during the same period, and they sustained a reduction of only 223 nearby producers in 1966 as compared to a loss of 485 non-nearby producers in that year.

Moreover, the administrative records disclose that many non-nearby producers who had supplied the secondary markets for years and had made investments in reliance thereon were forced out of business by the lowering of their price when federal regulation spread the nearby differential to those markets where it had never before existed. (A. 609, 697-99, 695, 692-93). Unlike the nearby producers, the non-nearby dairy farmer has no alternative economic opportunity in most rural areas when low returns and high costs drive him from dairy farming. He is unable to sell his land at huge profits for housing subdivisions or commercial development. He usually salvages a small piece of land with his modest homestead and thenceforth contributes little or nothing to the growth and economy of his community. His children or hired help migrate to cities which are already overcrowded with individuals who are ill-equipped by training and background for urban absorption. The present extent of this mounting problem cannot be over-stated and is receiving the attention of the Congress, governmental agencies, a large number of states and many private organizations.[1] It is significant that the record below contains numerous affidavits from local and state officials in Vermont attesting

[1] See Congressional Record, 91st Cong., 1st Sess., at S2034-S2040, E1214-E1215, and bills H.R. 7336, 7575, 7617, 7789 re "tax farmers"; also at H13227, H1007, E1421 re rural areas, rural job development, and rural migration to cities.

to the loss of dairy farms in that state, and many non-nearby producers in upstate New York who market under the Connecticut order often lose $5,000 or more annually by virtue of that nearby differential. Many marginal dairy farmers could have stayed in business if the differential payments had not been exacted from their uniform minimum price, and their remaining in business would have inured to the benefit of small business communities and the financial support of local governments. A. 166-86) A growing threat to the consumer welfare and an adequate milk supply is also inherent in an inconsistent and discriminatory differential that precipitates such problems and the demise of natural dairying areas which have no other substantial economic opportunities or industries.

The respondents note that Rhode Island nearby producers supply but about one percent of the milk for the Massachusetts–Rhode Island marketing area, and that their numbers are steadily dwindling as a reliable source of the milk supply. On January 1, 1965, there were 262 nearby producers located in Rhode Island, and this number was decreased to 203 as of January 1, 1967, a drop of 59 producers in the two-year period preceding the escrowing of respondents' monies in this case. The brief *amicus curiae* states that Rhode Island's "many producers" now number but 178, a decline of 25 in the two-year period that the nearby differentials have not been paid to Rhode Island producers. The respondents respectfully submit that these figures reflect that Rhode Island producers are in no manner dependent upon non-nearby dairy farmers for economic survival.

In respect to the contention of the *amicus curiae* that Rhode Island producers obtained higher prices for their milk prior to federal regulation, the respondents note that Rhode Island producers could not market their milk under the higher prices of the state's preferential price program for local producers; that the higher prices were in part

attributable to the fact that Rhode Island would obtain much of its milk as needed from the Greater Boston market, thus forcing the respondents to bear the burden of surplus that should have been associated with the Rhode Island and Southeastern New England markets, and that Rhode Island producers would have lost their markets to non-nearby producers in the absence of federal regulation. A. 340-46.

The Secretary made the same findings in respect to the "nearby" Massachusetts producers (A. 331-39, 349), and it is clear that they can continue to enjoy the benefits of federal regulation without receipt of the nearby differential subsidies from smaller fellow dairymen in less populous and influential states.

The preliminary injunction and escrow order was entered on January 16, 1967, and the official figures from the Market Administrator's annual statistical reports discloses that there were 1,411 Massachusetts producers who marketed under the Order as of January 1, 1967. The same reports reflect that there were 1,664 Massachusetts producers under the Order on January 1, 1965, and this would indicate a loss of 253 Massachusetts producers during the prior two-year period. As of January 1, 1969, there were 1,180 Massachusetts producers under the order, a drop of only 231 producers during the two-year period of the escrow account. *The official reports thus show that fewer Massachusetts producers who marketed under the Order left dairy farming during the two-year period of escrowing than in the prior two year period of 1965-1967,* and the respondents respectfully submit that such fact evidences the lack of necessity for continued subsidization of nearby producers by the respondents.

The brief *amicus curiae* also refers to average income figures for either dairy farmers or all farmers in the Northeast United States, the exact reference not being fully

identified in the brief. The reference would include non-nearby dairy farmers in any event, and their smaller incomes would necessarily reduce the overall average figure and render it inapplicable to the larger nearby producer. Significantly, the brief acknowledges the larger size of the average nearby producer's operation when it cites the increase in the size of their herds in the last ten years. This clearly indicates that nearby producers are able to sell their herds to other nearby producers when they decide to sell their land at huge profits for housing developments or other commercial purposes.[2] This citation would also indicate that there is little overall impact on the Massachusetts dairy business when nearby producers do sell their farms and their cows. Under these circumstances, the statistical data cited by the *amicus curiae* as to attrition in the number of nearby producers or farms has little real meaning or significance.

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[2] "I, Herman L. Sparrow, have for fourteen years owned and operated a dairy farm in the town of Northboro, Worcester County, Massachusetts, which has been in my family since 1900 and on which I produced 1,118,967 pounds of milk during 1966 which was sold to a handler regulated under the Massachusetts–Rhode Island federal milk order. My income from the farm operation for this year was about $74,000 and my expenses for the year amounted to about $72,100 without allowing for any return on approximately $27,000 of new capital invested in the business. Net return for my labor and management above expenses was therefore $1,900 and allowance for five percent return on capital invested would reduce this figure to $550. Without the $.46 per hundredweight differential payment I now receive, my gross income would have been $5,147.40 less in 1966, and I would have begun to seriously consider disposing of my property for a housing development. * * *." Respondents submit that such affidavits are unrealistic, counsel proffering the same not assuming responsibility therefor even though he had notarized some of the same, and they further maintain that they should not have to subsidize such producers who could obtain a better return from a bank for their monies.

The brief *amicus curiae* also alleges that "Connecticut's total producer numbers have shrunk from a 1955 total of 3,689 to the current level of less than 1,300", and that the average monthly loss numbers between 7 and 8 producers. Of course, the citations fail to note that such loss is much below the losses suffered in other markets, and we note that some of the same selective figures are utilized in the joint brief as were set forth in the brief *amicus curiae* of the Commonwealth of Massachusetts in support of the petitions for certiorari. The Court is respectfully requested to consult the respondents' brief in opposition thereto for a full rebuttal of such misleading statistics that fail to note various relevant factors.[3] Moreover, we are unable to follow the various "numbers" employed in this and related litigation, and note that the government advised in *Cranston* that there were 1,800 nearby producers serving the Connecticut market in 1967 as contrasted to the figure of 3,000 mentioned in the *Cranston* decision.

It would require the essence of legal legerdemain to argue that the Connecticut nearby differential provision is intended to reward nearby producers with a 2-cents differential payment rather than to penalize non-nearby producers at the rate of 44-cents for each hundred pounds of milk they market in Connecticut. The nearby differential is hardly "economically legitimate" under such circumstances, and it is equally obvious that there would be no price reduction or decline in respect to nearby producers if their milk is actually worth 2-cents over the uniform minimum price as the *amicus curiae* alleges in its brief. The fact that Connecticut is defined as the

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[3] The present brief *amicus curiae* does not attempt to justify the statistical citations by reference to the official statistics of the Market Administrator's Office.

marketing area under the Connecticut Order is also not without significance since no other Order has a marketing area defined by the borders of a state. The Congress was certainly not referring to the borders of a state when it specified that *regional* production and marketing areas should be utilized in the milk orders, and it is also obvious that costs of production and other like factors do not vary appreciably for farmers located just over the Connecticut boundary.[4]

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[4] Milk and its products are exempt from the requirement of Sec. 8c(11) of the Act that limits orders to the smallest regional area, and such matters as production costs are considered in determining the *regional* marketing or production area. Moreover, the colloquy involving Sen. Copeland revolved primarily around the size of such regional area and the latter's view that his district should not be included in an arbitrary region. He was assured by Sen. Murphy that the Secretary would not do this, but he was also informed that all producers within the same region would be subject to the same terms. Sen. Murphy also cited the differentials that were authorized under the Act and which reflected the present practice of business, such as the location differential that provided for an adjustment for the place of delivery of the milk, in that the cost of transporting the milk to the primary market entered into the pricing of the milk. He mentioned the market differential which was paid for the direct delivery of the milk to the city plant or market and which provides a service or saving to the handler by the elimination of handling costs involved when milk was first delivered to a country plant. He mentioned the differential for grade or quality of the milk delivered and which compensates producers for a milk of a certain butterfat content. All of these items reflected the then present practice of business and to some extent relate to production costs generally, and Sen. Murphy assured Sen. Copeland that the Act provided for the same. Nearby producers are still compensated for such location value of their milk under the order, but handlers never paid an extra payment to "nearby" producers simply because of the location of their farms and there was no "nearby" differential until it was placed in the 1937 Boston order.

The reference of the *amicus curiae* to the alleged reliance of nearby producers on continued receipt of such illegal exactions from respondents is an obviously unsound and inequitable argument. One could argue with equal force that the increased costs of necessary supplies should be borne only by non-nearby producers because the nearby producers had not anticipated such increased costs. The nearby Rhode Island producers might argue that they need such nearby differential payments because of anticipated institution of a state income tax in Rhode Island. Even an individual who had been embezzling monies from his employer over a long period of time could argue that he should continue to receive such monies because of reliance thereon and investments made upon such basis. But it must be remembered that non-nearby producers go out of business and simply bear the loss of their vocation and investments. The fact that one's expected profit or return is decreased, however, would not entitle one group of individuals in a particular field of endeavor to claim that the unexpected lower profit or return should be covered by a forced payment from their fellow workers or investors. Nor should this reasoning apply to require an extra profit or return to certain preferred producers, particularly from out of the pockets of the smaller dairy farmers. This is neither good Government nor sound economics. It creates illegal discrimination among dairymen and leads to disorderly marketing.

Moreover, the total lack of merit in the fallacious "reliance" argument is illustrated by the testimony of nearby producers in the *Cranston* trial, and said testimony evidences that such arguments do not usually originate with dairy farmers. One nearby producer testified in that case that he had relied on such differential payments in making an investment of $107,000 and another stated that he had relied on such payments of 46-cents per hundredweight (or almost $5,000 annually) in incurring

indebtedness that required payments of about $1,000 per month. These nearby producers stated that they were receiving nearby differential payments of 46-cents per cwt. under the Connecticut milk order, but the differential in that order returns them only but about 2-cents per cwt. or an average of $12.50 per month over the uniform price in the absence of such differential. They testified that the CMPA economist had instructed them concerning the nearby differential payments, and the lack of merit in the argument concerning "reliance" on the nearby differential payments in making investments, etc., becomes painfully evident when it is realized that this same argument was even made in respect to the 2-cents nearby differential of the Connecticut order. Additionally, other "nearby" producers all across the United States are able to exist without such subsidies in making their investments. Nevertheless, the *Cranston* trial devotes page after page to such inaccurate testimony that only serves to illustrate that most nearby producers did not even know they were receiving such a differential payment. Most nearby dairymen would not be in favor of exacting such payments from their smaller fellow dairymen, and some nearby Massachusetts and Vermont producers actually signed a petition stating that they favored elimination of the differential.

The respondents respectfully submit that the Connecticut nearby differential, rather than serving as a reason for reversal, actually demonstrates that the lower court's decision was correct and that such decision should be affirmed. It graphically illustrates how such a device can be utilized in a most unjustifiable and discriminatory manner to injure producers and consumers alike. It forecasts the complete chaos and disorderly marketing[5] that would

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[5] The *in terrorem* contentions of USDA personnel referred to by *amicus curiae* are made as a matter of course in all milk cases to dissuade the courts from discharging a plain duty. Identical

occur in every market if such an illegal price preference could be obtained through political and group pressures. It predicts the nullification of the very purpose and policy of the Agricultural Marketing Agreement Act and a return to the cut-throat competition that led to a national emergency in the milk supply. It is clear that the narrow interest of Connecticut, Rhode Island, or Massachusetts producers may not predominate over the public interest or constitute a singular exception to the Act and Constitution.

Although the brief *amicus curiae* cites an affidavit of the CMPA economist, Stewart Johnson, concerning shifts to the present Order and higher retail prices to consumers as a result thereof, respondents note that the testimony of said CMPA economist has been not only prejudicial in favor of his employer but also extremely self-contradictory. Indeed, Dr. Johnson actually admitted during the 1963 hearings that he was concerned with milk moving into the Connecticut Order market (A. 560), and it is difficult to perceive how this would raise rather than lower consumer prices. The testimony of said economist during the N.Y.-N.Y. hearings of 1956 when he appeared for "nearby" producers hardly denotes any interest in the consumer:

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[5] (Cont'd)
statements were made in the *Blair* case but that Order is functioning much better without the nearby differential. Petitioners and the *amicus curiae* resort to adjectives rather than facts, and such contentions are made to counteract the fundamental fact that chaotic conditions would prevail in every market if the nearby differential is judically validated. Moreover, it is difficult to perceive how Connecticut producers can create chaotic conditions in the surplus Mass.-R.I. market by changing their marketings to the deficit Connecticut market.

A. From Testimony of Dr. Stuart Johnson, C.M.P.A. Economist, During 1956 N.Y.–N.J. Administrative Hearings, Re Reasons for Higher Price Statistics for Nearby Milk:

CROSS EXAMINATION BY MR. WINTON:

"Q. Do you know how much milk is being sold at those prices, or whether the producers regulated by OMI aren't losing markets? A. I have no comment on that. Dr. Waller covered that on need for market.

Q. You recognize there is a difference between fixing a price and marketing milk at that price, don't you? A. I recognize that difference, Mr. Winton.

Q. And you are not going to testify how successfully milk is being marketed at the prices fixed by OMI though you cite price fixed by OMI? A. I am interested in prices received by farmers.

Q. And not how many of them receive it? A. And how many receive it.

Q. Then you must be interested in whether they are able to market their milk, the thing which you said you weren't interested in. A. I think most farmers in Northern New Jersey do have a market. I haven't hear of any of them dumping their milk or feeding it to calves because they had no market whatsoever.

Q. You have read about them switching under Order 27, haven't you? A. I have general knowledge that there have been transfers from one market outlet to another.

Q. No, from OMI regulation to Order 27. You know that, don't you? There has been an increasing number going to Order 27 because they didn't have another market. A. It depends on what time period you choose, but you can find periods of recent years when shifts took place in that direction.

Q. As an expert in the milk business, don't you know, and isn't it something that would occur to you, that when differences exist between two markets, they are often the result of manipulation of health approval? . . . .

THE WITNESS: I wouldn't use the word "manipulation"because it has an inference that Health Departments were doing something wrong. But I would say that price differences have been associated with Health Department requirements in some instances.

Q. Assuming that that was the responsible policy of the officials of the State of New Jersey, would you say that the Secretary of Agriculture would be warranted in adopting price differences resulting from such policy as the basis for pricing milk under a Federal order? A. I don't know whether that was the policy and, if so, for how long, and I have no comment.

Q. Do you think that irrespective of what the health practice of regulating milk was, for purposes other than health regulations, the resulting price situation should be perpetuated by Federal order?

EXAMINER HYDE: He has indicated he is not going to talk about these health matters, Mr. Winton.

Q. You are aware, are you not, you are from Connecticut, that health practices have also been utilized in Connecticut, similarly, and that this is something which an economist should be aware of?

MR. DOLAN: I object as immaterial. . . .

EXAMINER HYDE: The witness has indicated that he is not going to talk about health matters, Mr. Winton, and you have asked him five or six times. In my opinion, that is ample to show his attitude. Pass to something else."

"Q. Did you give the testimony which I have marked off here? A. I did."

* * *

"MR. WINTON: 'Mr. Andresen: In other words, at any time a farmer can meet the sanitary requirements of Connecticut he can ship milk or cream into the area?

> "Mr. Johnson. With that proviso of meeting the sanitary requirements and obtaining approval, the answer is yes.'

By Mr. Winton:

Q. Wasn't it clear to you that there was something more to getting into a market than meeting the sanitary requirements; You also had to have an authority that was willing to approve you, even if you met the sanitary requirements?"

* * *

"MR. LENT: The witness has testified to a locational differential for the separate New Jersey order, which is higher than the locational differential in the present New York order to producers across the line in Orange County. He has said that the justification for that is an historical record of higher prices on the New Jersey side of the line.

Mr. Winton is trying to show that that justification was based on a restricted, competitive situation, caused by the Health Department of New Jersey activities. It seems to me it is directly connected with his direct testimony, and while this question is more important to the proposition of the requirement of Jersey Health Department approval for admission to the New Jersey order pool, it nevertheless has pertinence to the amount of the location differential as well. . . .

MR. WINTON: In that connection, the refusal of the witness to discuss the underlying facts which an

economist should take into effect when considering the reasons for the prices, I think should give rise to the inference that the difference is due entirely to the reasons which the witness refuses to discuss."

* * *

"Q. You refer on page 25 of Exhibit 34, to a letter of Dr. Vial pointing out the existence of premiums. In that same letter, was it not pointed out that the premiums did not exist in Orange County, New York, in anywhere near the amount shown for Sussex County? A. That is correct, Mr. Winton.

Q. And Orange County and Sussex County are situated relatively the same distance from the market, are they not? A. I think they are about the same.

Q. In your opinion, what is the difference between Orange and Sussex County due to? A. I don't know exactly, Mr. Winton, and I don't know whether I should speculate on a matter on which I do not have detailed knowledge.

Q. The next paragraph on page 25 says, "Whatever the reason, whether seasonally uniform production, a schedule of transportation differentials under Order 27, which underprices nearby milk, or a more marketable product than more distant milk, the fact is clear that historically the nearby producers who likely would be included in a North Jersey pool have received substantial premiums over Order 27 prices, which prices include the Order 27 location differential."

There you are referring to New Jersey producers, aren't you? A. Primarily so, Mr. Winton.

Q. Secondly, your conclusion in this paragraph is you don't know the reason why the New Jersey producers have gotten more money than other producers

similarly situated, because you say whatever the reason, and you don't state what the reason is, is that correct? A. Well, I state whatever the reason, and then I give three reasons that I think are pertinent in making possible the premium.

Q. The first two you have already admitted have nothing to do with location differentials as you propose them under Order 90, that is, seasonally uniform production, and under-pricing transportation differentials. A. I have said they have little to do with it, yes.

Q. Now we get, then, to what we have been getting to gradually, the more marketable product.

Do you say that North Jersey milk is more marketable than Orange County milk or other milk that is further away in the milkshed? A. Do you have a question?

Q. Yes. I say, do you say that? A. Yes, I do.

Q. And by more marketable, do you mean marketable at a higher price? A. That is what I mean.

Q. Then does that mean anything other than that historically New Jersey producers have received somewhat more than other producers? A. The two go along together, Mr. Winton.

Q. They are the same thing, aren't they? A. Well, they are not identities, but because of greater markeability the price is higher.

Q. Would one of the factors of marketability be that the Department of Health of the State of New Jersey has restricted outside milk coming into the state so that the nearby milk occupies the Class I market to a greater degree? Is that one of the factors? That is, of marketability? A. It may or may not have been, Mr. Winton. I see we are back on the health question again. . . .

Q. Did it come to your attention that surveys by the New Jersey Health Department, published in its official bulletin, showed that milk produced outside the State of New Jersey and approved for New Jersey had less bacteria than milk produced within the State of New Jersey? I show you, in that connection, Exhibit 98. A. Exhibit 98 had not come to my attention, Mr. Winton. . . .

Q. Don't you think before you discuss the greater marketability of milk produced nearby, you should have checked either in the Department of Health of the State of New Jersey or its official publications, data showing that the nearby milk was not of as high a quality as the far away milk, because for this reason stated by the Health Department, "The comparison may be explained in part because we select and license from all available supplies situated outside our borders only those that comply with our laws, but at the same time we must live with, and by means of education improve, supplies located in New Jersey". A. A more pertinent factor, it seemed to me, Mr. Winton, was that a large number of producers were approved any many more than needed, to supply the fluid market. . . ."

"Q. Did you notice this, that the state Health Department said that, as to out of state supplies, they enforce their laws strictly, but they went on to say, "Definite health hazards must be proven before we close a man's business in the state and deprive him of a means of livelihood?"

Don't you think that is also a factor which you should consider in talking about the greater marketability of nearby milk; A. I did not read the sentence that you have pointed out to me, Mr. Winton."

"Q. As an economist, and student of milk marketing do you think that regulation should put a higher tag on milk produced under less rigorous sanitary requirements than out of state milk? A. By a higher tag, Mr. Winton, what do you mean?

Q. The price tag. To price it higher because of the bacteria count or other quality? A. No, I do not think so, Mr. Winton."

Although CMPA economist Stewart Johnson refused to testify in the interest of the consumer during the aforesaid hearing, it is noted that the Report of the Federal Milk Order Study Committee (Nourse Committee) had no hesitation in condemning the methods employed in Connecticut to prefer local producers. Further, the only individual who dissented from the Report's recommendation to abolish or re-examine the nearby differential was NEMPA economist C. W. Swonger whose testimony at administrative hearings was often the essence of self-contradiction. (A. 689-91, 694-95, 696-97). The Secretary has consistently refused to accept the recommendations of experts appointed by himself, and it is evident that no basis exists for further "study" of the following discriminatory practices:

From the 1962 Report of the Federal Milk Order Study Committee (Nourse Committee) appointed by the Secretary:

"OBSTACLES TO INTER-ORDER TRANSFERS OF MILK SUPPLIES

Among the order provisions and other factors that have interfered with normal adjustment of utilization patterns and uniform producer prices through orderly transfers of milk supplies from one market order pool to another are the following: individual handler pooling,

"pooling requirements, assignment of other source milk to lower classes, compensatory payments, special location differentials to "nearby" producers, sanitary regulations and other institutional factors."

* * *

"*Sanitary regulations.* When the system of Federal milk orders was inaugurated, lists of plants and producers approved by the health authorities of various states and municipalities were useful as a basis for identifying the milk supplies to be priced and pooled under the orders. Thus in many instances municipal or State health authorities found themselves in a position to determine what milk supplies could be pooled under a given order. The situation has changed, however, and health authorities now have much less influence over the composition of Federal order pools than they had during the early years of the program.

The requirements for pooling make it necessary in most instances that the sources be approved by local or State milk inspection authorities. Many of the orders embrace the jurisdictional areas of more than one such agency thus limiting the opportunity of any one agency to control access to the pool. During recent years there apparently have been few instances in which sanitary inspection agencies have attempted to restrict entry of milk supplies to the marketing area for other than valid sanitary reasons.

The Connecticut milk order pool is a noteworthy exception to this general condition of freedom from control by milk inspection agencies. The milk marketing area defined by the Connecticut order is completely within the jurisdiction of the State Commission of Agriculture and Natural Resources who administers the dairy laws of Connecticut, including the so-called "Connecticut Milkshed Law." This law among other things authorizes the

"Commissioner to approve new sources of milk supply only when the receipts of Connecticut handlers exceed their fluid sales by less than 10 percent in November or December or by less than 25 percent in other months.

From the viewpoint of milk producers and public authorities in Connecticut this system of regulation undoubtedly has great merit. But from the viewpoint of achieving equitable relationships among producers and handlers under the Federal orders for Connecticut and adjacent areas it constitutes an arbitrary barrier. It accounts to a considerable degree for the high Class I utilization under the Connecticut order as compared with the much lower utilization percentages for the adjacent Boston and New York-New Jersey orders.

Such extra-order control of access to market order pools should be a matter of serious concern to the Department. As suggested in the preceding discussion of Marketing Areas, one promising remedy for such outside interference with a Federal order is to so define the marketing area that it will embrace the jurisdictional districts of more than one sanitary control agency. But this remedy alone may not be adequate in all cases."

* * *

"Individual handler pooling.

. . . Individual handler pooling and market-wide pooling in the orders for adjacent or competing markets are incompatible for two reasons: first, because individual handler pooling tends to cause handlers to restrict their purchases of milk and to throw a disproportionate burden of maintaining regional reserves upon neighboring market pool or orders, and second, because operating cooperatives under orders with individual handler pools have an economic incentive to move their surpluses into other markets at cut prices.

"Only by keeping his milk supply closely adjusted to his fluid sales can a handler under an order with individual-handler pooling place himself in an advantageous position from the standpoint of procurement. If he fails to maintain a high Class I utilization which permits him to pay attractive blended prices, he will find competitors picking off his more desirable producers. The high Class I utilization and high blended returns are, of course, beneficial to the producers who are fortunate enough to participate in them. But this system usually reacts unfavorably upon the producers whose milk is priced and pooled by other orders in the same region.

Practically without exception, individual handler pools have failed to absorb their proportionate shares of the reserve supplies of market milk in the regional areas where they are used. A comparison of Class I percentages for the 14 handler pool orders and the market pool orders nearest to each of them for the year 1960 reveals the following: the simple average of Class I percentages for the handler pool orders was 84.5 percent; the comparable average for 25 adjacent market pool orders was 67.3 percent.

It is clear that individual handler pooling has a strong tendency to prevent desirable utilization adjustments among Federal order markets and to maintain unwarranted disparities in the blended producer prices established by the two types of orders.

As indicated previously, individual handler pooling in markets where substantial quantities of milk are handled by cooperative associations may generate unfair competition not only in the markets to which this system applies, but also in others.[3] Since cooperatives are allowed to pay members the net proceeds of their operations, they have a strong incentive under individual handler pooling to dispose of surpluses in outlets that will yield

"more than the surplus value. This usually means sales for fluid use in outside markets at cut prices." [Footnote omitted]

* * *

"Substantial and continuing differences in utilization and in blended producer prices under orders for adjacent markets should be recognized as evidence of discrimination which inevitably leads to disruptive competition."

* * *

"*Special location differentials to "nearby" producers...* In fact, the specified rates of nearby differentials are the same under all Federal orders for New England markets (46 cents in the nearby area and 23 cents in the intermediate area) even though the percentages of pooled milk used in Class I differ widely. In 1960, the range of Class I percentages was from 58 percent in Boston to 79 percent in Connecticut . . .

Under the Boston order, nearby differentials are paid on only about 6 percent of the pooled milk and the uniform price is depressed less than 3 cents per hundredweight by these payments. Under the New York-New Jersey order, slightly less than 20 percent of the pooled milk qualifies for the nearby differentials and the uniform price is depressed about 6 cents per hundredweight.

On the other hand, under the Federal orders for Worcester, Springfield, Southeast New England and Connecticut, nearby differentials are paid on 65 percent to more than 90 percent of the pooled milk and uniform prices are depressed from about 30 cents to more than 40 cents per hundredweight. In 1960, 90 percent of the pooled milk under the Connecticut order qualified for the 46 cent differential, and 3 percent for the 23 cent differential. The total amount paid in nearby location differentials was equivalent to 43 cents per hundred pounds of

"all pooled milk and the uniform price to producers outside the differential zones was depressed to that extent. Thus, the attraction of the high blended price resulting from a high Class I utilization under the order is substantially reduced with respect to producers in the outlying areas.

In circumstances where a high percentage of milk qualifies for the nearby differentials the producers who participate derive little net gain except for the pool tightening effect of the lower blended returns in the outer zones. Thus, order provisions for nearby differentials of this magnitude can and do effectively limit access to the pools . . .

The uniform prices determined under several of the orders are significiantly depressed by payment of special differentials out of pool funds to "nearby" producers. In a few instances, a high percentage of the milk in the market order pool qualifies for such payments with the result that returns to producers in the outer zones are substantially reduced. Aside from the equities involved internally, such large special payments constitute a barrier to the entry of additional supplies from adjacent production areas and tend to prevent desirable intermarket adjustments. The Committee suggests that the justification for such differentials be reconsidered, especially in the case of areas with high fluid utilization, with particular attention to the impact of these payments upon producers who are ineligible to participate . . . "

Many of the aforesaid matters were reported to the Secretary 30 years ago in a study entitled, *Barriers To Internal Trade In Farm Products, A Special Report To The Secretary Of Agriculture By The Bureau of Agricultural Economics,* United States Department of Agriculture (USGPO, March, 1939) which enumerates many barriers to free trade between the New England states:

"Apparently the State of Connecticut has followed the practice of limiting its out-of-State inspection of farms that produce fluid milk for the Connecticut market. In 1931 permits were withheld from a small group of producers in New York State, located near the Connecticut border, who had been sending milk into Connecticut. Public protest led to the revival of these permits, but with the provision that the New York producers must pay inspection costs. Despite the concession, relatively little milk has been permitted to come in from outside the State. In part, at least, as a result of this restrictive policy, Connecticut producers have been enabled to get relatively high prices for their fluid milk. Spencer, Leland, *Practice And Theory Of Market Exclusion Within The United States,* Journal of Farm Economics, vol. XV, pp. 150-51.

This conclusion is supported by the study made by the Federal Trade Commission of the Connecticut milkshed. The commission reports that – 'There are . . . indications that Connecticut has used its milk inspection laws advantageously in keeping out milk from other States, although it does not admit this use of its powers.' *Sale and Distribution of Milk Products, Connecticut and Philadelphia Milksheds,* 74th Cong., 1st Sess., House Doc. 152 (1935) p. 90.

Recent dairy legislation passed by the State of Connecticut directs the State commission to refuse to inspect farms outside the 'natural milkshed.' Perusal of the pages of the Connecticut Milk Producers Association Bulletin strongly indicates that an important purpose of this legislation was to secure even more effective restriction of out-of-State milk. *Connecticut Milk Producers Association Bulletin,* April, May, and June, 1937.

" * * * Bills have been proposed before the last two sessions of the (Massachusetts) legislature which

"would extend inspection requirements to cream as well as fluid milk. One of the latest proposed measures provided that special inspection certificates should be issued to cream shippers which would not entitle them to ship milk as well. Such a distinction is apparently related not so much to public health as to market exclusion. At least the editor of the *New England Dairyman* seems to have regarded protection to Massachusetts producers as the chief purpose of the proposal. See, for example, the issue of January, 1938.

" * * * By an amendment to its laws in 1936, Rhode Island required reregistration of all dairy farms. In this process, 62 registrations of farms were terminated in Massachusetts and Connecticut and only one distributor was reregistered in Vermont. The number of shipments of milk from Vermont have been nearly cut in half since 1931, * * * See Fielding, J.G., *A Study of the Milk and Cream Supply of Greater Providence,* 1929-31, R.I. State Coll., Agr. Expt. Stat. Bull. 237.

* * *

"Small towns as well as large cities place definite limits on the area from which they will accept shipments of dairy products. In a study recently completed, R.G. Bressler, Jr., shows that three Massachusetts towns follow this plan. He points out that grade B milk for Haverhill must be produced within 40 miles of the town, for Walpole within 30 miles, and for North Attleboro within 8 miles. Bressler, R.G., Jr., *Laws and Regulations Governing the Production of Grade B Milk in New England* (Boston, 1938)

* * *

"Instead of refusing to inspect beyond a given number of miles, the authorities may use less obvious methods.

1. Obstacles may be raised to the licensing of new producers. Inspection may be promised but indefinitely delayed, or higher standards may be required of new producers who wish to enter the milkshed than are required of those already licensed. Thus, farmers seeking to enter the market may be discouraged by being told that certain expensive alterations in their plant or new equipment will be required before permits will be issued."

* * *

"A press release issued by the United States Deparment of Justice, dated July 7, 1938, describes how sanitary regulations may raise barriers to trade. It says in part:

> ' . . . A frequent method of erecting such a barrier was limiting the number of farms which could be inspected and certified by the health authorities in a given milkshed. In some cases municipal ordinances prevented farmers located beyond an arbitrarily selected area from obtaining licenses to ship milk to the city in question. More often, however (and this is true in the Chicago area), the area in which farms could be inspected was left to the sale and uncontrolled discretion of the health authorities. This resulted in a condition under which farmers able to supply milk of the required grade were denied a market under ordinances ostensibly directed at sanitation. This development gave local boards of health not only sanitary control over the quality of milk, but economic control over the price of milk, because they regulated the supply. It created enormous political pressure upon such boards

"Gradually their part in the milk price became openly admitted at public meetings . . . '"

"Although the general public is often unaware of these informal market limitations those in the industry usually understand the situation and often given such restrictions their open approval. The case may be cited of a statement made at a meeting sponsored by the milk control board of a New England state. A member of a milk producers' association who addressed this meeting gave enthusiastic approval of restriction through health measures. The Springfield Republican reported him as saying:

> 'The attitude of the board of health is the key to success in producing a situation in which the surplus milk problem is brought to the vanishing point. This desirable result is produced by refusal of the board of health to approve dairies outside a certain radius.' (October 16, 1935).' "

* * *

"One other type of market limitation that comes under the heading of health regulations is that having to do with pasteurization and transportation to market. * * * Rhode Island stipulates that normally all milk shipped into the State shall go directly from the farm where it is produced to the consumer or dealer within Rhode Island. The disadvantage of this law to farmers located any appreciable distance from the Rhode Island boundary is obvious. If milk is delivered in violation of this Rhode Island law the commissioner of agriculture of the state is empowered to add colored vegetable matter to this milk so that it may be easily identified. On August 10, 1937, such action was taken and red coloring matter added to 5,000 quarts of milk

from Bellows Falls, Vermont. This was widely protested and court action was begun by the interested distributors. * * * "

Little improvement resulted over the years as the following excerpt from a 1955 article discloses:

"Rhode Island requires that milk be delivered to a plant within the State in the original container in which it was placed by the producer. 'Emergency' permits are granted for milk which is needed in the State but which cannot be handled at reasonable cost under this requirement. Thus, about 30 percent of the State's milk supply is received from tank trucks from plants located principally in Vermont and New York. The permits for this milk must be renewed monthly. The possibility that permits will not be renewed deters milk dealers from dropping local producers in order to buy out-of-state milk, the price of which is not subject to the Rhode Island price regulations. Milk cans were the only approved containers until recently. Assembly by tank truck from farm bulk tanks was not permitted. This requirement was contested by one company and a restraining order issued on June 12, 1953 by the Federal District Court for Rhode Island. This Order prevented the State from acting against the Company, which continued its business in Rhode Island. On April 5, 1955, the State amended the regulation and now approveds assembly of milk from farms by tank truck."[6]

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[6] *Regulations Affecting the Movement and Merchandising of Milk*, USDA, Agricultural Marketing Service, (1955), p. 26. The brief of Zuber, *et al.*, fails to mention the above discriminatory practices which injure producer and consumer alike in maintaining that bulk tank hauling of milk did not take place until 1958 and that the lower court was in error on this point. Their brief (page 74, ft. 117) understandably cites 23 Fed. Reg. 8227 in support of their contention, such citations referring to the Rhode Island or Southeastern New England market.

The respondents submit that the nearby differential reflects a continuation of the discriminatory devices that have injured consumers as well as "other producers whose production is an essential part of the market supply." (A. 343). It represents a return to the period preceding the adoption of a Constitution which it violates in the most fundamental sense:

> "If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints." *Gibbons v. Odgen,* 9 Wheat., U.S. 1, 231, 6 L. Ed. 23.

"It is clear that repeated *in terrorem* contentions that are devoid of substance may not dissuade this Court from striking down a clear illegality that "has been carefully nurtured and maintained by the Secretary."

CONCLUSION

The judgment of the lower court should be affirmed.

Respectfully submitted,

CHARLES P. RYAN
EDWARD J. RYAN
JOHN J. SIMARD

September 1969

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IN THE

Supreme Court of the United States

October Term, 1969

No. 25

FREDERICK T. ZUBER, *et al.*,

Petitioners,

v.

RUSSELL ALLEN, *et al.*,

Respondents.

No. 52

CLIFFORD M. HARDIN, Secretary of Agriculture,

Petitioner,

v.

RUSSELL ALLEN, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONSE OF RUSSELL ALLEN, *ET AL.*, IN NATURE OF OBJECTION TO MOTION OF LORTON BLAIR, *ET AL.*, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

CHARLES P. RYAN
EDWARD J. RYAN
JOHN J. SIMARD

400 Prudential Building
Washington, D. C. 20005

Attorneys for Respondents

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RESPONSE OF RUSSELL ALLEN, *ET AL.*, TO MOTION OF LORTON BLAIR, *ET AL.*, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The respondents, Russell Allen, *et al.*, responding to the motion of Lorton Blair, *et al.*, for leave to file a brief *amicus curiae* herein, respectfully say as follows:

1. The respondent, Russell Allen, advised counsel for Lorton Blair, *et al.*, by letter mailed prior to July 7, 1969, that respondents did not desire the filing of the requested brief *amicus curiae.* Respondents set forth a number of reasons for their position, including the fact that respondents' counsel was the main attorney for Lorton Blair, *et al.*, in the United States Court of Appeals for the District of Columbia Circuit and that the position of the *Blair* litigants would be adequately covered in respondents' briefs. A number of requests for the filing a brief *amicus curiae* have been received by the respondents, and they believe that the Court should not be burdened with such briefs that merely restate some of the more obvious arguments made by the respondents.

2. Respondents' counsel advised that he supported the position of Russell Allen in objecting to the filing of said brief, and his objection was made on the additional ground that only the validity of the nearby differential of the Massachusetts-Rhode Island Order is before this Court. The Secretary failed to petition this Court of certiorari in respect to the nearby differential of the New York-New Jersey Order, and the respondents are of the view that a belated application for certiorari may not be made through this case that involves a different administrative record and decision of the Secretary of Agriculture, who was permanently enjoined from instituting the same or any similar nearby differential in the New York-New Jersey Order. Respondents also do not wish the filing of said brief *amicus curiae* to be possible ground for self-disqualification of any member of the Court and specifically state that they have no objections of any nature in this regard.

Except for the foregoing qualifications, respondents interpose no additional objections to the filing of said brief

amicus curiae if the same might be of any assistance to the Court herein.

Respectfully submitted,

CHARLES P. RYAN
EDWARD J. RYAN
JOHN J. SIMARD
400 Prudential Building
Washington, D. C. 20005

Attorneys for Respondents

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 25

FREDERICK T. ZUBER, ET AL., PETITIONERS

v.

RUSSELL ALLEN, ET AL.

No. 52

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE, PETITIONER

v.

RUSSELL ALLEN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF AGRICULTURE

In the main, respondents' arguments raise no issues not aired in the government's opening brief, and hence require no reply. Underlying much of their argument, however, is the proposition that because the nearby differential is paid from the marketwide pool before the blended price is determined, it is in effect an unlawful "subsidy" of nearby farmers by distant ones. It is to

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this proposition—and the accompanying assertion that any payment of such a differential should be made by individual handlers—that this reply brief is addressed.

1. It is true that like many other differentials, the nearby differential is paid out of the marketwide pool and thus does have the technical effect of reducing the blend price from which each farmer's receipts are calculated. It is circular, however, to argue from this relationship that the differential is an unlawful tax on distant farmers for the benefit of the near. Under federal regulation, farmers are not entitled to absolute equality of treatment. Only if nearby and distant farmers are entitled by the Act to receive identical sums for their milk can one say that the distant farmers are being "taxed"—*i.e.*, deprived of funds to which they are entitled—for the benefit of the nearby farmers. Thus, the argument assumes what it is meant to prove. The economic reality of the situation is that nearby farmers, as a result of the nearby differential, receive somewhat more for their milk than do distant farmers; if that is a state of facts envisioned by the Act, the mechanism for bringing it about is irrelevant.

It is improper to argue, as respondents do, that the nearby differential is illegal under the Act because it results in lower prices to distant farmers than would regulation under the Act without that differential. As we have shown in our main brief, what the Act seeks to do is to approximate, but in an orderly way, the pricing structure which would exist in the market *in the absence* of regulation. The proper comparison is between the prices distant farmers now receive and the prices they would receive in an orderly market in the absence of

any regulation at all. On that comparison, the differential is valid.

2. Section 8c(5)(B)(ii) provides that Milk Marketing Orders may contain "adjustments for (a) volume, market, and production differentials customarily applied by the handlers * * *." Thus, the Act explicitly permits the Secretary to *require* the payment of "customarily applied" market differentials; he need not depend on handlers to continue their custom. If, as we have urged, the differential falls within the term "market differentials" and was customarily applied, then it is authorized.

The payment of differentials out of the pool has a long history of acceptance. The practice of the cooperatives, on which the Act drew, was to distribute payments received from handlers to their members equitably, not equally. The differentials the cooperatives used were paid out of the pool, thus "reducing" the blend price in the same manner as the nearby differential does now. See, *e.g.*, H. Doc. 501, 74th Cong., 2d Sess. (1936), pp. 37–39. The 1935 Act follows those cooperative methods. See our main brief pp. 30–38. The nearby differential sustained in *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 567, was paid partly from the pool and partly by the handlers. *Id.* at 551–552, n. 14. The farm location differential of the Boston Order upheld in *Green Valley Creamery, Inc.* v. *United States*, 108 F. 2d 342, 346 (C.A. 1), also was

payable from the pool. So are other differentials currently in effect.[1]

Finally, it would be inconsistent with the purposes of the Act for the Secretary to leave to individual handlers the payment of whatever premiums they deem appropriate for nearby milk, as respondents and the court of appeals in *Blair* v. *Freeman,* 370 F. 2d 229, 238–239, insisted must be done. Leaving it to individual handlers to pay such differentials as each feels is warranted, in light of the regulation imposed upon him, is an invitation to uneven treatment of farmers similarly situated—and thus to destructive competition among farmers for premiums, contrary to the Act's main purpose of stabilizing the market. The argument that the Order should not provide for a premium to nearby farmers is not so much one against this particular differential as it is one against any differential regulation. The Act does not require the Secretary to leave payment of other differentials to each handler, depending upon the value of the milk to the handler; an individual handler cannot avoid paying the butterfat differential (a "quality" differential) contained in an Order if he views milk with high butterfat content as having little value to him. No reason appears why the nearby differential, in particular, must be left to the handlers to pay.

[1] See Summary of Major Provisions in Federal Milk Marketing Orders (U.S.D.A. 1969), Table 17, pp. 59–63, col. 2. All positive differentials there listed, of which there are eleven, are paid in part by the pool, and thus reduce the blend price.

For the reasons stated above and in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

PETER L. STRAUSS,
Assistant to the Solicitor General.

ALAN S. ROSENTHAL,
WALTER H. FLEISCHER,
Attorneys.

OCTOBER 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

FILE COPY

FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 25

FREDERICK T. ZUBER, ET AL., *Petitioners,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

No. 52

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE, *Petitioner,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONERS FREDERICK T. ZUBER, ET AL.

LAWRENCE D. HOLLMAN
CARLYLE C. RING, JR.
KALER, WORSLEY, DANIEL
& HOLLMAN
710 Ring Building
Washington, D. C. 20036
Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY BRIEF FOR THE PETITIONERS FREDERICK T. ZUBER, ET AL.

Through this reply, Petitioners Zuber, et al. seek to point out seriously erroneous factual premises relied upon by Respondents which have resulted in an analysis by them of the history and economic aspects of milk regulation in the Massachusetts-Rhode Island

market bearing little resemblance to the actual situation. Respondents' factual errors have also given rise to crucial fallacies in their analysis of the meaning of the Act, which also require correction.

At the outset, however, two more general characteristics of Respondents' brief require comment. First, Respondents make extensive use of factual assertions which either are devoid of record support or record citation or which fail to support their assertions.[1] Second, Respondents liberally employ selective excerpts from materials not of record before any court or from records in other cases not before this Court either to substantiate their own position or collaterally to attack the decisions of other courts relied upon by Petitioners on brief.[2] In this regard Respondents have

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[1] Respondents' frequent citations to pp. 657-736 of the Appendix are to non-record materials as noted on the blue page preceding page 657. See also footnote 98, p. 61 of Brief for Petitioners Zuber, et al. filed June 27, 1969. Respondents also make a number of allusions to alleged improper actions by Petitioners and their counsel in the course of this case. In keeping with the mandate of Rule 40(5) of this Court's Rules that briefs be "free from burdensome, irrelevant, immaterial, and scandalous matter," no attempt is made here to respond *seriatim* to the personal attacks on opposing counsel and others by Respondents on brief. Petitioners simply deny flatly those aspects of Respondents' version of the facts which give rise to these attacks.

[2] To cite but two illustrations of these collateral attacks on other judicial decisions, Respondents, at pp. 140-141 of their brief, set forth correspondence involving Reuben Hall, Esquire, who testified in the *Cranston* case. *Cranston* v. *Freeman*, 290 F.Supp. 785 (N.D.N.Y.) appeal docketed Nos. 32,793-99 (2d Cir. Oct. 28, 1968). This correspondence, never a matter of record before any court, was apparently selectively extracted from files at the National Archives in an attempt by Respondents to impeach collaterally minor facets of the *Cranston* testimony of Mr. Hall. Other correspondence in the same National Archive files, however, demon-

also extensively referred to the administrative and judicial record (not before this Court) in the case of *Blair* v. *Freeman*, 370 F.2d 229 (D.C. Cir. 1966). As Respondents have admitted elsewhere, however, that case "involves a different administrative record and decision of the Secretary of Agriculture."[3]

A. Factual Errors

Much of Respondents' brief is devoted to their proposition, not passed upon by either court below, that the nearby differential adjustment is economically unsound. That proposition is based on a plethora of economic suppositions and misstatements leading to factual and legal conclusions contrary to those of the Secretary consistently and correctly reiterated and relied on over the years. Congress wisely left to the Secretary both the comprehension of the economic forces in milk markets and the authority to devise regulatory techniques "to establish and maintain . . . orderly market conditions." § 2 of the Act.

1. At frequent intervals throughout Respondents' brief, they point to the nearby differential provision of the Secretary's 1964 Massachusetts-Rhode Island Order and the Order itself as effecting a drastic change in

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strates conclusively that Mr. Hall's testimony is fully supportable. At p. 98 of their brief, again in an effort collaterally to impeach the testimony of witnesses in the *Cranston* case, reference is made to materials which were not a matter of record before that court since their authenticity had never been established. Respondents' use of such material here is particularly troublesome in that they also improperly attempt to relate it to the substantive issues before this Court.

[3] See *Response of Russell Allen, et al. In Nature of Objection to Lorton Blair, et al. for Leave to File a Brief Amicus Curiae*, filed by Respondents with this Court on September 11, 1969.

the economics of the marketplace and in the mix of nearby and distant producers serving New England markets. For example, the 1937 Boston Order is compared by Respondents with the 1964 Order, giving rise to the assertion that:

> "[T]he cost as recently as 1962 was 3 cents per cwt. but has increased 400 percent under the consolidated Order." (p. 8).

This and similar statements by Respondents also suggest that the rate of the nearby differential drastically changed between 1937 and 1964. In fact, the nearby differential has been maintained at precisely the same 46¢ and 23¢ per cwt. levels since 1937 as part of the regulated pricing structure established by the Secretary (R. 645, 255, 230-31, 305, 349-357). Moreover, a differential of approximately the same amount was paid by handlers to nearby producers as far back as the 1920's (R. 263-269, 277-288, 299, 635-637), throughout the period before federal regulation under agreements negotiated by farmer cooperatives with handlers in a free market, and under the pre-1937 licenses and early marketing orders of the Secretary. *Cranston* v. *Freeman,* 290 F. Supp. at 800, 814. During the 1930's this 46¢ differential adjustment represented approximately 25% of the milk price received by nearby farmers (R. 463, 366-67). Now, however, the same 46¢ differential represents less than 8% of the milk price received by such farmers. Thus, the differential has not increased but has proportionately shrunk.

Respondents' assertion that the 1964 consolidation order imposed a new economic burden on distant farmers because of the continuation of the nearby differential adjustment (at an identical rate) is patently

erroneous. The consolidated markets enjoyed far higher fluid milk sales than was true of the predominant Boston market before consolidation. As a consequence, on an average during the 12-month period following the 1964 Order, each distant farmer serving the Boston market actually pocketed 3¢ more per hundred pounds of milk than in the 12-month period immediately before the Order took effect. This favorable increase in returns to distant farmers, after taking into account the same nearby differential, had been forecast at hearings before the Secretary (R. 360-65). Presumably, this economic benefit motivated the distant farmers, comprising over two-thirds of those in the market (R. 55), to join their nearby counterparts, in approving the Order by a vote of over 89%.[4]

Respondents similarly claim (p. 133) that the number of nearby farmers increased drastically under the 1964 Order when compared to those serving the Boston market in 1937 and that substantial numbers of farmers whose farms had never been classified as nearby just prior to 1964 were added to the nearby group by the 1964 Order. Both claims are false. The first compares two discrete marketing areas. The increase in nearby farmers from the 1937 Boston Order to the 1964 Massachusetts-Rhode Island Order stems from the 1964 consolidation of three other secondary markets, largely served by nearby farmers, with the Boston market served primarily by distant farmers. Neither the Secretary nor the nearby farmers enlarged their

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[4] 29 Fed. Reg. 12237 (1964). Statistics regarding the blend prices for distant farmers are based on the Market Administrator's published price statistics for the 12-month period preceding October 1, 1964, the date of the 1964 Massachusetts-Rhode Island Order and for the 15-month period thereafter.

class over the years; they simply were grouped together along with the markets they served under one regulation, just as all distant farmers serving the same markets were consolidated. Moreover, the number of nearby farmers immediately before and after the 1964 Order were essentially identical although a procedural change in the manner of fixing the nearby area, from airline arcs to comparable geographical locations, did effect a minuscule change. As the Secretary noted in his 1964 decision (R. 356), nine nearby Boston producers who previously had farms located in the 23¢ area for Boston were shifted to the 46¢ area and one lone farmer who had not previously been located in any differential area was shifted to the 23¢ zone.

Respondents also suggest that the nearby differential's inclusion in the 1964 Order served as a stimulus for production increases by nearby farmers causing unstable and disruptive marketing conditions. The Secretary confronted a similar unsupportable allegation in hearings preceding the 1964 Order and pointed out in his decision (R. 351) that, despite the presence of the nearby differential in the Boston and secondary markets before 1964, increases in milk production in both nearby and distant areas followed almost identical trends. See also p. 10, *infra*. The correct inference is thus exactly the opposite of that drawn by Respondents; the nearby differential is entirely compatible with the economics of the market.

The facts of the matter thus are that the Secretary's 1964 Order changed neither the economics of the marketplace nor the mix of nearby and distant farmers serving the market, in consolidating the Boston milk market with the three contiguous secondary markets. Consolidation of the markets was necessary, as the

Secretary concluded, "to maintain orderly and efficient marketing in these areas." 29 Fed. Reg. 11206 (1964). The only direct economic impact on the farmers themselves was a small but significant increase in the financial returns to the preponderance of distant farmers covered by the Order who were serving the Boston market.

2. Respondents, at pp. 79-80 of their brief, dote on an assertion that a revalidation now of the Secretary's 30-year inclusion of the nearby differential in the Massachusetts-Rhode Island Order would "open the floodgates to the issuance of similar discriminatory differentials in virtually every milk order across the country" and "would precipitate cut-throat competition leading to disorderly marketing." This *in terrorem* rhetoric misses the mark in a number of respects.

First, the Secretary for over 30 years has employed the differential discriminately and in large metropolitan areas only, in each case in order to achieve orderly marketing and with undisputed success.[5] Second, in other markets, those away from areas dominated by competing, heavily urbanized population concentration, where relatively nearby supplies provide sufficient milk for fluid needs at all times, the Secretary has relied on other mechanisms, such as individual handler pools or more rigorous quantity controls on those handlers

[5] Respondents elsewhere suggest on brief (p. 6) that the differential provision is a most unusual regulatory provision. The facts are that, shortly before the 1966 decision of the court below in *Blair* v. *Freeman*, 370 F.2d 229, close to 50% of federally regulated milk was governed by orders containing the differential, including Chicago, New York-New Jersey, Massachusetts-Rhode Island and Connecticut. See USDA Statistical Bulletin No. 403, FEDERAL MILK ORDER MARKET STATISTICS, ANNUAL SUMMARY FOR 1966 (1967), pp. 22-23.

eligible to be covered by his orders, all in order to preserve a steady and reliable source of supply from nearby farmers in keeping with the most economic operations for the milksheds.[6] Third, Congress vested the Secretary alone with the authority to devise milk orders which would "establish and maintain orderly marketing conditions." Where the Secretary has employed the nearby differential adjustment as one integral facet of his regulatory mechanisms for milk, he consistently has concluded that orders including the differential will achieve this purpose.[7] Fourth, distant farmers, comprising a heavy majority of total farmers in the market, repeatedly have voted the Secretary's orders including the nearby differential into effect, demonstrating their positive acquiescence in the validity of the Secretary's conclusions. Respondents attempt to dismiss the crucial significance of these affirmative votes by alleging (e.g. pp. 143-144 of their brief) that with respect to the differentials "few dairy farmers in non-nearby areas were even aware of their existence." Yet, at the same time, Respondents stress

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[6] All economic studies employed by the Secretary over the years and milk marketing treatises, including all those cited by Respondents, e.g. Benedict & Stine, THE AGRICULTURAL COMMODITY PROGRAMS, 485 (The Twentieth Century Fund, 1956), have uniformly agreed that optimum and most efficient milk marketing economics require that fluid milk requirements be obtained from areas adjacent to the market and milk for manufacturing purposes be processed in the distant areas of the milkshed. (See R. 495, 505.)

[7] Concomitantly, the Secretary has concluded, e.g. in 1964, that opponents of the differential have not established that retention of the nearby differential adjustments "are resulting in unstable or disruptive marketing conditions which warrant their deletion" (R. 351). In his 1964 decision, he also concluded that "an unwarranted decrease in returns to nearby producers would result" from a reduction in the nearby differential (R. 352).

on brief (e.g. pp. 133, 163) repeated protests against the differential filed with the Secretary by distant farmers and cooperatives and other organizations of which they are members.[8] Respondents may not have it both ways, alleging, on the one hand, obliviousness to the differentials by distant farmers to escape the legal consequences of their votes favorable to the differential while, on the other hand, relying on repeated, but insubstantial, distant farmer objections to the differentials in every pertinent administrative hearing over the years to show that many distant farmers have continuously aired their complaints in hearings before the Secretary.

As supposed proof of their prognostications of doom if the nearby differential is maintained, Respondents refer in various filings to an attrition between 1965 and 1966 in the number of distant farmers, larger than that of the nearby farmers, serving the market, which they claim results from the differential.[9] These references are distortions of published statistics of the Milk Market Administrator (MILK MARKET STATISTICS, published annually by the Market Administrator for the Massachusetts-Rhode Island Milk Market). Since the trend throughout all portions of the milkshed is to larger farms, the only accurate gauge of economic dislocation is that which measures the share

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[8] Not only have distant farmers and their organizations availed themselves of all opportunities before the Secretary to condemn the differential, thus demonstrating their awareness of it, but the Market Administrator in his publications circulated directly to all farmers has commented upon it at length (R. 642).

[9] See, e.g. pp. 2-3 of Brief of Respondents in Opposition to Joint Brief Amicus Curiae of the Attorney Generals (sic) of Massachusetts, Rhode Island and Connecticut.

of the market by volume of milk produced as well as by producers, as follows:

State	1965		1966		1968	
	Avg. No. of Prod.	Mkt. Share by Volume	Avg. No. of Prod.	Mkt. Share by Volume	Avg. No. of Prod.	Mkt. Share by Volume
Massachusetts	1603	17.1%	1461	16.9%	1233	14.4%
Rhode Island	244	2.8%	217	2.7%	188	2.1%
Vermont	5111	50.7%	4405	49.8%	4135	47.9%
New York	981	11.9%	1007	13.4%	1448	18.4%

As these figures reflect, Vermont farmers have lost only 5.5% of their share of the market. Massachusetts farmers have lost 15.8% of their share while Rhode Island farmers have lost 25.0% of their share from 1965 to 1968. More significantly, the share of distant New York farmers has risen from 11.9% to 18.4%, an increase of more than 54.6% and strong evidence that prices for distant farmer milk under the Massachusetts-Rhode Island Order are sufficiently high to have caused a steady and substantial shift of New York milk into the market. The above tabulation also reflects that, from 1965 to 1968, the attrition in the number of Massachusetts and Rhode Island farmers was about 23%; but in Vermont farmers, less than 20%. In this same period, the number of New York farmers increased by 467, or more than 47%.

3. Respondents rewrite history in suggesting that it was primarily nearby farmers who sought federal regulation at the outset, allegedly because they were losing their markets. Respondents also assert, without record support, that "improvements in roads and motor transportation in the early 1930's . . . virtually eliminated the preferential position of the nearby producers" (p. 22) and "made distant milk accessible to even the smaller dealer" (pp. 23-24).

The facts are otherwise. Farmers from all four states serving the Boston market actively sought means to stabilize the Boston milk market after fluid milk prices declined there in 1930.[10] Joint action was initiated first by the Commissioners of Agriculture in the States of Maine, New Hampshire, Vermont and Massachusetts who formed the New England Milk Board in 1930 and thereafter by the Governors of these four states through the Governors' Dairy Advisory Board which actively participated with the AAA in drafting the first license for the Boston market. That license (in Exhibit D) included a preferential base rating for nearby farmers.[11]

The 1936 and 1937 Boston Orders were urged upon the Secretary by all affected states and by both nearby and distant farmers, some nearby farmers indicating at administrative hearings that unless a nearby differential adjustment were included they would prefer no federal order (R. 279, 304). Governor George Aiken of Vermont evidenced the concern of Vermont distant

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[10] Contrary to statements in Respondents' brief (pp. 24-25), cooperatives were effective in maintaining stable prices in *the Boston fluid market* until 1930. See Record, *H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588, October Term, 1938, No. 772, Master's Report, pp. 103-109. The nearby price differential continued in effect after 1930 despite the overall price instability characterizing the market after 1930 (R. 287-288 showing price differences between nearby and distant milk in 1932).

[11] Record, *H. P. Hood & Sons, Inc., supra*, Master's Report, pp. 130-133. Respondents' contentions on brief (pp. 30, 91-92, 156) that the Massachusetts Milk Control Board extracted the nearby differential as the price for cooperating in enforcement of the Secretary's early licenses (Nov. 1933, March 1934) is false. The Board was not created until July 1934. See Chap. 376, 1934 Acts of the Commonwealth of Massachusetts.

producers in preserving the Boston Order, telegraphing Congress to secure prompt passage of the 1937 Act.[12]

Respondents attempt at some length on brief (pp. 88-91) to rehabilitate the lower court's unsupported speculation (R. 209, n. 36) that nearby farmers were impelled to seek federal regulation because bulk tank trucking made distant milk directly accessible in the 1930's. They, however, misconstrue the facts as did the court below. It was not the use by handlers of bulk tank trucks from country to city plants that permitted distant farmers to deliver directly to the city but the installation of bulk tanks at the farms. As Respondents admit, bulk tank installation on the farms was a much more recent phenomenon. What Respondents and the lower court failed to realize, perhaps understandably in view of the intricate complexities of milk marketing economics, is that distant farmers generally were not able in the 30's to deliver their milk directly to the city because they and their handlers were still using cans to transport the milk *to the country plants,* and that this same situation was still continuing in part as recently as 1964. 29 Fed. Reg. 11211 (1964). The transportation problem for the distant farmers throughout the years centered on getting their milk to the handlers in the absence of farm bulk tanks and in view of poor road conditions. The solution was country plants because direct delivery

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[12] Governor Aiken's telegram stated:

"Passage of Marketing Agreement Amendment apparently only hope for 15,000 Vermont dairymen. Situation critical and haste needed." 81 Cong. Rec. 4964 (1937).

from the farm to the cities over long distances and using milk cans was not economically feasible or practical. Even today with bulk tanks on the farms, nearby farmers situated near or on major highways and close to city plants still retain an advantage over distant farms on country roads. While the measure of accessibility between nearby and distant farmers may have narrowed, it has not disappeared. To the extent that modern transportation improvements and the placement of bulk tanks at the farms have lessened the advantages of nearby milk, that consideration has, in effect, been reflected in the relative decrease in value of the nearby differential over the years (R. 463).

Respondents recite (pp. 63-68) portions of the Secretary's decisions relating to unsettling conditions in the secondary markets, e.g. Southeastern New England and Springfield, immediately preceding federal regulation (R. 332, 336, 341) in a further attempt to show that it was the nearby farmers alone who sought such regulation and that handlers were unwilling to pay a higher price for nearby milk under free market conditions. They are wrong on both counts. All farmers marketing in the secondary New England markets just prior to regulation were experiencing destructive competition similar to that initiated by handlers in the Boston market in the early 30's before federal regulation. A committee of milk experts including spokesmen for the Vermont dairy industry, in considering these problems, unanimously found that the effects of unregulated milk supplies in these secondary markets were equally as destructive on the distant northern farmers as on the nearbys and that federal

regulation was required to protect and assist both groups.[13]

As to the prices paid by handlers to nearby farmers in these markets, the evidence before the Secretary showed that customarily a premium price had been paid to them for their milk.[14] Shortly before federal regulation, however, problems, largely independent of this premium, developed in these markets. State regulatory agencies which had controlled the prices for state-produced milk since the 30's, but were legally barred from regulating out-of-state milk,[15] had prescribed individual handler pools and high fluid milk or Class I prices for milk sold by in-state producers.

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[13] The 1949 report of this committee, the New England Regional Milk Price Committee, composed of 12 milk specialists stated:

"EFFECT OF UNREGULATED MILK—NORTHERN NEW ENGLAND

"The problem of unregulated milk also has destructive effects on producers in northern New England.

"The problem for northern New England producers not under Federal regulation is that as the Boston blend price is reduced by increased surplus in that market the price offered for their milk will decline correspondingly. The chain of cause and effect here is that as their milk displaces the milk normally going into secondary markets, the Boston surplus is increased. As the Boston surplus increases, the Boston blended price drops. Since the price paid for unregulated milk outside the Boston pool depends on the Boston blended price, the price for such unregulated milk also falls."

Exhibit 5, Hearings before the Secretary on the 1949 Springfield Order, the decision for which appears at 14 Fed. Reg. 7085 (1949). This report and all other portions of the administrative record for the Springfield record were not submitted to the lower courts.

[14] Tr. 463-466, Exhibits 9 and 10, Springfield hearings (Docket No. AO 205); Tr. 634-641, Exhibits 16 and 25, Worcester hearings (Docket No. AO 204). Again, these administrative records were not before the lower courts.

[15] *Baldwin* v. *Seelig*, 294 U.S. 511 (1935).

For example, in 1958 farmers located in Rhode Island were paid a price of $1.60 or more per hundredweight over the blend price in the Boston market at the 20th zone (R. 622). This resulting price spread, even after allowing for transportation and handling costs, was far in excess of the value of nearby milk which customarily in the Boston market enjoyed a premium of only 46¢. Consequently, some handlers serving the secondary markets reached out for unregulated, out-of-state distant milk purchasable at or near the Boston blend price which was cheaper by $1.60 or more per hundredweight. Handlers buying this distant milk thus avoided paying the class prices established by state agencies and those established by federal regulation in the Boston market. Instead, these handlers bought at a price comparable to the Boston blend price and resold the milk almost exclusively for fluid use without paying the higher fluid use Class I prices established by state and federal regulation. The results were larger profits for the handlers and a loss of Class I values for the farmers. Thus, the problems were largely caused by the intermix of unrealistic state regulation with adjoining federal regulation, together creating unnatural economic results. The Secretary's remedy was to restore the situation and the returns to all farmers "more nearly in line with their prospective returns without marketwide equalization" for the benefit of both distant and nearby farmers. 23 Fed. Reg. 8238 (1958).

4. A central theme of Respondents' brief is that the economic values of nearby milk reflected by the nearby differential never in fact existed, are no longer viable or are improper for recognition under the statutory scheme. For example, Respondents (pp. 40, 51, 113)

point to "evenness of production" which generally characterizes nearby, but not distant, milk currently, as well as before and after federal regulation commenced, and alternately contend that this economic value either is not really meaningful [16] or is otherwise rewarded by the Secretary. Whether or not evenness of production is an important economic value for the market is a matter for the Secretary, as is the determination of how and by what measure the Secretary encourages and rewards it. Respondents argue that a change in the regulatory scheme in 1967, "the seasonal incentive plan," [17] compensates the nearby farmers sufficiently for their greater evenness. The short answer is that this device was first employed in the market in 1967, after this suit was commenced and the nearby differential escrowed, and was not a portion of the 1964 Massachusetts-Rhode Island Order under re-

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[16] Outside milk experts have concluded otherwise. Thus, the New England Regional Milk Price Committee in their July 1949 report, footnote 13, *supra*, unanimously agreed upon six standards for federal milk regulation, one of which they stated to be:

> "3. *Equality of prices to producers.* Prices paid to producers should vary only to reflect differences in the actual value of their milk. These differences depend on (a) quality of the milk; (b) butterfat test; (c) transportation costs; (d) *evenness of seasonal production;* and (e) *actual economic advantages of location near the market.* Prices to producers supplying secondary markets should be kept in line with prices to producers supplying primary markets. In order to maintain such equality in pricing, it is necessary to establish a method of pooling which includes all of the producers who supply that market or markets." (Emphasis added.)

Dr. Thurston M. Adams, University of Vermont, and E. Frank Branon, Chairman, Agricultural Committee, Vermont House of Representatives, 1948-49, were members of this Committee who shared in its unanimous view.

[17] 32 Fed. Reg. 5288 (1967).

view here. More importantly, this incentive plan (as its name implies) provides an incentive for uneven farmers, primarily those distant from the market,[18] to become more even and tailor their production more closely to market needs. It does not serve to recognize, as does the nearby differential, the contribution already made by those historically and currently more even nearby producers who have incurred large expense and effort in tailoring their production to market needs.[19]

In decrying the economic advantages of nearby milk, Respondents also pass over without comment or reply the fact that the Vermont Milk Control Board has employed a nearby price differential adjustment for nearby farmers in their own state orders,[20] a fact also

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[18] The continuing significant disparity between nearby and distant farmers in attaining evenness of production is shown in the published annual statistical reports of the Market Administrator for the Massachusetts-Rhode Island market:

SEASONALITY IN DAILY AVERAGE OUTPUT OF PRODUCER MILK BY VARIOUS PRODUCTION ZONES

(Percentage by which high month exceeds low month)

(Per farm basis)

	Nearby Area	Distant Area	Zone 21	Zones 22-27
1965	15.9	26.5	36.0	55.1
1966	14.7	31.5	32.6	58.7
1967	13.8	32.7	47.5	59.8
1968	14.2	28.1	41.5	61.1

Source: MILK MARKET STATISTICS, published annually by the Market Administrator for the Massachusetts-Rhode Island Milk Market.

[19] The Secretary also recognized this value of the milk of nearby farmers as one factor justifying the nearby differential. 32 Fed. Reg. 9919 (1967).

[20] See footnote 110 at p. 68 of Petitioners' main brief herein. See also 32 Fed. Reg. 9904 (1967).

ignored by the Attorney General of Vermont in his brief amicus curiae here. Vermont would obviously like it both ways: a premium price to Vermont nearby farmers marketing in Vermont; and a higher price than now available to Vermont distant farmers marketing outside Vermont in competition with nearby farmers of other markets.

Throughout their brief, Respondents' predicate for their economic suppositions ignores the basics of milk marketing. The most economically efficient milkshed is reasonably compact with ample nearby sources of supply. In a free market, competitive forces tend to create a fluid milkshed that conforms to the most economically efficient patterns. Milk, a bulky and perishable product, is difficult and expensive to transport. To maximize efficiency the more distant milk should be manufactured in the country into milk products, and the nearby milk employed in the fluid market because transportation costs will then be minimal.[21] To manufacture nearby milk and transport

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[21] Respondents, in their Brief in Opposition to the Joint Brief Amicus Curiae of the Attorney Generals (sic) of Massachusetts, Rhode Island and Connecticut, liberally quote (at pp. 18-23) from the so-called Nourse Committee Report, incorrectly suggesting, however, that 16 of the 17 members were unanimous in their views regarding the nearby differential. In any event, in that portion of the Report on which all agreed, they stated:

> "In addition, we are concerned with maintaining as high a degree of efficiency as possible in the organization of the milkshed. This can only be achieved where the fluid milk requirements are obtained from areas immediately adjacent to the market, so that surpluses will be processed into the more concentrated manufactured dairy products in the outlying areas of the milkshed, thus minimizing total transportation costs.
>
> "We recognize that procedures which provide transportation differentials exactly equal to differences in actual transporta-

distant milk to the consumers' doorstep is economically wasteful, and the incremental cost ultimately will result in higher prices to the consumer.

Government regulation establishes an insulated market structure. Unless the Secretary employs techniques to substitute for normal competitive market forces, the handler has no incentives to maximize efficiency. The individual handler, under marketwide pooling (§ 8c(5)(B)(ii) of the Act), is required by the Order to pay the same net price for milk, no matter how near or far the farmer is from the market, how efficient the producer may be in meeting the requirements of the fluid market,[22] or how effective the handler and his producers may be in balancing supply with market needs.[23] The result is that a marketwide pooling order, with classified pricing but only adjustments for transportation costs, has an artificial expansionist effect which is economically inefficient. The nearby differential adjustment tends to minimize this artificial ex-

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tion costs may be inconsistent with the objective of minimizing total transportation expenses, since such a system tends to make the handler indifferent to the location of producers of his fluid milk supply."

See also J. D. Black, THE DAIRY INDUSTRY AND THE AAA, 217, 219 (Brookings Institute 1935).

[22] Under an order, without any adjustments in price except for transportation costs, the even and uneven producer would be paid the same price per hundredweight.

[23] The handler who works with his producers to establish a milk supply equal to his fluid requirements and thus obtains a high fluid or Class I utilization retains none of the benefits of the efforts of himself and his producers, for he must pay into the producers settlement fund the difference between his higher utilization and the marketwide utilization factor, the value of which accrues to producers of handlers who may have been less effective in balancing supply and demand.

pansion just as does a free and unregulated market, while at the same time recognizing the extra economic values of nearby milk.[24]

B. Erroneous Legal Analysis

Stripped to their essentials, Respondents' lengthy arguments regarding the legal validity of the nearby differential adjustments under the Act appear to distill into three propositions. One, Respondents claim the core of the Act was an intent by Congress to prevent one or more producers supplying the same market from receiving different prices than those of other producers supplying that market, based in any degree on different use patterns of the milk marketed. Two, Respondents contend that the differentials are not authorized by the statutory language "market . . . differentials customarily applied" presumably because the only differential adjustments Congress intended to cover by this statutory phrase were differentials reflecting savings in double handling costs when farmers shipped milk directly to city plants rather than through country stations. Three, in any event, Respondents contend, the differential was not customarily applied by handlers prior to passage of the 1935 and 1937 Acts or to the extent that it was applied in either a free market or under earlier federal regulation, it was illegal. Respondents base their contentions on erroneous conjecture, tortured reasoning and inaccurate and unsupported factual premises.

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[24] See pp. 61-80 of Brief for Petitioners Zuber, et al. filed June 27, 1969. Respondents' attack on state regulatory practices with respect to the Connecticut marketing area is undercut by the simple fact that approximately 50% of the Connecticut market's supplies are received from regular registered producers located outside the state, most of them in New York.

1. *The Core of the Act.* Contrary to Respondents' views, the core of the Act lies not in the mechanical aspects of marketwide pooling but in the grant of authority to the Secretary to stabilize milk markets and promote orderly marketing conditions, thereby assuring parity prices to farmers and an orderly flow of supply to the market. § 2 of the Act, "Declaration of Policy." To implement this mandate the Secretary is authorized to set parity prices for dealers to pay and farmers to receive for milk sold by the latter to the former. § 8c(5) of the Act. The Secretary's authority embraces not only the power to establish these prices but also to identify the farmers or group of farmers that are to receive them. The Secretary is free to define these producers by regional production areas, by regional marketing areas, by fluid milk markets, by manufactured milk markets or by any combination of these that he determines to be most appropriate for orderly marketing, §§ 8c(9) and (11); provided always that he obtains the concurrence of the farmers, who are entitled by vote to adopt or reject his order.

The provisions of the Act themselves underscore that Congress did not intend to prohibit differences or adjustments in prices between farmers whose milk was priced under the Act or under its marketwide pooling provisions even though such differences might in some way have been related to differing use patterns of the milk being marketed.[25] The presence of § 8c(5)(B)

[25] Respondents' argument that unvarying *equality* was the congressional goal is not even supported by their citations; e.g. the Economic Brief of the USDA quoted at pp. 54-55 speaks of equity rather than equality and specifically supported inclusion of the nearby differential (R. 274-275). Respondents refer to, and quote extensively from, the decision of this Court in *Rock Royal*, but that

(ii)(d) in the statute expressly permitting the Secretary to employ base-rating plans is conclusive evidence in point and demonstrates the error of the construction placed by Respondents and the court below on the "irrespective of the uses . . ." language of the Act to reject the nearby differential adjustments.

Under explicitly authorized base-rating plans the Secretary is able "equitably to apportion" milk pool proceeds among farmers on the basis of sales advantage for fluid use. Thus, as Respondents admit on brief (p. 39): "the producer is paid the Class I or fluid milk price for all milk delivered within his 'base'." Since these bases must vary among farmers in accordance with the typically varying levels of evenness of production of individual producers, an unequal distribution of Class I fluid milk sales necessarily results. Since the Act does not authorize any collection of added funds from handlers where base-rating is employed, the differing returns to farmers must be paid from the equalization pool. Thus, in base-rating as in customarily applied nearby differentials Congress rejected any notion that strict equality was the watchword and that an unequal division of the fluid milk

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opinion emphasized that no "exaggerated equalization" was intended by the Act. This Court pointed to the "usual market variations" expressly authorized by the Act, 307 U.S. at 571, 572, and specifically upheld the "nearby differential" of the New York Order, 307 U.S. at 567. The Respondents quote language from the *Lehigh* decision of this Court. *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76 (1962). It speaks not of unwavering equality but of "a proportional share" of the different use markets for each producer (370 U.S. at 81). Respondents' citations do not constitute support for their strained construction imposing rigid equality among the farmers regardless of the equities and the differing contributions to the market made by discrete groups of farmers.

market among farmers was prohibited. On the contrary, arrangements of this nature were specifically permitted under the Act.[26]

The close association of base-rating plans with historic and potential fluid milk patterns likewise destroys the myth which the court below initiated and which Respondents attempt to perpetuate—that any adjustments in farmer returns which are related in any manner to such patterns are flatly prohibited by the Act. Base-rating plans are directly concerned with and premised on such patterns. The bases of individual farmers are fixed in relation to a prior period, and to a low marketwide production point in that period when supplies are consequently lower. Those farmers who have supplied the fluid milk market with significant production at this low point are provided bases for their efforts which reward them with a larger proportion of the handlers' higher Class I price pool payments resulting from these handlers' fluid milk sales throughout the year. Again, this reward is directly tied to the historic and prospective fluid use of the milk received from the more efficient and more even farmers in the market and necessarily

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[26] The individual farmer referendum requirements now relating to base-rating which Respondents cite (p. 40) as a stricture on the Secretary's authorization here did not become part of the statutory scheme until 1965. 79 Stat. 1187. Before then, base-rating was subject to the same procedures as any other portion of a milk order. Respondents thus miss the point which is not what Congress intended in 1965 as to base-rating but rather the congressional intent in 1935 and 1937 as to the Act's "irrespective of uses" language. Had Congress been disenchanted with the nearby differentials in 1965 when they applied in orders for between 40% and 50% of federally regulated milk they were free to circumscribe the Secretary's authority pertaining to them in the same manner as they did with respect to base-rating plans.

reduces the returns to the less efficient and less even farmers.[27] Handlers do not bear the cost of this reward, for the benefits which it reflects in a regulated format are to the market as a whole and not to the individual handlers themselves. Respondents' contentions that the extra economic values of nearby milk should be left to the individual handlers to reward on an unregulated basis thus are as specious in connection with the nearby differential as they would be for base-rating.

2. *The Nearby Differential as a Market Differential.* Respondents' arguments on this point reflect a serious dilemma from which they are unable to extricate themselves. Faced with 30 years of consistent administrative construction and judicial interpretation that the nearby differential is a market differential adjustment under the Act, they place absolute reliance, not on the words of the Act themselves, but on their own interpretation of a selective excerpt from congressional Committee Reports for the 1935 Act, while ignoring the remainder of those reports, which repeatedly emphasize a congressional intent to "follow" the methods and practices of the cooperatives and the federal licenses issued under the 1933 Act. These Committee Reports speak of market differentials, which "vary with the markets" as those "given to the producer to compensate him for delivering his milk

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[27] Base-rating thus enables the Secretary to apportion milk pool proceeds in much the same manner and effect as does the nearby differential adjustments although the latter price adjustments reflect other extra values for the market as well. Against the background of his consistent use of the nearby differential adjustments in the Massachusetts-Rhode Island market, the Secretary has rejected a base-rating plan for that market (R. 359-360).

to a city market instead of to a country plant."[28] That, in fact, was precisely what nearby farmers did —they delivered their milk to a city market instead of a country plant in the 1930's and they do so today, for country plants are located far from the market's core and cannot economically be receiving points for nearby milk. (See n. 29, *infra* p. 26.) Thus, in upholding the nearby differential as a market differential in *Green Valley Creamery, Inc.* v. *United States,* 108 F.2d 342 (1939), the court there found that "[m]ilk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market," while the Secretary in his decision for the 1964 Order referred extensively to the continuing and widespread use of country plants, 29 Fed. Reg. 11210-211 (1964), which are the receiving points for the milk of distant farmers.

Respondents rely on differing arguments in an attempt to exclude nearby differentials from the Act's market differential language. They maintain (pp. 92-93) that the only "market differential" intended by Congress is the country station or direct delivery differential paid to farmers whose milk is transported directly to city processing plants rather than country receiving stations, thereby avoiding double handling costs. This is currently provided for in the Massachusetts-Rhode Island Order as a portion of the zone differential (R. 347-49). But this differential, which the court below cited solely as an authorized "example" of a market differential (R. 209), does not fully comport with the Committee Reports' explanation of mar-

[28] H.R. Rep. No. 1241, 74th Cong., 1st Sess. 11 (1935). The Reports also state that "market differentials are usually paid in secondary markets."

ket differentials as those "usually paid in secondary markets" since in the 30's secondary markets were simply not served regularly by country plants.[29]

Perhaps recognizing this anomaly, Respondents go on to assert (pp. 21-22, 93) that an obscure differential existing in the upstate New York secondary markets in the pre-federal regulation years of the 1950's and for some years under the Secretary's 1957 New York-New Jersey milk order also was a market differential and presumably one which Congress had in mind in writing the 1935 Act. While Respondents suggest that this differential also was intended to recognize savings in handling costs, that is not the case. As the Secretary made clear in his decision, 22 Fed. Reg. 4212-16 (1957), this differential, in the form of a price premium, was "paid by local dealers in Upstate New York . . . to obtain the milk they want." In short, dealers were offering a premium, not for savings in handling costs, but in recognition of their proximity to competing markets. As Respondents acknowledge, this differential qualifies as a market differential despite Respondents' error as to its underlying basis.

Respondents also recognize (pp. 104-105) a third variety of differential as qualifying as a "market differential": the cooperative payments differential of the 1937 Boston Order held in the *Green Valley* decision to be an authorized market differential. They attempt to hedge, however, by straining to show that this differential was really intended to reflect primarily the handling cost advantages of the country station differential. The cooperative payments differential

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[29] Record, *H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588 (1939), Master's Report at p. 79; *Cranston* v. *Freeman*, 290 F.Supp. at 798-799.

however, related to a variety of marketing services supplied by cooperatives, just as the nearby differential, also affirmed as a market differential by the *Green Valley* court, compensated for a variety of extra economic values inherent in nearby milk.

Finally, Respondents deal with the differential of the New York Order before this Court in *Rock Royal*[30] (pp. 144-148). As Respondents concede, this was a differential payable primarily out of the equalization pool and not by handlers. Moreover, its payment to nearby farmers was in excess of country station handling costs and transportation costs and was not designed to reflect the cost of marketing services. While Respondents' discussion here is less than clear, they appear to accept this Court's holding that the differential there was an authorized one even though it reflected solely the extra values of nearby milk.

In sum, Respondents appear to acknowledge that at least four distinct differentials, each reflecting differing economic values, conform in substance to the "market differential" terminology, including the nearby differential at issue in *Rock Royal*. In this light, their rejection of the nearby differential adjustment of the Massachusetts-Rhode Island Order which likewise was customarily applied to reflect certain economic values is without foundation.[31]

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[30] *United States* v. *Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939).

[31] Respondents' erroneous analysis of the market differential is further compounded in their discussion (pp. 113-114) of License No. 15 issued by the Secretary in 1933 for the Boston market. Respondents point to the provision of that license which provided an adjustment to those farmers whose milk on September 1, 1933 was being trucked directly from farms to plants located in the marketing area. In n. 79 at p. 114, Respondents then claim this

3. *Customary Application of the Nearby Differential.* Throughout their brief, Respondents attempt to cast doubt upon the customary application of the nearby differential adjustment in the Massachusetts-Rhode Island market. They present two different arguments. First, they claim (e.g. pp. 72, 112 and 116) that all differential adjustments which were the predecessors of the 1937 nearby differential adjustment were illegal. Thus, they assert (p. 72) that the 1936 Order differential was tainted with illegality. Again, they comment (p. 112) upon alleged illegality of the early base-rating provisions which were set forth in the Secretary's pre-1935 Boston licenses. But it is absurd to contend that the nearby differential could not have been customarily applied because at all times its forerunners were illegal. Not even the lower court went this far in its analysis.

Respondents' second line of attack flows from similarly unsupportable premises. They contend (p. 120) that no provision in form identical to the nearby differential adjustment of the 1937 Order preceded that Order, arguing also that since no marketwide pool antedated federal regulation, no nearby differential

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was both a direct delivery and a market differential. In fact, it was only the latter since a separate country station or direct delivery differential was provided in the license. As testimony in the hearing record makes clear (R. 447-449), the license provided a differential adjustment of $.7103 between country station and direct delivered milk to cover transportation cost of 44.78¢, a country plant handling allowance of 23¼¢ and 3¢ for can service. In addition, a special differential was provided in the license for those farmers, all nearby, who delivered directly to plants located in the marketing area. This differential adjustment was the forerunner of the present nearby differential provision and was designed to recognize the inherent economic advantages of nearby milk.

adjustment comparable to that adopted in the 1937 Order could have been customarily applied by handlers. Respondents refer to scattered testimony from various administrative hearings in which witnesses stated that handlers did not pay differentials as such but rather price premiums and that the adjustments were not made by adding them to base prices for distant milk but were instead a component of the higher prices paid to nearby producers (pp. 121-125 of Respondents' brief). The facts show that prior to regulation handlers simply paid nearby producers a higher price, approximately 46¢ in excess of that paid distant farmers, after taking into account transportation and handling costs (R. 263-269, 277-288, 299, 635-637). To deny that such higher prices were differentials "customarily applied" exalts form over substance. Respondents reflect an awareness of these higher prices paid nearby producers before federal regulation by labelling the statistics which demonstrate them as (p. 126) "artificial, inaccurate and illegal price statistics."

In a critical respect, however, Respondents fail to succumb to crucial factual errors in the lower court's analysis. The lower court erroneously assumed that the pre-1937 nearby differential adjustment was intended to reflect only transportation and handling costs and was never payable in excess of the differential paid to distant farmers who delivered their own milk directly to nearby plants (R. 204). Respondents attempt to bury this facet of the lower court's analysis, commented upon at length at pp. 51-52 of Petitioners' main brief, by placing an incomprehensible interpretation on it in an obscure footnote (p. 90, n. 68a) and then dismissing it as "of no great moment."

CONCLUSION

For the reasons in the main brief of Petitioners Zuber, et al. and in this reply brief, it is respectfully submitted that the relief requested in Petitioners' main brief should be granted.

Respectfully submitted,

LAWRENCE D. HOLLMAN
CARLYLE C. RING, JR.
KALER, WORSLEY, DANIEL
& HOLLMAN
710 Ring Building
Washington, D. C. 20036
Attorneys for Petitioners

October 10, 1969

[illegible]

October Term, [illegible]

Nos. [illegible] and [illegible]

FREDERICK T. [illegible] et al.,
Petitioners

vs.

RUSSELL ALLEN et al.,
Respondents

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE,
Petitioner

vs.

RUSSELL ALLEN et al.,
Respondents

MOTION BY LORTON BLAIR ET AL. FOR LEAVE TO FILE BRIEF AMICI CURIAE

PROPOSED BRIEF FOR AMICI CURIAE

C. WAYNE SMYTH,
Counsel for Lorton Blair et al., Proposed Amici Curiae.

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1969
No. 25 and No. 52

Frederick T. Zuber et al.,
Petitioners

vs.

Russell Allen et al.,
Respondents

Clifford M. Hardin, Secretary of Agriculture,
Petitioner

vs.

Russell Allen et al.,
Respondents

MOTION BY LORTON BLAIR ET AL. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Lorton Blair, Orton Mattocks, Lawrence Roloson, Gordon W. Albrecht, Milford L. Kinsman and Bruce McClelland by their attorney, C. Wayne Smyth, move the Court for leave to file Brief as Amici Curiae in the above matter and in support thereof allege as follows:

Motion for Leave To File Brief

1. The moving parties were the Plaintiffs, Appellants and ultimately the successful litigants in the case of *Blair vs. Freeman* in the United States Court of Appeals for the District of Columbia Circuit, 370 F. 2d 229.

2. The question presented in the case at bar was ruled below on the authority of *Blair vs. Freeman* (supra) and the legality of nearby Differentials is, therefore, for the first time, squarely before the highest court.

3. The moving parties for reasons set forth in *Blair vs. Freeman* (supra), are substantially interested in supporting the conclusion reached below in the case at bar since any upholding of Nearby Differentials would probably result in a new promulgation of them by the Secretary of Agriculture who removed them from the present New York-New Jersey Milk Marketing Order (7 CFR 1002) only after the result became final in *Blair vs. Freeman* (supra).

4. The moving parties have requested the consent of the Parties to this litigation to the filing of said Brief as Amici Curiae, the original letters of consent of Lawrence D. Hollman, Esq. and Erwin N. Griswold, Esq., Solicitor General of the United States, are attached hereto. Charles P. Ryan, Esq., for himself and Edward J. Ryan, Esq., and John H. Simard, Esq., representing Russell Allen et al., have refused consent by letter dated July 7, 1969 in response to certified mail request to them dated June 16, 1969 deposited in the United States Post Office at Troy, Pennsylvania.

5. A reading of the Petition for Certiorari and Brief thereon, the Brief for Respondents and the Brief

of the Amici Curiae thereon discloses that there is a probability that the following arguments may be insufficiently presented:

a. That Congress did not and could not have intended to authorize Nearby Differentials of the kind in question here, the history argued about by the principal disputants ignoring salient facts which lead to this conclusion concerning Congressional intent;

b. That until some service or value can be established for nearby milk passing not to the handler but to the non-nearby producer there is no justification for reaching into the pocket of the non-nearby producer to pay to the Nearby producer what should be paid by the handler, *if at all;*

c. That the Nearby Differential is an illegal market barrier;

d. That there is no justification for further hearings.

Respectfully submitted,

C. Wayne Smyth,
Counsel for Lorton Blair et al., Proposed Amici Curiae.

BRIEF FOR AMICI CURIAE

STATEMENT OF INTEREST

Amici Curiae were the Plaintiffs, Appellants and successful litigants in the case of *Blair vs. Freeman*, 370 F. 2d 229 (1966). They are all individual dairymen farmers, none of whom qualified in *Blair* for the Nearby Differential under the New York-New Jersey Milk Marketing Order, 7 CFR 1002 et seq. as it then existed. The case at bar was ruled below on the authority of *Blair* and the legality of Nearby Differentials of the kind Amici Curiae regard as illegal, is now before the highest Court. Amici Curiae are substantially interested in supporting the conclusion reached below in the case at bar lest such Nearby Differentials again appear in the Marketing Order for their area.

ARGUMENT

We advert only to the substantive question of the legality of Nearby Differentials as we later define them, and not in any manner to questions of procedure.

This Brief assumes that the principal contestants will have researched pertinent authority adequately and will have presented with emphasis not only their own arguments but also the sharply divergent viewpoints expressed by the Blair Court and the Cranston Court (U. S. Circuit Court of Appeals for the District of Columbia in *Blair vs. Freeman,* 370 F. 2d 229 (1966), and below in the case at bar, and the U. S. District Court for the Northern District of New York in *Cranston vs. Freeman,* 290 F. Supp. 785, appeal docketed, Nos. 32, 793-99 Cal., Oct. 28, 1968). The Blair Plaintiffs, amici curiae here, will have two purposes in this Brief: To clarify arguments which may have become so complicated by over-elaboration that their simple principles are in danger of being clouded, and to combat vigorously a suggestion persistently made by defenders of the Nearby Differential which would, if adopted, give them an unwarranted victory by attrition.

For these purposes we outline our Brief as follows:

I. The Nearby Differential under any name violates the Agricultural Marketing Agreement Act on three counts:

a. It is not one of the four permitted adjustments to uniformity provided in the statute.

b. Its uniquely discriminatory operation against a particular class of producer makes it inherently illegal.

c. It is clearly a market barrier prohibited by Sec. 608c (5) G of the Act.

II. The persistent suggestion by defenders of the Nearby Differential that this Court does not have enough "testimony" for a proper decision coupled with requests that the case go back for further hearings not only assumes the conclusion that the differential can be sustained but also seeks to win by attenuating indirection what cannot be won directly.

I.

a. The Nearby Differential cannot be sustained as a "market differential"; it is not one of the four permitted adjustments to uniformity.

Since many discussions and references confuse legitimate nearby differentials for transportation and direct delivery, with the kind of Nearby Differential to which we object, a definition is required. An illegal Nearby Differential is one which in effect removes from the value of the milk pool before announcement of the uniform price an amount of money not charged to the handler, to provide a bonus over and above factors of transportation and direct delivery to be paid to nearby producers based solely on the presumed nearness of their farms to the market center, by means of lines drawn on a map. (Most often *all* producers have a nearby deduction removed from

their share of the pool but the nearby producers then receive back more than the deduction—thus receiving a bonus at the expense of the non-nearby producers. In the Connecticut order a class of "nearer-by" producers get back part of the deduction but not all of it, thus suffering a loss which is less than that suffered by the producers furthest from the market center.)

One significant fact has been overlooked in all of the cited History of Milk Marketing and the chaotic conditions which preceded Federal Milk Marketing Orders: That there were, in the days prior to the Agricultural Marketing Agreement Act, 7 USCA, Sec. 601 et seq. (hereinafter the Act), two distinct grades of milk being produced in significant quantities in the Northeastern United States.[1] One grade was produced under Board of Health regulations pursuant to farm inspection and was thereby eligible for sale for fluid (drinking milk) purposes. The other grade was uninspected and could only be marketed legally for cheese, butter, etc.—(manufacturing purposes). Since the inspected supply—more expensive to produce—was of higher quality and available for fluid use (indeed for any use), it could ordinarily command a higher price in the market place than the uninspected supply. The cutthroat competition for the higher priced market came about to a large extent from the fact that more and more uninspected producers improved their facilities, thus gaining Board of Health approval to market their milk for fluid purposes. Handlers simply would not pay more for milk for one particular use (fluid) than for another (manufacturing) if that milk was of the same quality and

[1] Cf. 28 F.R. 11956, Nov. 8, 1963.

availability. It was the old distinction between inspected and uninspected milk which led to the constant reference in milk marketing discussions to an extra value for fluid milk. Under Federal Order *all* milk is Health-inspected, fresh, top quality—fungible with all other Federal Order milk.[1] When supplies of it are greater than the needs of the fluid market it was, is and always will be, an inevitable economic fact *in an unregulated market* that prices for those supplies will fall to the level of the lowest common denominator—the level of manufacturing milk.[2]

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[1] See "The pricing of Milk Under Federal Marketing Orders" by Neil Brooks, Assistant General Counsel, U. S. Department of Agriculture, in 26 *Geo. Washington Law Review* 180 (1958).

[2] Finding by the Secretary, Nov. 8, 1963, at 28 F.R. 11956:

"The reason for these depressed prices primarily was that an excess of milk above the quantity which could be used in whole fluid form was being produced and delivered to market. It was demonstrated that whenever any significant excess of milk was produced for the fluid market, prices would fall to the level of manufacturing milk prices. The major problem now, as it was when the order was first established, is to maintain orderly marketing for milk in this market in a situation, where in order to assure consumers of sufficient quantities of milk at all times, it is necessary that more milk be produced and delivered to market than can be used as fluid milk. *In the absence of regulation, the maintenance of a necessary reserve of milk above Class I requirements has a depressing effect upon the prices for all uses of milk, including producer returns* and an unstabilizing effect upon the marketing of milk in the area. The institution of a classified pricing plan and marketwide pooling through the Federal milk order is the means for achieving adequate and dependable supplies for consumers (which includes the necessary reserve) without the unstabilizing conditions and depressed prices to producers *which would otherwise result.*" (Emphasis ours.)

Under the Act, the classified pricing system whereby a higher price is affixed to that portion of milk which is sold for fluid use than for the remaining portion is part of a broad economic program devised by Congress to increase prices to farmers. The higher fluid use price does not relate to the milk which is involved since all of the milk is fungible. Nor does it relate to a producer or group of producers since the milk of one producer is indistinguishable from the milk of another. Thus the benefit of the fluid use price is not, even in part, the property of or the privilege of any producer but a result of *governmental regulation* as part of a broad economic program for all farmers. *As such it must be apportioned uniformly to all producers.*

The *Blair* Plaintiffs do not presume to be able to improve upon the *Blair* Court's exposition of how the Nearby Differential relies upon the fluid use of milk by handlers to arrive at a prohibited exception to uniformity. In the case at bar and the *Cranston* case, however, to obviate the force of that reasoning, supporters of the Nearby Differential have suggested that the Secretary in *Blair* simply put his reliance on the wrong adjustment to uniformity; that even though the Nearby Differential certainly does not meet the requirements of a Location Differential under adjustment (c) the Secretary in the case at bar put his justification on the right line by calling it, in effect, a "Market" Differential. There follows a long and complicated history of the legislative development of the Act together with discussion of the "record" of the years prior to enactment—a record which was the chief subject of the testimony in the *Cranston* case. At best the principal contestants come up with a welter of confus-

ing propositions and counter-propositions which prove nothing, especially since the point sought to be made is largely irrelevant.

If anything is clear about Congressional intent it is the purpose of Congress to end once and for all the cut-throat economic competition in an industry peculiarly subject to the worst competitive evils by the existence of "flush" and dry periods of production. Are we for one moment to ssume that, by the last minute inclusion of "broad" words, contrary to the whole carefully conceived plan to avoid the pitfalls of unconstitutional delegation of discretion,[1] Congress intended to authorize the Secretary to imbed into the regulatory scheme a means to perpetuate the evil effects of the very competition it sought to terminate? If there is anything clear about the years just prior to the Act it is the self-evident economic fact expressed by the Secretary that whenever any significant excess of milk was produced for the fluid market, prices would fall to the level of manufacturing milk prices.

Thus *all* producers stood, before enactment of the Agricultural Marketing Agreement Act, on the brink of economic disaster from marketing warfare. As more and more farms became Health-inspected, their milk fully qualifying for any use, thus swelling the total of available *fluid* supply milk (as distinguished from "manufacturing" milk, for cheese and butter, from uninspected farms), any producer, near or far, could find his higher-cost inspected milk going for manufacturing prices as the raiding forays of this warfare ebbed and flowed. No producer had more than a precarious and temporary ad-

[1] Cf. *Cranston vs. Freeman* (supra), at page 799.

vantage, and the advantages, often mentioned for nearby milk (its availability, its threat of direct competition with the handler as retail milk, etc.,—advantages for which the *handler* should pay if valuable to him) were (and are) not limited to the market center (Boston or New York or Hartford as the case might be). Thousands of producers supplying hundreds of towns in the non-nearby areas had local and temporary advantages[1] but *all* stood in peril. No one gave up any substantial economic position by coming under the protection of the Act. As the Court said in *Blair* at page 27, "For the general welfare of all it [Congress] decreed that some producers might have to forsake their peculiar advantages, by requiring that uniform prices be paid to all producers, subject only to a few narrow and well-defined adjustments." The benefit of fluid prices derives not from the milk itself—all milk under Federal Order is fungible—nor from the producer, but from Government regulation, smoothing out the hills and valleys of prices for a product of equal value uniformly to all producers. Congress could scarcely have intended otherwise.

Thus to contend that there was before the Act a "Market" differential which in the circumstances gave nearby producers a higher share of the fluid market is not only impossible history from the standpoint of economics, but also confuses the later statutory concept of "Fluid" prices and "Manufacturing" prices for fungible milk, with the pre-statutory fluid prices for inspected milk and manufacturing prices for uninspected milk, both

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[1] Cf. Secretary's decision of Feb. 1, 1964, 29 F.R. 1646, at p. 1652-3.

of which tended, to the detriment of all producers, to sink to the lower level.

We submit that the "Market" differential is nothing more nor less than what the *Blair* Court termed it, compensation to a producer "for delivering his milk to a city market instead of to a country plant" (and, we add, as such payable by the handler, not by fellow producers).

We point out in passing that handlers before the Act *could not* customarily have applied any such differential as the one in the case at bar by removing it from the pocket of one producer and placing it in the pocket of another. The handler had no such power. If he paid more for nearby milk he paid the extra amount out of his own pocket, and the allocation between transportation, direct delivery, and any kind of bonus was never entirely clear. If, occasionally in the economic battles of the times, cooperatives used a pooling method with nearby producers receiving more than non-nearby producers, the amount inextricably commingling transportation and other factors, those cooperatives were acting not as handlers but as producers' representatives and anyone who objected to his share could deal elsewhere. In practical effect, modern Nearby Differentials allow no such freedom but have fastened the evil relict of the old economic warfare upon the hapless non-nearby producer indefinitely unless this Court voids them.

Just as whatever extra price might have been paid by handlers for nearby milk inextricably commingled elements of transportation, direct delivery, quality, and possible bonus for factors the handler may have considered of value to him, the proponents of the Nearby Differen-

tial have confused and continue to confuse legitimate and necessary Differentials for transportation, etc. with the illegitimate, unnecessary and indefensible Nearby Differential. The Nearby Differential, based solely on farm location, *is in essence a tariff assessed against one group of producers payable to another group of producers within the same market and constitutes a partial exemption from pooling.* Only after the money for the Nearby Differential payments has been subtracted from the pool is the remainder made a part of what is announced as the uniform price. The resulting announced uniform price cloaks the truth and is not uniform to all producers. All other Differentials, while varying prices to producers under the Order, actually contribute to the principle of uniformity rather than violating it. For example, varying butterfat tests are accounted for, according to the market value of the butterfat; transportation Differentials reflect actual hauling costs. But the Nearby Differential relates to nothing of a tangible nature and can only be accounted for by a disproportionate sharing of the Class I value of the pool. 24 F.R. 1049, 1063 (1959).

There is one other consideration which seems to have escaped the attention of the disputants. No matter what the Nearby Differential may be named it is in every case geographical and by that token a *location* differential. Since it does not, as shown by the *Blair* Court, measure up to the requirements of a Location Differential, and since by ordinary statutory construction what cannot be sustained under direct provision of Congress cannot be presumed to be authorized under the vague general wording of another provision, how can the Nearby Differential be permitted to stand? If the historical exploration

of *Cranston* and the appellants has uncovered anything of value at all, it is that Location Differentials were intended to cover transportation and nothing else. Does this not spell the complete doom of the Nearby Differential?

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b. In interpreting a statute we must presume a constitutional result.

It is a truism that equal parties equally placed must have equal treatment under our laws. "Differentials" are simply differences based upon factors enabling the law to treat everyone equally. Manifestly, a farmer producing a better (more valuable) product must not receive a price equal to the price of those who produce a less valuable product; such equal treatment would not be equality at all. Thus Differentials are provided as equalizers to make sure that everyone gets *essentially* equal treatment. The Statutory scheme in the Agricultural Marketing Agreement Act is calculated to accomplish exactly that result. Federal Milk Marketing Orders establish a base price which applies to milk of a designated butterfat test which is delivered in a designated zone or area. Both the Massachusetts-Rhode Island Order and the New York-New Jersey Order establish the base price for milk of 3.5 percent butterfat which is delivered in the 201-210 mile zone. Milk testing either above or below the 3.5 standard is accounted for according to the market value of butterfat to both the individual producer and the purchasing handler. By the same token, milk delivered closer to or more distant than the 201-210 mile zone is adjusted to both the producer and the purchasing handler in accordance with actual transportation

costs. It is common ground that there may be other market variables in addition to these two which should be accounted for and they are covered in the Act under the terms Market, Volume and Production Adjustments. Although we believe that the pertinent Committee reports are reasonably specific as to what these permissive adjustments encompass, appellants choose to argue that they were meant to cover a broad range of variables. We submit that the precise meanings or latitude of these permissive adjustments are irrelevant to the basic question involved in this case. It is axiomatic that any adjustment must relate to a specific service which is performed or a tangible value which has been added or subtracted. It is clear that the basic question before this Court is not whether there is or ever has been any service or value supplied by Nearby producers but in the event there is or was, *to whom did the benefit accrue*? To interpret the Statute in a way permitting the Secretary of Agriculture to assess non-nearby producers for a service or value which accrues to the handler would result in an unconstitutional discrimination. Any real service or tangible value could properly be assessed to the handler benefited, within the framework of the Act, without reference to geography and the fact that it has not been so assessed demonstrates the illusory nature of the alleged value.

The *Cranston* Court, at p. 809, acknowledged that differentials *paid without reference to any rational basis* would be invalid, then cited *Secretary of Agriculture vs. Central Roig Refining Co.*, 338 U.S. 604, 616-618 (1950), that *customary payment* is alone a sufficient rationale for continued payment under a scheme of regulation. It is obvious that customary payment (even though, as we

have shown *this* custom could have no valid historicity and conflicts both with the basic intent of Congress and the specific provisions of the Act) is the only hope of defenders of the Nearby Differential. Is custom then so potent? *IF* there had been a custom would it authorize the Secretary unlimitedly to broaden its extent geographically and financially? Would it fasten its hold on the future indefinitely? If the alleged custom was itself evil, could it be recognized as a rationale? Racial discrimination was a custom in many parts of this country—could it support even to the slightest extent a valid administrative rule? The *Cranston* Court puts too much strain on the *Central Roig* case.

The only adjustment to uniformity not yet mentioned is (d), to reward even production. If this could conceivably be construed as a service to uneven producers it is still an individual matter impossible to reward on a geopraphical basis without patent discrimination.

The Guernsey case, *N. Y. Guernsey Breeders Co-Op vs. Wickard,* 141 F. 2d 802 (1944), cert. den. 323 U.S. 725, clearly shows that no one occupies a position of special privilege for values that cannot be established. Put simply the Secretary can no longer be permitted to continue reaching into the pockets of one group of producers to place money in the pockets of another group separated only by a line arbitrarily drawn on a map *and by no other viable difference.*

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c. The Nearby Differential is an illegal market barrier.

There is nothing sacred about the names used to describe areas. The Non-Nearby area in any order is pat-

ently a "production area in the United States", within the meaning of the Statute. The Nearby Differential in its operation most certainly limits the marketing of milk in the nearby areas, both from the non-nearby production area of the particular Order in question and from other production areas. Economics alone would dictate such a result in border zones between Orders but the statement is not just theoretical in view of the extreme example of the Connecticut situation (7 CFR 1015). There, non-nearby farmers are penalized 43-45¢ per hundredweight in a generally deficit supply Order area thus effecting a failure to draw in the necessary milk in times of low production from surplus producing lower-priced Order areas such as the New York-New Jersey marketing Order area. As a result prices under the Connecticut Order remain artificially high while New York prices have for years been the lowest in the Northeast as shown by any examination of USDA Federal order statistics. All of this is done ostensibly to make available to the nearby farmers about 3¢ per hundredweight, but this minimal benefit per farmer for the large number of nearby farmers to the very great detriment of so few non-nearby farmers is obviously not the real reason for the Differential. Patently the real reason is to exclude as many farmers as possible from seeking a Connecticut Market so that the Connecticut fluid use and producer price will remain high. In this Order area the Nearby Differential is used not merely (and not greatly) to *enrich* nearby farmers at the expense of those further from the market center but *as a market barrier to effect the maintenance of high prices at the expense of neighboring Order areas.* Lehigh Valley Cooperative Farmers, Inc. v. U. S., 370 U.S. 76 (1962),

alone should serve to terminate this misuse of official authority. This Connecticut extreme example merely serves to highlight the inequity of Nearby Differentials when their operation is carried to absurdity.

The Nearby Differentials set up within the first few years after enactment of the Agricultural Marketing Agreement Act in the New York and Boston Orders bore lightly upon the non-nearby producers both in amounts and in territory designated as "nearby", calling for pool deductions around 2¢ and 3¢ per cwt. Meanwhile came the Connecticut Order where 93% of the milk and geographically most of the milkshed was designated as "Nearby", at an oppressive cost to the remaining non-nearby producers. Accompanying this increase of special privilege was a gerrymandering of territory and a blanketing of entire states within the nearby zones regardless of distance. (Some parts of New Jersey 150 miles from the Market Center were arbitrarily placed in the 1-50 mile zone by declaring all of New Jersey "nearby" under the now voided Nearby Differential in the New York-New Jersey Order.) If there ever had been a Nearby Differential comprehended within the meaning of a "Market differential customarily applied by the handler", since it would be hinged upon custom, how can the Secretary be permitted to expand it at his whim? If the Nearby Differential is some kind of reward for previous competitive position how can the reward become greater over the years when competition for fluid markets is supposed to have ceased?

An examination of the Secretary's Decisions in the promulgation of the Orders above mentioned disclosed *no new* History and no *economic geography* to inspire such

piracy, only the increasing demands of pressure groups for more privilege. With the trend toward mergers and larger and larger Order regions there will soon be a great temptation to declare large parts or all of the politically potent Northeast as a "nearby" zone for the effective exclusion of, for example, Wisconsin milk, unless this Court calls a halt to the whole program of creeping privilege. Once an illegality such as this gets a foothold it can corrupt the entire process of milk marketing. "Power tends to corrupt; absolute power corrupts absolutely." (Lord Acton, 1887)

II.

No further hearings are justified.

Until the *Blair* suit was brought by six individual producers no distinctly "grassroots" producer suit had ever been filed in the field of milk marketing, and to this date only the *Blair* case and the case at bar have been pushed by and supported by individual farmers without organized support. The *Blair* plaintiffs filed their appellate Brief in the Circuit Court of Appeals for the District of Columbia in special form upon affidavit that none of them had an income in excess of $6000 net per year; since that time the return of their costs in *Blair* enables them now to print this Brief. The point is that it is economically difficult for small farmers to mount a legal offensive and it would be even more oppressive were they faced with the necessity of extensive hearings requested by supporters of the Nearby Differential. Where could small individual farmers find and how could they employ an array of economists and experts to prevent the sheer weight of irrelevant expertise brought

forward by the Government and large Cooperatives from overwhelming the judgment of the trial court as apparently happened in *Cranston?* The argument that no case so important as *Blair* and the case at bar should be decided on motion for summary judgment, because the ultimate decision should be made only after full development of the facts, presupposes that those facts will be of value to the Court. But with a full record in *Cranston* there is still no aid for the Court in deciding the basic question to which the *Cranston* testimony and record are entirely irrelevant. The only valuable facts are the Statute, the Regulations, the Secretary's discussions—and descriptions of the operation of Milk Marketing—on which there is no dispute. As we have shown, testimony of prices paid to particular producers prior to the Act, and evidence trying to establish the Nearby Differential as a "Market Differential" customarily applied by handlers prior to the Act, not only attempts to undercut the very purpose of the Act itself and contains much impossible history but also is irrelevant until such time as the proponents of the Nearby Differential can come up with some value or service attaching to nearby milk *to justify payment by the non-nearby producer instead of the handler*—an impossible task. By emphasis on lengthy hearings and testimony those who wish to uphold the Nearby Differential hope to confuse the real issue and smother the small farmer in a morass of tedious irrelevancies. Their whole foundation for requesting further hearings rests on the false assumption that the Nearby Differential *can* be justified; their battle is largely won if the Court grants their request for further hearings, for they would then clinch the victory by attenuation.

CONCLUSION

The decision of the Circuit Court of Appeals for the District of Columbia should be affirmed and *Cranston vs. Freeman,* 290 F. Supp. 785, expressly disapproved.

Respectfully submitted,

C. WAYNE SMYTH,
Counsel for Lorton Blair et al.,
Proposed Amici Curiae.

SUPREME COURT OF THE UNITED STATES

Nos. 25 & 52.—October Term, 1969

Frederick T. Zuber et al., Petitioners, v. Russell Allen et al. (25)	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
Clifford M. Hardin, Secretary of Agriculture, Petitioner, v. Russell Allen et al. (52)	

[December 9, 1969]

Mr. Justice Harlan delivered the opinion of the Court.

This action was brought by respondent Vermont dairy farmers, "country" milk producers, seeking a judgment invalidating as contrary to the Agriculture Marketing Act of 1937, as amended, 7 U. S. C. § 601 *et seq.* (1968), the so-called farm location differential provided for by order of the Secretary of Agriculture.[1] The effect of that

[1] The Secretary has promulgated comprehensive regulations to govern the marketing of milk, 7 CFR § 1002.00 *et seq.* (1969), pursuant to the Agricultural Marketing Act. The provisions relevant to this case are set forth in Part I of this opinion, pp. 8–9, *infra*.

The action was originally brought against the Secretary only. Petitioners Zuber et al, nearby farmers, unsuccessfully sought leave to intervene before the District Court in support of the Secretary's regulations. When judgment was rendered against the Secretary, petitioners sought leave to intervene for the purposes of appeal. Leave was granted and the Secretary also decided to take an appeal. The parties have devoted a good deal of energy to disputing what constitutes the record in this case. Petitioners at various times have referred us to the testimony and record compiled in an action

order is to require milk distributors to pay to milk producers situated at certain distances from milk marketing areas, "nearby" farmers, higher prices than are paid to producers located at greater distances from such areas. The District Court issued a preliminary injunction on January 16, 1967, against further payments and on respondents' motion for summary judgment transformed its decree into a permanent injunction on June 15, 1967. The Court of Appeals for the District of Columbia affirmed. 402 F. 2d 660. We granted certiorari to resolve the important issue of statutory construction involved in this aspect of the administration of the federal milk regulation program. 394 U. S. 958.

I.

BACKGROUND

Once again this Court must traverse the labyrinth of the federal milk marketing regulation provisions.[2] While previous decisions have outlined the operation of the statute and the pertinent regulations, a brief odyssey through the economic and regulatory background is

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brought in the Northern District of New York, *Cranston* v. *Freeman*, 290 F. Supp. 785. Respondents have objected, noting that the record in *Cranston* is not formally before this Court, and have included in the appendix various materials that were not of record below. The Court need not pause over the controversy since none of the materials in respondents' appendix is decisive of the action before us. As for the references to the *Cranston* record, they too are not decisive of the dispute.

[2] See, *e. g.*, *Lehigh Valley Cooperative* v. *United States*, 370 U. S. 76; *Brannan* v. *Stark*, 342 U. S. 451; *Stark* v. *Wickard*, 321 U. S. 288; *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533; *H. P. Hood & Sons* v. *United States*, 307 U. S. 588. The lower courts have also been plagued by the milk problem. See especially Judge Frank's lament, *Queensboro Farm Pds.* v. *Wickard*, 137 F. 2d 969 (C. A. 2d Cir. 1941); see also *Blair* v. *Freeman*, 370 F. 2d 229; *Green Valley Creamery, Inc.* v. *United States*, 108 F. 2d 342 (C. A. 1st Cir. 1938).

essential perspective for focusing the issue now before the Court.

A. The Economics of the Milk Industry

The two distinctive and essential phenomena of the milk industry are a basic two-price structure that permits a higher return for the same product, depending on its ultimate use, and the cyclical characteristic of production.

Milk has essentially two end uses: as a fluid staple of daily consumer diet, and as an ingredient in manufactured dairy products such as butter and cheese. Milk used in the consumer market has traditionally commanded a premium price, even though it is of no higher quality than milk used for manufacture. While cost differences account for part of the discrepancy in price, they do not explain the entire gap. At the same time milk industry is characterized by periods of seasonal overproduction. The winter months are low in yield and conversely the summer months are fertile. In order to meet fluid demand which is relatively constant, sufficiently large herds must be maintained to supply winter needs. The result is oversupply in the more fruitful months. The historical tendency prior to regulation was for milk distributors, "handlers," to take advantage of this surplus to obtain bargains during glut periods. Milk can be obtained from distant sources and handlers can afford to absorb transportation costs and still pay more to outlying farmers whose traditional outlet is the manufacture market.[2] To maintain income farmers increase production and the disequilibrium snowballs.

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[2] For fluid use, milk must be transported in its natural state and as such is a bulky and highly perishable commodity. Thus cost of shipment to a consumer market is greater than transporting an equal supply to a manufacturing plant. These factors, combined with more rigid sanitary requirements for plants distributing the fluid product, see Agricultural Adjustment Administration Reports (1933–1935) 154 (1938), explain part of the disparity between the price

To protect against market vicissitudes, farmers in the early 1920's formed cooperatives. These cooperatives were effective in eliminating the self-defeating overproduction by pooling the milk supply and refusing to deal with handlers except on a collective basis.[4] During the 1920's era of relative market stability the nearby farmers enjoyed premium prices for their product. These favorable prices were apparently attributable to reduced transportation costs and also the nearby's historic position as a fluid supplier.[5]

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for Class I and Class II milk. Nearby producers, given equilibrium of supply and demand, are logical fluid suppliers to the urban areas. See generally J. Cassels, A Study of Fluid Milk Prices (1937).

[4] The cooperative system amounted to a pooling arrangement wherein participating producers would bargain collectively with the handlers and threaten to withhold their milk if the handler refused to agree to purchase a certain minimum percentage of his Class I fluid milk from the pool. Without this supply the handler would be unable to meet his winter requirements.

Essential to this arrangement of course was a sufficiently wide membership to insure no alternative source of supply to the recalcitrant handler.

The second aspect of the arrangement was the division of the profits among the producer members of the cooperative. Frequently employed was a base-rating plan whereby each producer would be assigned a percentage of his milk for which he could claim payment at the Class I fluid price. For the remaining production he would be paid at the Class II rate. Apparently bases were assigned according to the anticipated participation of the producer in the fluid market. As a result, nearby producers received more favorable bases in view of their historical role as fluid suppliers in an equilibrium market. For descriptions of the cooperative systems see J. Cassels, *supra*, n. 3, at 56–70; J. Black, The Dairy Industry and the AAA 49–51 (1935).

[5] Because they were historically fluid suppliers the nearby producers apparently maintained at all times production sufficient to service the consumer fluid market. In addition their close proximity enabled them to deliver to small retailers. As such they were potential competitors.

B. The First Federal Program

The drop in commodity prices during the depression years destroyed the equilibrium of the 1920's and utter chaos ensued. Congress, in an effort to restore order to the market and boost the purchasing power of farmers, enacted the licensing provisions of the AAA, 48 Stat. 31, 35. Under § 8 (3) the Secretary of Agriculture was empowered

> "to issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or of any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and restoration of normal economic conditions in the marketing of such commodities or products and financing thereof. The Secretary may suspend or revoke any such license, after due notice and opportunity for a hearing, for violations of the terms of the agreements or conditions thereof . . . ."

Under the licensing system base-rating plans not unlike the private arrangements that obtained in the 1920's were adopted.[6] Producers were assigned bases which fixed the percent of their output that they would be permitted to sell at the Class I price that was paid

[6] See Agricultural Adjustment Administration Reports (1933–1935) 159–161 (1938); G. Barnhart, The Development of the Licenses and Order Regulating the Handling of Milk in the Greater Boston, Massachusetts Marketing Area, No. 3, 1933–June 1946 (unpubished dissertation on file with Department of Agriculture and Harvard University).

for fluid milk.[7] The viability of the licensing scheme was jeopardized, however, by judicial decisions disapproving a similarly broad delegaton of power under the National Industrial Recovery Act provisions. *Schecter Poultry Corp.* v. *United States,* 295 U. S. 495. With its agricultural marketing program resting on quicksand, Congress moved swiftly to eliminate the defect of over-broad delegation and to shore up the void in the agricultural marketing provisions. Section 8 (3) of the 1933 Act was amended in 1935 and the pertinent language has been carried forward without change into § 8 of the present Act. Agricultural Marketing Act of 1937, 50 Stat. 246, 7 U. S. C. § 601 *et seq.* (1968).[8]

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[7] License 38 for the Boston area provided more favorable bases for the nearby producers. See Barnhart, Federal Regulation of Milk Handling in Boston 1933–1946, *supra,* n. 6, at 95–96.

[8] "Milk and its products; terms and conditions of orders . . . .

"(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"(B) Providing:

"(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by

C. The Present Regulatory Scheme

The present system, which differs little in substance from the scheme conceived in 1937 for regulating the Boston market,[9] provides for a uniform market price

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at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

"(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

"subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, one the basis of their marketings of milk, which may be adjusted to reflect sales of such milk by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year."

[9] The Boston order of 1937 established uniform prices for all producers at $3.19 and $3.01 per cwt. of milk, depending on the place of delivery, with a further adjustment for transportation to the handler's plaint in the marketing area. Article VIII 4 (1) also provided for an adjustment based on the cost of tranporting milk from outlying plants to the primary Boston market. The present regulations calculate price with reference to the purchasing power of milk based on the 1958 cost of living index. No transportation adjustment is provided for in calculation of the uniform price under § 1001.62 of the order. Differentials to compensate for zone of delivery are retained as separate adjustments. See *infra*.

payable to all producers by all handlers.[10] Prices are established for Class I and Class II uses. The total volume of milk channelled into the market in each category is multiplied by the appropriate coefficient price and the two results are totaled and then divided by the total number of pounds sold. The result represents the average value of milk sold in the marketing area and is the basic "uniform" price. Were all producers to receive this price they would share on an equal basis the profits of Class I marketing and assume equally the costs of disposing of the economic surplus in the Class II market. The actual price to the producer is, however, the "blended" price which is computed by adding and subtracting certain special differentials provided for by statute and order. See 7 CFR § 1001.64 (1969). The deduction for differential payments withheld for the benefit of nearby producers reduces the uniform "blended" price to those producers ineligible to collect this particular adjustment.[11] The provision is contained in § 1001.72 of the order and provides:

> "In making payments to producers . . . each handler shall add any applicable farm location differential specified in this Section
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> "(a) With respect to milk received from a producer whose farm is located within any of the

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[10] The Secretary has three alternative modes of proceeding under the Act. He may establish "use" prices which all handlers must pay to all producers according to the actual amount of milk used in each category, § 8 (A); individual handler pools where all producers or cooperatives selling to an individual handler shall be paid a uniform price for milk delivered to that handler; or a marketwide pool where all handlers must pay all producers a uniform price for all milk delivered irrespective of end use.

[11] Also included is an adjustment for delivery to a nearby plant. The location of handler plants is classified by zones. 7 CFR § 1001.62. Delivery to a plant located nearby the consumer market

places specified in this paragraph, the differential shall be 46 cents per hundredweight unless the addition of 46 cents gives a result greater than the Class I price determined under §§ 1001.60 and 1001.62 which is effective at the plant at which the milk is received. In that event a rate shall be added that will produce that price."

A differential of 23¢ is provided deliveries from farms in intermediate nearby zones. § 1001.72 (b).

The foregoing provisions appear in the so-called 1964 Massachusetts-Rhode Island Order, which consolidated into one region the four sub-markets which were previously regulated separately under the so-called four "New England" orders: the 1951 Boston order which carried forward the order adopted for the Boston area in 1937; the Springfield order promulgated in 1949; and the Southeastern New England order of 1958. Each order included a provision for a nearby differential payment to farmers within a stated radius of a designated market center. For example the differential under the Boston order was payable to farmers located within a 40-mile radius of the State House in Boston; a slightly lower differential was paid to farmers within an 80-mile radius. Under the 1964 order there is no central point for the computation of the radius for payment of the differential; the Secretary has retained the differential provisions as they appeared in the previous four orders. Farmers who would have been entitled to the differential under any one of the previous four marketing regulations continue to receive those pay-

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is of course advantageous to the handler and the producer is compensated for this service. The handler also saves the cost of handling and processing at his country plant in addition to saving transportation cost. Conversely milk deposited at handlers' plants in outlying districts results in a negative adjustment.

ments under the present order. These nearby farmers are eligible for the differential on any shipments within the New England marketing area, even though their milk may actually be used outside the radius of their particular nearby zone.

II.

THE STATUTORY SCHEME

The foundation of the statutory scheme is to provide uniform prices to all producers in the marketing area, subject only to specifically enumerated adjustments. The question before the Court, stated most simply, is whether payment of farm location differentials, set forth above, is a permissible adjustment under § 8 (B) to the general requirement of uniformity of price.[12]

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[12] Section 8c (5)(B)(ii) requires all uniform prices be paid "irrespective of the uses made of such milk by the individual handler to whom it is delivered." Respondents contend that the nearby differential is merely a disguised payment for the nearby suppliers' greater share of fluid milk sales. Such was apparently the case in the New Jersey order invalidated by the Court of Appeals in *Blair* v. *Freeman*, *supra*, where the payment of the differential was explicitly linked to the percentage of nearby milk actually supplied to the fluid market. We share respondents' skepticism and our doubts are reinforced by the explicit connection of differential payments with the share of fluid milk supplied in the 1936 Boston order. Further cause for skepticism is found in the present zone differential structure which undercompensates the handlers for transportation from outlying districts and thus encourages them to buy from nearby farmers. See Kessel, Economic Effects of Federal Regulation of Milk Markets, 10 Journal of Law and Economics 51, 64–65 (1967). Here, however, unlike in *Blair* v. *Freeman*, *supra*, the producer receives the differential irrespective of the use to which his milk is ultimately put. Since the nearby differential in the present order is not directly tied to the percentage of fluid milk sales, although the order limits differential payments to 46¢ or the Class I price, whichever is higher, we accept the Government's contention that, as a matter of strict logic, the payment of differentials based on the historical position of nearby producers as fluid suppliers, is not inconsistent with the irrespective-of-end-use requirement.

The Secretary has in the past labeled the "nearby" differential a "location" differential and defended its inclusion in his orders on that ground. The justification and argument is now, however, pitched in a different key. The Government has apparently abandoned all but one of the numerous theories advanced below, and pressed most vigorously in the *Blair* v. *Freeman* litigation (370 F. 2d 229), and it now stresses the provision in § 8 for "volume, market, and production differentials customarily applied by the handlers subject to such order."

While the proper resolution of the issue is by no means self-evident, we are persuaded that "market differentials . . . customarily applied" contemplates *cost* adjustments. The plain thrust of the federal statute was to remove ruinous and self-defeating competition among the producers and permit all farmers to share the benefits of fluid milk profits according to the value of goods produced and services rendered. The Government's proposed reading of the Act, bottomed, as it is, on the historical payment of a premium to nearby farmers during the monopolistic era of the cooperative pools, would come to perpetuate economic distortion and freeze the milk industry into the competitive structure that prevailed during the 1920's.

Without the benefit of government muscle to eliminate crippling price warfare in the summer months, neither nearby nor country producers could share in the monopoly-type profits that accrue from fluid milk sales. Absent regulation only the handlers, if anyone, would stand to benefit from the "fluid" monopoly. While we cannot project what would be the case today if a free market prevailed, we might well anticipate that the nearby producers' winter advantages would be negligible in view of reduced transportation costs and more reliable refrigeration. Thus even in winter handlers might be free to play nearby and outlying farmers against each other since handlers would be free of the leverage exercised by the

nearby cooperatives during the 1920's. Nearby producers now seek the best of both worlds. Having achieved the security that comes with regulation, they seek under a regulatory umbrella to appropriate monopoly profits that were never secure in the unregulated market.

We are reluctant to attribute such intent to Congress and, simply in the name of administrative expertise, to follow a path not marked by the language of the statute. Indeed, such signposts as may be discerned from the legislative history point in a very different direction. The legislative history strongly suggests that "market differentials," as well as all the other differentials, contemplated particular understood economic adjustments. The House Report, in discussing the allowable adjustments characterizes the market differential as a payment over and above the transportation costs, *i. e.*, a location differential, for delivery to the primary market.[13] Thus farmers would share with handlers the savings from bypassing country-station processing and handling the milk only at the city plant.

The significance of the legislative history emerges upon study of the subsequent administrative practice. The original Boston order obscures the market differential payment by providing in place of a labeled adjustment a two-price structure which allowed an additional 18¢ per cwt. for city-delivered milk over and above the costs of transporting the milk from the country plant. However, the testimony of the Market Administrator, Mr. Aplins,

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[13] "The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of a country plant. These differentials vary with the markets and cannot be qualified as a 'location' differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets." H. R. Rep. No. 1241, 74th Cong., 1st Sess., 1935, at 10.

erases any doubt that those responsible for administering the Act fully understood the meaning of the Committee's explanation of market differential.[14]

Subsequent orders have combined the country station handling adjustment, properly the market differential, and the location-transportation differential into the so-called zone differential.[15]

The statute before us does not contain a mandate phrased in broad and permissive terms. Congress has spoken with particularity and provided specifically enumerated differentials, which negatives the conclusion that it was thinking only in terms of historical considerations. The prefatory discussion in the House Report emphasizes the congressional purpose to confine the boundaries of the

[14] The relevant excerpts from the hearing are included in the Joint Appendix and appear at pp. 258–259.

"Section 4 . . . provides for location differentials. The price arrived at from the calculation of the pool is a blended price for all milk FOB the market *with country station allowances deducted.* Now Paragraph 1 [of § 4] provides that there shall be deducted from that blended price in the case of milk delivered to a plant more than 40 miles from Boston an amount equal to the carlot freight rate from that plant to Boston, so that deduction would be different for each freight zone, and the price would be smaller by the amount of difference in freight from each zone as we go out from the market. Now Paragraph 2 [of § 4] provides that in the case of milk delivered from a producer to a plant located within forty miles of Boston (State House) there should be added 18 cents per cwt. That is added for the reason that in the case of country stations there is allowed the dealers on Class I milk a 20 cents/cwt. as a country station charge, and we are allowing for containers in which to ship the milk received at city plants, instead of having a 20 cent and a three cent deduction which would be 23 cents. There is a receiving station allowance of only five cents. The difference is 18 cents per cwt. We add back in here 18 cents to the producer whose milk does not pass through a country station." (Emphasis added.)

[15] See G. Barnhart, Federal Regulation of Milk Handling in Boston, *supra*, n. 6, at 620.

Secretary's delegated authority.[16] In these circumstances an administrator does not have "broad dispensing power." See *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 617. The congressional purpose is further illumined by the character of the other statutory differentials, for "volume," "grade and quality," "location," and "production," [17] all of which compensate or reward the producer for providing an economic service of benefit to the handler.[18]

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[16] "To eliminate questions of improper delegation of legislative authority raised by *Schecter* v. *United States* the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing, and terminating orders, and specify the terms which may be included in orders dealing with enumerated commodities." H. R. Rep., *supra*, at 8. See *Brannan* v. *Stark*, 342 U. S. 451, 465.

[17] In this connection it should be noted that the production differential authorized for maintaining an adequate supply for fluid use during the lean winter months is not strictly speaking a handler cost but a general cost of the market. It is, however, an essential cost that cannot be eliminated by looking to an alternative supplier. Viewed in this context it is of course a cost to the handler; for in a nonregulated equilibrium market, a handler would be forced to pay a premium during the winter months when supply is limited and demand constant.

[18] "The volume differential is a differential which is paid when the operations of several country plants are consolidated into one plant. The inconvenience caused to producers by closing up plants to which they have been delivering and requiring that all of their milk be handled by one plant, is compensated by an additional payment to the producers. The production differential which is paid to the producer, compensating him for keeping his farm qualified for a city market even though his milk may actually be going into manufactured use . . . . The production differential is a payment to the farmer for performing this *function in the market.*" (Emphasis supplied.) H. R. Rep., *supra.*

In *Brannan* v. *Stark*, *supra*, this Court invalidated regulations providing certain payments to cooperatives which had the effect of reducing the blended price to non-member producers. The

The general language of the Committee Report indicating that Congress intended to carry forward the basic regulatory approach adopted under the 1933 Act, following the precedent of the 1920's, is stressed by the dissent to this opinion. This committee language, it is argued, reinforces the continuity connotations of the "customarily applied" language, a thrust that is not blunted by any specific language indicating a legislative purpose to treat all farmers equally.

Legislative silence is a poor beacon to follow in discerning the proper statutory route. For here the light illumines two different roads. If nearby payments had the notoriety and significance in the milk distribution industry attributed to them by the dissent, Congress could have given its blessing by carving out another specific exception to the uniform price requirement. In an Act whose very purpose was to avoid the infirmity of overbroad delegation and to set forth with particularity the details for a comprehensive regulatory scheme, it would have been a simple matter to include in a list of enumerated differentials, "nearby" payments, or at least allude to them in the report of the draftsmen. It is clear that Congress was not conferring untrammeled discretion on the Secretary and authorizing him to proceed in a vacuum. That was the very evil condemned by the courts which the 1935 amendments sought to eradicate.[19] It would be perverse to assume that congressional drafters, in eliminating ambiguity from the old act,[20] were

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premise underlying our holding was that these payments would have to represent compensation for rendering of economic services of benefit to all producers. Even the dissenters took as a point of departure the proposition that the payments could be sustained only if justified in terms of services rendered.

[19] See *Brannan* v. *Stark*, *supra*.

[20] "The proposed amendments, insofar as they relate to marketing agreements and orders, are primarily intended to implement and spell out in more detail and with greater freedom from ambiguity

careless in listing their exceptions and selecting the illustrations from the Committee Report from which their words would ultimately derive content.[21]

We consider our conclusions in no way undermined by the colloquy on the floor between Senator Copeland and Senator Murphy upon which the dissent places such emphasis. A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen. It would take extensive and thoughtful debate to detract from the plain thrust of a committee report in this instance. There is no indication, however, that the question of nearby differentials and the meaning of "market differentials customarily applied" was precisely considered in the floor dialogue. The exchange is not only brief but inconclusive as to

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the powers which were provided for in the original act. The present language of the statute is, unfortunately, subject to serious misconstruction. This has given rise to obstacles in connection with the enforcement of marketing agreements and licenses which have seriously endangered their successful operation." H. R. Rep., *supra*, at 3.

[21] The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens unawareness, preoccupation, or paralysis. "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U. S. 61, 69. Its significance is greatest when the area is one of traditional year-by-year supervision, like tax, where watchdog committees are considering and revising the statutory scheme. Even less deference is due silence in the wake of unsuccessful attempts to eliminate an offending interpretation by amendment. See, *e. g.*, *Girouard* v. *United States*, *supra*. Where, as in the case before us, there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence, let alone the approval discerned by the dissent.

meaning.[22] Indeed, Senator Murphy apparently acquiesced in Senator Copeland's implied criticism of the statute for providing uniform prices for distant and nearby producers within the marketing region. When Senator Copeland pursued his inquiry, asking whether the Act recognized the higher cost for taxes on nearby lands, Senator Murphy merely recited the differential provisions of the Act and suggested that they "adopt the present practice of business," but conspicuously lacking is an affirmative statement that any specific differential covered these costs. This is not impressive legislative history especially in light of Senator Murphy's earlier agreement with Senator Copeland's statement that "the provisions of the equalization . . . provide that a producer who is producing his milk on farms near to cities would receive the same price for his product as a farmer who produces his milk, say, 40 or 50 miles away from the same community," and the specific business illustrations of the House Report.

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[22] The floor exchange is reported at 79 Cong. Rec. 11140.

"Mr. COPELAND. What has the Senator to say to the suggestion that in a number of communities in up-state New York there is not sufficient supply of milk surrounding the market to take care of the demand; therefore, milk must be brought into the market from more distant points? The provisions of the equalization which we are now discussing provide that a producer who is producing his milk on farms near to cities would receive the same price from his product as a farmer who produces his milk, say, 40 or 50 miles away from the same community.

"Mr. MURPHY. If they were embraced in the same marketing area, that would be true. Let us keep in mind what the situation is. There is a deficiency of consumer demand. There is a surplus of milk. The price is greatly depressed, and has been for 5 years. The only way in which one can determine how each one of the producers included in the plan provided here shall bear his share of the cost of effecting a higher price is to divide the milk by classification uses.

"Mr. COPELAND. I do not think the Senator has quite stated all the conditions. He does not take into consideration the difference

III.

SCOPE OF MARKET DIFFERENTIAL

While market differentials customarily applied need not be restricted to the sole illustration in the House Report, that illustration, taken in conjunction with the discussion of all the statutory differentials, suggests that the permissible adjustments are limited to compensation for rendering an economic service.[23] The challenged nearby differentials do not fall into this category.[24]

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in the cost of production. Taxes and values of property near the city are very much higher than in the case of property farther away from the city. The transportation differential does not compensate for the difference in cost, as I see it.

"Mr. MURPHY. If the Senator will refer to page 12, line 13, he will see that there is this qualification:

"'Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order—'

"They adopt the present practice of business—

"'(2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.'"

[23] The market differential does not, strictly speaking, compensate the producer for absorbing a cost to the handler for it may be no additional cost to the producer to deliver to a city plant. A nearby farmer, for example, would not incur additional costs by delivering to a preferred city plant as opposed to a country station. The savings to the handler are nevertheless plain and the market differential should properly be viewed as an adjustment that permits the producer to share in the handler's profits resulting from reduced costs.

[24] See Kessel, Economic Effects of Federal Regulation of Milk Markets, 10 Journal of Law and Economics 51, 65–66 (1967). After criticizing the present undercompensation for transportation costs from far-away zones as a disguised subsidy to nearby producers, resulting in an inefficient allocation of economic resources, the author draws a comparison with the nearby differential lamenting, "However weak the case for zone differentials that fail to depict transportation costs, it is infinitely stronger than the case for location differentials."

Nor has the Secretary advanced any economic justification for these differential payments. It is plain from the administrative record that the nearby differential was included in the original Boston order as a recognition of the favored position of nearby producers in the fluid market and as an inducement to nearby farmers to approve the Secretary's order. (J. A. 237.)[25] The only sense

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[25] The Secretary's 1964 findings include the following: "The farm location differential provisions under the present New England orders should be continued under the Massachusetts-Rhode Island order and the Connecticut order.

"A group of nine cooperative associations which represents principally producers whose farms are located outside any of the specified farm location differential areas, proposed that farm location differentials be eliminated under the proposed New England orders. Three other cooperative associations proposed that a producer whose farm is located within New England and who is presently eligible to receive a farm location differential . . . under any New England order be eligible to receive the same differential irrespective of the New England order under which his milk is pooled. Another cooperative association proposed that the farm location differentials be increased.

. . . farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.

"While considerable testimony in support of removal of the provisions was received, it was not established that the farm location differential provisions are resulting in unstable or disruptive marketing conditions which warrant their deletion from the orders at this time. Although certain marketing problems in the nearby and intermediate markets areas were referred to in the testimony, these problems are not the result of production increases on farms in these areas which logically might be attributable to the higher returns to producers in these areas. Such increases have not been significantly

in which the handler may be said to gain economically is by virtue of the elimination of the nearby producer as a potential competitor. While this factor is mentioned in the findings accompanying the 1937 order, it has not been emphasized in the 1964 findings and the testimony at the 1963 hearings suggests that support in the record is indeed scant. That entry of the nearbys into the distribution market would bring unwanted competition, is irrelevant if it does not jeopardize market stability. We think the analysis of the court below was correct: if there is any economic benefit here, producers should receive their compensation directly from the handlers and not out of the marketwide pool. 402 F. 2d 665.

While petitioner nearby farmers do not concede so readily the absence of economic foundation for the differential, no justifications are advanced that find any substantial support in the record. The allusion to the evenness of production on nearby farms would not justify the exclusive payment of this differential to nearby farmers. If the Secretary intended a production differential, all producers who qualify would be eligible. *Amici* and petitioners point to higher taxes on nearby lands and opportunity costs as reason for retaining the differential. These are, admittedly, additional costs of nearby production, but they are of no concern to handlers who seek only to obtain reliably the cheapest cost milk. See Kessler, Economic Effects of

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different from those on farms not eligible for the farm location differentials."

There is no reason to dispute the Secretary's finding that the differentials have no disruptive effect on the market. The issue, however, is whether the provisions are authorized by statute. The Secretary's order is devoid of any economic justification and relies solely on the historical factor of the nearby producer's favorable share of the fluid use market. See also Report to the Secretary of Agriculture by the Federal Milk Order Study Committee 74–75 (1962).

Federal Regulation of Milk Markets, *supra*. This Court has been slow to attribute to Congress an intent to compensate for inefficient allocation of economic resources. Cf. *West Ohio Gas Co.* v. *Comm'n*, 294 U. S. 63, 72. While petitioners argue that the differential is a necessary inducement to keep the nearby farmer in business, the record does not reveal that the Secretary acted out of concern that the nearby farmers would quit the market, nor is there any evidence demonstrating the present necessity for nearby producers. In an era where efficient transportation is available this may be of nominal concern. At most this may have been an unspoken consideration in 1937.[26]

Since the Secretary made no findings to that effect, the Court need not consider whether they would justify payment of the nearby differential in view of the legislative history indicating that the statute contemplates adjustments primarily for economic costs to handlers that are absorbed or reduced by the producers. Further if the representations of respondents are correct—and they are not without support in the record—it appears that the elimination of the 40-mile zone nearby differential payments of 46¢, even with the suspension of the intermediate differential payments of 23¢, would result in a higher uniform price to those farmers now receiving the 23¢ differential.[27]

IV.

PRIOR DECISIONS

Our holding does not represent a departure from this Court's precedents. No opinion of this Court has ever

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[26] See Report to the Secretary of Agriculture by the Federal Milk Order Study Committee, *supra*, n. 22, at 75.

[27] See J. A. 455 reporting excerpts from the Secretary's decision of October 21, 1958, accompanying the order for the Southeastern New England marketing area.

explicitly approved the nearby differential. Reliance on *United States* v. *Rock Royal Corp.*, 307 U. S. 533, is misplaced. This Court's refusal to invalidate the payment of a nearby differential to farmers in certain counties named in the New York order must be taken in the context of that action which was initiated by the Government against handlers who refused to obey the regulations. That decision did not repudiate the District Court's finding that the provision was "discriminatory as between producers." 307 U. S., at 567. The narrow reach of our *Rock Royal* holding was recognized in *Stark* v. *Wickard*, 321 U. S. 288, where we noted that *Rock Royal* held the handlers without standing "to object to the operations of the Producer Settlement Fund." 321 U. S., at 308, except as it affected handlers. The Court in *Rock Royal* went on to reject Rock Royal's contention that the payments placed those *handlers* without customers in the nearby counties at a competitive disadvantage.

Our attention is also drawn to the First Circuit's decision in *Green Valley Creamery* v. *United States*, 108 F. 342. As in *Rock Royal*, *supra*, the parties did not have standing to raise the invalidity of the nearby differential. To the extent the First Circuit's view is contrary to our present holding, we disapprove it.

V.

SIGNIFICANCE OF DEPARTMENTAL CONSTRUCTION

While this Court has announced that it will accord great weight to a departmental construction of its own enabling legislation, especially a contemporaneous construction, see *Udall* v. *Tallman*, 380 U. S. 1, 16; *Power Reactor Co.* v. *Electronics*, 367 U. S. 396, 408, it is only one input in the interpretational equation. Its impact

carries most weight when the administrators participated in drafting and directly made known their views to Congress in Committee hearings. See *Power Reactor Co.* v. *Electronics, supra; United States* v. *American Trucking Assns.*, 310 U. S. 534, 539. In such circumstances, absent any indication that Congress differed with the responsible department, a court should resolve any ambiguity in favor of the administrative construction, if such construction enhances the general purposes and policies underlying the legislation. See *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 112–114.

The Court may not, however, abdicate its ultimate responsibility to construe the language employed by Congress. Those props that serve to support a disputable administrative construction are absent here. There is no suggestion in the findings, nor have the parties explained how the present differential contributes to the broad, general purpose of eliminating crippling competition. Nor in the present case has the Court's attention been drawn to any hearings that suggest that Congress acted with the particular administrative construction before it in either 1935 or 1937. And if those administrators who participated in drafting the 1935 Act understood market differentials to encompass the farm location differential, they obviously failed to communicate their understanding to the drafters of the Committee report. It is also evident that the 1937 re-enactment of the 1935 amendments was routine and did not follow a comprehensive review of the issues that had been explored in detail by the 1935 draftsmen who wrote the Committee Reports.[28]

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[28] Judge Frank expressed the view in *Queensboro Farm Prods.* v. *Wickard*, 137 F. 2d 969 (C. A. 2d Cir. 1943), that Congress intended to adopt the intervening administrative interpretation of the "use" language of § 8c (5)(A) by its 1937 reenactment. The construction

It is true that a report from the Federal Trade Commission set forth the computations employed under the 1936 Boston order which apparently provided for a nearby differential.[29] But the stark figures, set forth in the appendix to the report without explication, can hardly be said to have given the administrative construction the "notoriety" that this Court found persuasive in *Udall v. Tallman*, 380 U. S., at 18. In *Udall* the Court was impressed by the fact that the Secretary's interpretation had "been a matter of public record and discussion." Even despite active congressional involvement in reviewing certain administrative action in connection with particular leases, the Court noted that it would not attribute ratification to Congress. *Udall* v. *Tallman*, *supra*. Nor can petitioners put flesh on this argument by citing § 4 of the 1937 re-enactment, 50 Stat. 249,[30]

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of the "use" provision may well have caused more concern than the interpretation of the 8 (B) differentials. In any event, Judge Frank's assumption that Congress gave "careful consideration . . . in connection with re-enactment" is not supported by citation to specific legislative history that would indicate that Congress had in mind specific problems in connection with the administration of the marketing provisions.

[29] The 1936 Order provided for payment of a uniform price subject to adjustments and with a special exception for "any producer whose farm is located within forty (40) miles of the State House in Boston *and* who delivers milk to such handler at a plant located within forty (40) miles of the State House in Boston, at $3.30 per hundredweight for that quantity of milk delivered by such producer not in excess of the base of such producer." Art. VIII, § 1 (2).

[30] Section 4 of the Act provided:

"Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjust-

and the Committee Report, H. R. Rep. No. 468, at 4 (75th Cong., 1st Sess., 1937), which merely states in the language of the Act that § 4 purports "to ratify, legalize, and confirm" all action taken pursuant to the agreement and order provisions under the 1935 statute.[31]

VII.

RELEVANCE OF PRODUCER APPROVAL

Petitioners allude to the fact that the orders in question have been specifically approved by the farmers concerned as required by § 9 (B)(i) of the Act.[32] While the

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ment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed."

[31] To the extent that Congress could be said to have acted against the background of the 1936 order, the Court must reject petitioners' argument. The 1936 order was superseded by the 1937 order which differed in approach. The provision for nearby differentials in the 1936 order was obscured by allowing a more favorable total price to nearby producers. See n. 29, *supra*. The 21¢ differential incorporated in the 1937 order for the benefit of intermediate nearby zones was not included in the 1936 order. The 21¢ differential provided in § 4 (2) of the 1936 order could have been viewed as a true market differential since its payment depended on delivery to a handler within a 40-mile zone from a producer beyond a 40-mile zone. Further, as noted by the court below, § 4 is typical of statutory boiler plate traditionally included in legislative reenactments, to avoid breaks in regulatory continuity. 402 F. 2d 670.

[32] Section 9 (B)(i) of the Act provides that no order shall become effective until the Secretary determines:

"(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy and is approved or favored:

"(i) By at least two-thirds of the producers . . . who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period have

contention is meagerly adumbrated, the argument appears to run as follows: since provision is made for approval of orders by the regulated subjects, the Secretary's discretion should be generously interpreted. If provision for such approval could ever legitimize a regulation not authorized by statute, the provision has no significance in the case before us, in light of the considerations already discussed. It is the Secretary, not the farmers, who is responsible for administering the statute and initiating orders.[33]

VIII.

PROPRIETY OF SUMMARY JUDGMENT

Although the Secretary does not press the point, the private petitioners argue that this Court should at the very least reverse for a trial on the merits or alternatively reverse with instructions to remand to the Secretary for further consideration.

This is not a case where a department has acted without a formal record. In such instances a trial might be

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been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

"(ii) By producers who, during such representative period, have produced for market within the production area at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order."

[33] Lower courts have, in some circumstances, permitted an agency to rely on the approval of those affected by an action as evidence that the action is in the "public interest." Compare *Citizens for Allegheny County* v. *FPC*, — F. 2d — (D. C. Cir. 1969), with *Marine Space Enclosures, Inc.* v. *FMC*, — F. 2d — (D. C. Cir. 1969). We need not consider what scope, if any, may be given to these principles.

appropriate to afford the department an opportunity to develop those facts which underpin its action. When action is taken on a record the department cannot then present testimony in court to remedy the gaps in the record, any more than arguments of counsel on review can substitute for an agency's failure to make findings or give reasons. A remand to the Secretary is inappropriate in the absence of a request by the Government. Counsel for the Department has advanced no new theory for sustaining the order. Cf. *SEC v. Chenery Corp.*, 318 U. S. 80, 92.

Unlike *Addison* v. *Holly Hill Co., supra,* we do not have before us a definition in a regulation that is necessary to give meaning and content to the administrative scheme. Nor does our decision have the effect of engrafting a definition on a particular statutory term, a function that should, in the first instance, be left to the appropriate administrative body. The 1964 order, moreover, expressly provides for severance of any provision that is found invalid. See 7 CFR § 1001.96.

IX.

DISPOSITION OF THE ESCROW FUND

Petitioner farmers' last line of retreat is their contention that they are entitled to escrow monies that have been accruing since the District Court's entry of the order granting the respondents' motion for a preliminary injunction. The court below struck an equitable balance in awarding to petitioners, nearby farmers, all escrow monies collected prior to the entry of final judgment by the District Court. This is a fair solution, and one this Court will not disturb. Petitioners have been on notice since *Blair* v. *Freeman,* 370 F. 2d 226, that nearby differentials were bottomed on a shaky statutory premise.

Lest losing parties be encouraged to prolong litigation by frivolous appeals in order to reap a windfall, we think respondents deserve the fruits of their victory as of the date of final judgment at trial.

The judgment below is

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 25 & 52.—October Term, 1969

Frederick T. Zuber et al., Petitioners, v. Russell Allen et al. (25)	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
Clifford M. Hardin, Secretary of Agriculture, Petitioner, v. Russell Allen et al. (52)	

[December 9, 1969]

Mr. Justice Black, with whom Mr. Justice White joins, dissenting.

The central question in this case is whether a provision in the Secretary of Agriculture's Boston milk market regulation which provides that farmers close to Boston will receive a higher price for their milk than farmers farther away is valid under the Agricultural Marketing Act of 1937, 7 U. S. C. § 601 *et seq.* The majority concludes that this higher payment can be sustained only if it represents "compensation for rendering an economic service," *ante*, at 18, and then holds that since the Secretary has not provided such an economic justification for this payment, it is invalid. The effect of affirming the judgment below is that challenged payments which have been placed in a special fund since June 1967 and now amount to over $8,000,000 will be distributed to all farmers selling milk in the Boston market instead of only those located near Boston. This represents a drastic change in the distribution of the income from the sale of milk since only the nearby farmers have received these additional payments for at

least 30 years. My study of the legislative history convinces me beyond any doubt that this result is wrong and in direct conflict with the intent of Congress as expressed in the Agricultural Marketing Act and its predecessors. In my opinion Congress intended to permit the Secretary to regulate the milk industry in accordance with the practices that had developed in that industry prior to the first federal regulation in 1933 and did not intent to eliminate the economic advantages that specific groups had enjoyed in the past. Since it is clear beyond a doubt that farmers near Boston received more for their milk than did other farmers prior to federal regulation, I would reverse the judgments below and hold this provision of the Boston milk order valid.

In order to understand the purpose of the 1937 Act, it is necessary to go back to the 1920's at a time prior to any federal regulation. As the majority correctly points out, the economics of the milk industry at that time often led to destructive competition and chaos. Milk producers therefore formed cooperatives for their own protection and sold milk on a collective basis. All the parties in this case agree, and the record conclusively shows, that under the cooperatives at that time farmers close to marketing centers received more for their milk than did farmers farther away. This higher price resulted from many factors including the greater proportion of milk from nearby farms which was used for fluid purposes, the possibility that those farmers would compete with handlers by selling directly to customers, smaller seasonal variation in the volume of milk produced, and higher costs—such as taxes and land values—incurred in farming close to the cities.[1] As long as eco-

[1] The majority implies, p. 11, *ante*, that this higher price in the 1920's was an economic "distortion." There has been no such finding by the Secretary or any of the courts below, nor was any

nomic conditions remained generally stable, the cooperatives succeeded in protecting all farmers from the dangers of overproduction and excessive competition. Then the depression set in and milk farmers, like so many other Americans, were unable to maintain stable prices by self-regulation. Congress reacted to this situation by passing the Agricultural Adjustment Act of 1933 (A. A. A.), 48 Stat. 31, under which the Secretary of Agriculture was given broad powers to regulate the farm economy through licensing. *Id.*, § 8 (3), at 48 Stat. 35. Very few details or standards describing the Secretary's powers were provided in the 1933 Act, and there was no attention given to specific problems of nearby farmers in the milk industry. Under the provisions of that Act the Secretary issued a license for the Boston market in 1933 and this first license included provisions which effectively maintained the historical price advantage of producers close to Boston.[2] In 1935 bills were introduced in Congress to amend the A. A. A.[3] and hearings were held on those bills in February and March of that year.[4] In May 1935 this Court held in

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evidence taken which was directed to this issue. This Court is poorly equipped to pass judgment on the economic validity or invalidity of this higher price, surely not as well equipped as the Secretary and the economists who advise him. It is the Secretary, not this Court, to whom Congress has delegated the task of fixing the prices producers will be paid for their milk and of making the underlying economic judgments.

[2] This license adopted a somewhat complicated base-rating plan similar to that used by the milk cooperatives. See n. 4, p. 4, *ante*. There is general agreement among the parties that these licences effectively resulted in higher milk prices to nearby farmers, and the Court of Appeals recognized this fact. 402 F. 2d 664–665.

[3] H. R. 5585, S. 1807, 74th Cong., 1st Sess.

[4] Hearings on H. R. 5585 before the House Committee on Agriculture, 74th Cong., 1st Sess.; Hearings on S. 1807 before the Senate Committee on Agriculture and Forestry, 74th Cong., 1st Sess.

A. L. A. Schecter Poultry Corp. v. *United States*, 295 U. S. 495, that provisions of the National Industrial Recovery Act, 48 Stat. 195, were unconstitutional in part because that Act delegated powers to an administrative agency without providing adequate standards and guidelines. The congressional committees considering the amendments immediately recognized that the *Schecter* decision cast considerable doubt on the validity of the A. A. A. and they therefore reported out a completely amended bill which set forth detailed descriptions of the powers and standards which the Secretary was to employ.[5] As reported and passed by Congress, that bill contained specific provisions concerning the milk industry, and it is those provisions which are involved in the present case.[6] The committee reports accompanying that bill make it abundantly clear that a primary purpose of the bill was to "eliminate questions of improper delegation of legislative authority raised by the decision in *Schecter* . . . ."[7] There is no indication that when Congress passed those amendments it intended to cut back on or limit the authority the Secretary had actually exercised in regulating milk under the 1933 Act, but rather the purpose was to avoid judicial invalidation resulting from the absence of constitutionally sufficient standards. History and the legislative record make it quite clear that Congress in 1935 was concerned not about limiting an excessively aggressive Secretary, but about overcoming the limitations imposed by a Court which was frustrating the congressional purpose by holding laws unconstitutional. Pursuant to the 1935 Act, the Secretary issued a new order in 1936 for the Boston

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[5] H. R. 8492, 74th Cong., 1st Sess.

[6] These provisions of the 1935 amendments have been carried forward, virtually without change, into the present statute.

[7] S. Rep. No. 1011, 74th Cong., 1st Sess., 8; H. R. Rep. No. 1241, 74th Cong., 1st Sess., 8.

market which, like the 1933 order, contained provisions for additional payments to nearby farmers. In issuing this order he explicitly relied on the historical, economic factors which justified these additional payments. (App. 224.) The effectiveness of the 1935 amendments was also jeopardized by court decisions,[8] and Congress again acted by passing a new law, the Agricultural Marketing Act of 1937, 50 Stat. 246. This statute re-enacted the milk marketing provisions of the 1935 Act in substantially the same form and further provided that all market orders issued under that Act were "expressly ratified, legalized, and confirmed." 50 Stat. 246, 249. Proceeding under the new Act the Secretary reinstated the 1936 Boston order including the additional payments to farmers located nearer the city, and that order and the 1937 Act have remained in substantially the same form until this time. With this general historical picture in mind, it is easier to answer the central legal question in this case which is whether the 1937 Act authorizes the Secretary of Agriculture to provide that nearby farmers will receive more for their milk than farmers farther away.

The Act provides that the Secretary shall establish by order certain basic prices for milk delivered by producers and allows him to adjust that basic price to reflect "volume, market, and production differentials customarily applied by handlers subject to such order . . . ." 7 U. S. C. § 608c (5)(B), cl. (a).[9] The

[8] In *United States* v. *Butler*, 297 U. S. 1 (1936), this Court declared the processing tax provisions of the A. A. A. invalid, and some district courts then held that the entire Act was invalid. *E. g.*, *United States* v. *David Buttrick Co.*, 15 F. Supp. 655 (D. C. D. Mass. 1936), rev'd, 91 F. 2d 66 (C. A. 1st Cir. 1937), cert. denied, 302 U. S. 737.

[9] This language was first enacted in the 1935 amendments to the A. A. A., but was reenacted in the 1937 Agricultural Marketing Act without change. There is no relevant legislative history for the

Secretary here argues that the payment of additional sums to farmers close to Boston is an authorized "market differential." The argument cannot be settled simply on the basis of the statutory language since there is no definition of the term "market." However the legislative history makes it clear beyond any doubt that this provision was designed to allow the Secretary broad leeway in regulating the milk industry in accordance with prior practices and differentials in the unregulated market. The committee reports in both Houses said that the milk order provisions in the Act were designed to "follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present section 8 (3) of that Agricultural Adjustment Act." [10] The only discussion of these provisions during the congressional floor debates fully supports this statement. Senator Copeland, a former commissioner of health in New York City and a man well acquainted with the milk industry in New England, asked Senator Murphy, the floor manager for the bill, about the possibility that farmers near the cities would receive the same price for milk as farmers farther

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1937 Act, but the parties all agree that the history of the 1935 amendments also applies to the 1937 Act. The discussion of legislative history in the text is based on the 1935 legislative record.

The complete text of the relevant portions of the present statute is set forth in n. 8, pp. 6–7, *ante*.

[10] S. Rep. No. 1011, 74th Cong., 1st Sess., 9; H. R. Rep. No. 1241, 74th Cong., 1st Sess., 9. This basic purpose is reflected in the fact that Congress provided the Secretary with three different schemes of regulation, each of which followed a variety of regulation used by the milk cooperatives. See n. 10, p. 8, *ante*. In 1965 Congress followed this same basic purpose when it amended the Act to make explicit the Secretary's power to employ base-rating plans, described in n. 4, p. 4, *ante*. See 79 Stat. 1187, 7 U. S. C. § 608c (5)(B), cl. (d), (1964 ed., Supp. IV).

away. Senator Murphy's initial answer indicated this would be so, but when Senator Copeland pressed the inquiry further, stating that not all factors had been considered, Senator Murphy indicated that the provisions for specific differentials "adopt the present practice of business."[11] To me that reply indicates that nearby differentials would be permissible, if they were part of the business practice—as they were. The majority diminishes the importance of this discussion by saying that it represents only the views of two men, not those of the committee, but anyone acquainted with the realities of the United States Senate knows that the remarks of the floor manager are taken by other Senators as reflecting the views of the committee itself. This history makes it clear that Congress did not intend to limit the authorized differentials to any specific payments, but rather intended to permit the Secretary to employ whatever practices, consistent with the history of the unregulated market, he found necessary to achieve stability in the milk industry.

Applying these considerations it becomes plain that the additional payments to nearby farmers are authorized as a "differential customarily applied." Nearby farmers had always obtained a higher price for their milk than farmers farther away and the Secretary's regulations in 1933 and 1936 reflected this historical fact. Reinstatement of the nearby differentials after passage of the 1937 Act merely continued this prior administrative practice, based on the earlier economic realities, of paying more for milk produced on farms close to Boston. Had Congress intended to eliminate this feature of the prior practice, it would have been easy to say so, but there is absolutely nothing in the statute or in the legislative history that demonstrates a

[11] The full discussion is set out in n. 22, pp 17–18, *ante*.

desire to alter the advantage nearby farmers had always enjoyed.

My conclusion that this differential is authorized is buttressed by the actions of Congress and the Secretary since 1937. There has always been a healthy controversy among farmers about this differential, and extensive hearings in 1963 brought forth strong arguments against continuing it. (App. 350–599.) Yet Congress, even though it amended the statute in 1965, 79 Stat. 1187, still has not in any way indicated that the nearby differential was unauthorized by the 1937 Act nor that it should be eliminated at this time. Similarly the Secretary has continually reviewed this provision and refused to eliminate it, the most recent time being 1964. (App. 346, 349.) Since Congress, in my view, intended in 1933, 1935, and 1937 to authorize payments like the nearby differential and since it has not altered this authorization in the past 32 years, I cannot agree that this Court should or properly can eliminate the payment, ostensibly through a process of statutory interpretation.

This interpretation is not based on a theory of legislative silence as the majority seems to imply. To me the legislative history speaks clearly in saying that Congress intended the Secretary to regulate the industry in accordance with prior practices, and the statutory language, statements in committee reports, and floor debates do not "illumine two different roads," p. 15, *ante*. I see only one path that is marked by the legislative record, and the only silence I perceive is the striking absence of any statements in the statute or the legislative history which support the majority's interpretation.

My conclusion that the location differential is authorized by the Act finds support in other judicial decisions. In *United States* v. *Rock Royal Co-Operative, Inc.*, 307

U. S. 496 (1939), certain milk handlers made a broadside attack on the New York order issued under the 1937 Act. This Court rejected that challenge. One part of the argument was that the nearby differential provision of that order was invalid. This Court noted that "[t]he Act authorizes such an arrangement," citing the provision for market differentials customarily applied. *Id.*, at 567. Although that provision was promulgated under § 8c (5)(A) of the Act, the identical language supporting that conclusion is found in § 8c (5)(B), and it is that latter section which is involved in the present case. The majority attempts to distinguish that case by noting that it was a suit brought by the Government against handlers, but it is difficult to see what difference that makes. It does not matter who sues, if the Court decides an issue of statutory interpretation that decision should remain the same even if the litigants change.[12]

The nearby differential of the Boston order involved here was also approved by the First Circuit in *Green Valley Creamery* v. *United States*, 108 F. 342 (1939). The majority's dismissal of that case on the conclusion the handlers did not have standing to raise this issue is irrelevant. The First Circuit there found the differential valid and then stated that "[f]urthermore" the handlers lacked standing. *Id.*, at 346. It does not matter to me whether the decision on the validity of the location differential is classified as dicta or a holding. The point remains that the First Circuit considered these payments and found them expressly provided for by the language of § 8c (5)(B). *Ibid.*

[12] The majority also seems to imply, *ante*, at 22, that *Rock Royal* did not decide this issue since the handlers did not have standing to raise it. It seems to me that the Court there did decide that the handlers, who argued that the nearby differential reduced their own profits, could raise this issue.

The majority disagrees with the interpretation of the statute set forth above and instead finds that the foundation of the portion of 1937 Act involved here was to provide uniform prices to all producers, with adjustments to that uniform price only as "compensation for rendering an economic service." *Ante*, at 10, 18. This interpretation, as I understand it, would require the Secretary to disregard the historical price advantage nearby producers had in the sale of their milk, and to consider only whether there is a present economic justification for particular payments. I respectfully submit that this interpretation cannot be supported by the language of the Act considered as a whole or by the relevant expressions of congressional intent found in the legislative history. The theory of this Act adopted by the majority is clearly not that of Congress, but one created by the Court itself.

The conclusion that each of the differentials specified in the Act represents only "compensation for rendering an economic service" finds no support whatsoever in the language of the Act or the legislative history. None of the adjustments described in the Act is defined in terms of any "economic service." The majority does not refer to any legislative history which indicates such a definition was intended. It may well be possible for an analyst to fit the language of the Act, the committee reports, and the floor debates into a coherent pattern of economic services, but had Congress desired to require this as a touchstone for the authorized differentials, it would have been easy for it to have said so. Congress did not choose to do so in 1933, 1935, or 1937, and it has not done so in the intervening 30 years. Moreover, if there is any pattern into which all the differentials clearly fit that is fully supported by express legislative history, it is the clear pattern of allowing the Secretary to incor-

porate provisions reflecting the customary practices of the milk industry itself.[13]

Even if the majority's statutory interpretation were correct, I do not understand why it leads to the conclusion that the judgment below should be affirmed and the challenged payments distributed at this time to all farmers. Until this Court's decision the Secretary had no reason to know that he had to justify the provisions of this order as "compensation for rendering an economic service," and his failure to have provided such a defense does not necessarily mean it is unavailable. Indeed the Court apparently would approve this same provision were the Secretary to issue it again, but only if it were then accompanied by an economic study which this Court—composed of lawyers, not economic or agricultural experts—finds acceptable. If such a justification is present, the differential is in fact lawful at this time, and it would not seem to matter that the Secretary has not yet incanted the proper magic words.

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[13] In a footnote, n. 18, pp. 14–15, *ante*, the majority implies that there is support for this novel interpretation in our prior decision in *Brannan* v. *Stark*, 342 U. S. 451 (1951), which held invalid a provision in the Boston milk order that distributed certain sums to producer cooperatives. That case specifically held that such payments were not authorized by the catchall provision in the Act permitting provisions in milk orders "incidental to, and not inconsistent with, the terms and conditions specified in [other sections] and necessary to effectuate the other provisions of such order." 7 U. S. C. § 608c (7)(D); *Brannan*, at 457–458. It is true that the majority there did decide that the challenged payments did not represent compensation for an economic benefit received by all producers, but regardless of the validity of that decision, it is irrelevant to the decision in this case. It may be that payments which are sought to be justified solely on the basis of the "necessary provisions" section require independent economic justification, but that certainly does not mean that where the Secretary relies on a specific adjustment set forth in the Act, as he does in this case, he must also defend it on economic grounds.

I do not see what harm would follow if this Court were simply to vacate the judgment below, remand the case to the Secretary for appropriate study, and continue to place the payments in the special fund pending ultimate resolution of the controversy. If the Secretary cannot make the proper economic justification, the only result would be to postpone the day when the accumulating funds, which now amount to over $8,000,000, would be distributed. If, on the other hand, he is able to show that these payments compensate for an economic service, then the Court would not have unnecessarily given the accumulated millions to farmers who are not legally entitled to receive them.

My conviction that the Act was designed to permit the Secretary to include adjustments that reflected the prior practice of the milk industry does not mean that he can act with unlimited abandon and approve a payment simply because historically it was provided for prior to federal regulation. The statute requires that the Secretary issue orders which "will tend to effectuate the declared policy of [the Act] . . . ." 7 U. S. C. § 608c (4). Those policies are specifically set forth, 7 U. S. C. § 602, and in general provide that orders should establish and maintain orderly marketing conditions and parity prices for milk producers. In his latest promulgation of the Boston order the Secretary specifically refused to eliminate the nearby differentials (App. 349–357) and found that the order "will tend to effectuate the declared policy of the Act." 29 Fed. Reg. 12236. That finding cannot be disturbed, nor the nearby differential invalidated, unless it is shown that the order is not supported by substantial evidence in the administrative record considered in its entirety. Cf. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951). In this case the Court of Appeals did not make a specific finding on the substantiality of the evidence, and the re-

spondents argue that it is insubstantial, but a review of the entire record in light of the appropriate legal standards indicates that the nearby differential in the Boston order is fully supported by substantial evidence.

In reaching this conclusion, it must be remembered that the Secretary is required to find only two things. First that the proposed provision represents a payment customarily applied in the milk market, and second, that inclusion of the proposed provision will further the policies of the Act. The first of these questions is essentially a factual one, and there is no real argument in this case that the Secretary was wrong in finding as a matter of historical fact that nearby farmers received additional payments which are reflected in the location differential. The respondents do not really deny the historical existence of this higher price, but rather attack its legality under the Act. The Court of Appeals, moreover, specifically recognized the historical fact that such differentials existed, but accepted the respondents' argument that they were illegal. 402 F. 2d 663–665, 669. An independent review of the record confirms the conclusion that such differentials had been customary in the market. It is thus easy to find that the factual finding required by the Act has been supported by substantial evidence in the administrative record.

The second required finding, that the provision will further the policies of the Act, is a mixed question of fact and administrative policy. The Secretary has held extensive hearings in the past on the provisions of the Boston milk order (App. 233–247, 257–303, 305–330, 360–652), and he has repeatedly found that the nearby location differential furthers the policies of the Act. Since this is essentially a question of administrative discretion and will be set aside only on a strong showing by the parties that the finding is without support in the basic facts on which the Secretary has relied, it

is proper to say on this record that this second finding is adequately supported. Nothing in the respondents' arguments indicates that the nearby differential does not further the policies of the Act, but rather they argue only that elimination of the differential would better serve those policies. But this question is one for the Secretary, not for the parties or for this Court, to decide.

What is involved here is simply a question of interpreting and following the will of Congress. Over 30 years ago Congress decided that milk producers needed governmental assistance in stabilizing their income, but it also decided that this stabilization should be accomplished with a minimal amount of change in the industry's prior practices. Congress therefore authorized the Secretary of Agriculture to regulate the industry and left most of the details to him. For over 30 years he has used his authority to regulate the Boston milk market, and has consistently found it desirable to provide higher prices for milk produced on farms close to Boston. It may well be that this decision is not the best or the most economically sound one that he could make in light of changed economic conditions in 1969, but that decision is one Congress has committed to the Secretary alone. In my view this Court and the Court of Appeals in this case effectively substitute their will for the will of Congress and their views of economics and wise administration for those of the Secretary whom Congress selected to carry out its will. The Court indicates that its decision will avoid a "windfall." *Ante*, at 28. In fact the Court itself creates a windfall of over $8,000,000 which is siphoned out of the pockets of farmers close to Boston and bestowed like a Christmas present on those farther away. This the Court does contrary to the informed judgment of the Secretary who, faithful to the Act, has declared for years that distant farmers are not eligible for such a bonus. I am unable to agree that this is a proper function for the Court to perform and I therefore dissent.